CLIFFORD CHANCE

DCM Round Up: March 2022

Welcome to our periodic round up of key developments for DCM. Further details on some of these topics can also be found on the Financial Markets Toolkit.
For a more detailed service please contact one of our experts, who can discuss in detail how these developments will affect your business and transactions.

SANCTIONS

Russian sanctions and impact on capital markets

Many of the recent sanctions measures which have been announced have a direct impact on primary and secondary capital markets. The situation with regard to sanctions is still evolving – and there is often a lag between the announcement and implementation. We would be happy to assist with any specific queries, but, in the meantime, our **Clifford Chance briefing** provides an overview of the sanctions and export controls imposed by the US, EU, UK, Japan and Australia as at 2 March. This briefing is likely to be frequently updated so please do reach-out to us if you do not receive an updated version automatically through other Clifford Chance distribution channels.

Back to top

PROSPECTUS REGIME

UK Prospectus Regime review – Government publishes review outcome

On 1 March, the UK Government published its response to its July 2021 UK Prospectus Regime review. The **Review Outcome** is short but heralds significant regime change.

We will have to wait for more detail in a consultation by the UK FCA, to whom the government will be delegating more powers and granting more flexibility, but here are a few features which are flagged:

- removing the denomination threshold to differentiate disclosure – although the "necessary information" test for debt will focus on creditworthiness and not prospects;
- removing the criminal offence of requesting admission to trading on the regulated market before publishing an FCA-approved prospectus;
- removing the idea of prospectuses from public offers and replacing it, instead, with a general prohibition on public offers but with a broader range of exemptions than exists under the current prospectus regime; and
- although high denominations will still feature amongst the public offer exemptions, the government plans to replace €100,000 with £50,000.

These are just a few highlights. There are other proposals – including an expressed intention to develop a new regime of "regulatory deference" for offers into the UK of securities listed on certain designated overseas stock markets. This will permit offerings into the UK on the basis of offering documents prepared under the rules of the relevant overseas jurisdiction – and will be one of the new, broader "public offer" exemptions.

Back to top

ESG/SUSTAINABILITY

ESG ratings – a hot topic to watch

The concerns with ESG ratings are well documented namely, lack of transparency in methodology and comparability across providers and potential conflicts of interest. However, there is also broad agreement that ESG ratings can be a useful tool in growing the sustainable finance market by providing investors and market participants with appropriate sustainability information to make investment decisions.

This looks likely to become a hot topic during 2022 as regulators and standard setters are focusing on the issues with ESG ratings, looking at how to improve their provision and, in some cases, considering potential regulation. Recent weeks and months have seen a number of announcements and publications including:

- ***Europe***: ESMA published a **call for evidence on Market Characteristics for ESG Rating**

Providers in the EU on 3 February and the Commission is expected to launch a complementary consultation shortly. These consultations will determine the next steps on EU supervisory oversight and regulation of ESG rating providers.
- ***UK:*** in October 2021 the UK Government indicated it is considering bringing ESG data and rating providers within scope of FCA regulation (see Chapter 1 of **Greening Finance: a roadmap to sustainable living**).
- ***US:*** the **2021 SEC Staff Report** on Nationally Recognized Statistical Rating Organizations (NRSRO) was published in January. It notes that, NRSROs are offering an increasing number of ESG-related products and services and SEC Staff have identified several areas of potential risk.
- ***International****:* in November last year ISOCO published its **final report on ESG Ratings and Data Product Providers** which included its final recommendations. The OECD also published a report looking at **ESG Investing and Climate Transition** which discussed the need to improve the provision of ESG Ratings.

ESMA's Sustainable Finance Roadmap

On 10 February ESMA published its **Sustainable Finance Road Map 2022-2024**. This sets out ESMA's three priority areas - tackling greenwashing and improving transparency; increasing NCA's and ESMA's capacities; and monitoring and assessing ESG markets and risks - and the actions ESMA intends to take to address these areas.

A number of the specific action points listed by ESMA give a flavour of where there is likely to be continued regulatory scrutiny and development in the sustainable bond markets. These include:

- developing prospectus regulation disclosure for ESG bonds;
- improving consistency in NCA's approach and understanding of greenwashing issues and prospectus requirements;
- considering guidelines and compliance with the new MiFID ESG obligations, including product governance.

Clifford Chance briefing

In our briefing, **ESG: Trends to watch in 2022** we explore the ESG trends that we think will help shape the year ahead, for example: Regulation – more but different?; Sustainable Finance – growth in market share and ambition; and ESG litigation – the shifts from governments to businesses.

ESG monthly newsletter

This is a short section on recent ESG Developments. If you are interested in this topic we also prepare more detailed monthly newsletters. Recent editions (and details of how to subscribe) are available **here**.

Back to top

EU AND UK REGULATORY DEVELOPMENTS

Credit Rating Agencies Regulation

On 31 January ESMA published its **Guidelines on Disclosure Requirements for Initial Reviews and Preliminary Ratings**. These Guidelines will apply to credit rating agencies from 1 July 2022. The Guidelines are intended to address the concern of "rating shopping" i.e. where an issuer requests initial or preliminary reviews from a number of credit rating agencies and then engages only the agency that provides the most favourable rating. The Guidelines aim to reduce inconsistent compliance by credit rating agencies with the existing requirements to disclose any initial reviews and preliminary ratings under the Credit Rating Agencies Regulation. The Guidelines provide more clarity on what is meant by "initial review" and the content, timing and accessibility of the disclosures.

ESMA Market Abuse Regulation (MAR) Guidelines – delayed disclosure of inside information

The ESMA MAR Guidelines provide a non-exhaustive and indicative list of legitimate interests of the issuers that are likely to be prejudiced by immediate disclosure of inside information under Article 17 of MAR.

In January, **ESMA published a final report**, "Review of MAR Guidelines on delay in the disclosure of inside information and interactions with prudential supervision" which amends the MAR Guidelines, in respect of the interaction between the MAR inside information disclosure obligations and the prudential supervisory framework. The amendments:

- expand the existing list of legitimate interests to include:
  - the case where institutions intend to carry out redemptions, reductions and repurchases of own funds, pending regulatory authorisation; and
  - the case of draft Supervisory Review and Evaluation Process (SREP) decisions or preliminary information related thereto; and
- add a separate section clarifying that: (i) Pillar 2 Capital Requirements (P2R) are highly likely to meet the definition of inside information under MAR; (ii) Pillar 2 Capital Guidance (P2G) may be inside information under MAR, whenever assessed as price sensitive. The Guidelines provide examples of situations where P2G is expected to be price sensitive. Where assessed to be inside 6 information, P2G would require public disclosure as soon as possible, unless the conditions for a delayed disclosure under MAR are met.

The amended MAR Guidelines will apply two months after completion of the usual translation process.

Contractual Recognition of Bail-in for UK BRRD entities entering EEA law governed contracts

At the end of the Brexit transition period the UK put in place a limited grandfathering provision (see the **PRA Transitional Direction**) which allowed UK entities subject to the UK BRRD legislation not to include a contractual recognition of bail-in clause when entering into EEA law governed contracts (this did not extend to debt instruments). This grandfathering period will end on 31 March 2022 and as of 1 April 2022 EEA law governed contracts will need to include such language (see the **PRA Rulebook – Contractual Recognition of Bail-in**.)

UK ESEF filing requirements – grandfathering provisions

In our December Round Up we noted that the FCA rules requiring issuers of securities admitted to trading on a regulated market to publish their annual financial reports in a structured XHTML web browser format will apply for financial years beginning on or after 1 January 2022 (**DTR 4.1.1**4) but that issuers who only have wholesale securities admitted to trading will be exempt (DTR 4.4.2). It is also worth bearing in mind that issuers with older debt securities issued before 31 December 2010 with a Euro 50,000 denomination (the previous wholesale requirement) are likely to benefit from the transitional provisions in the FCA Handbook set out in Item 19 of **DTR TP1** that provide an exemption from DTR 4.1 for issuers of these securities.

Back to top

LIBOR, BENCHMARKS AND RFRs

In December 2021 ISDA **published new fallbacks** to cover IBORs in India (MIFOR), Malaysia (KLIBOR), New Zealand (BKBM), Norway (NIBOR), the Philippines (PHIREF) and Sweden (STIBOR). The fallbacks will apply to both the 2006 ISDA Definitions (by way of a supplement) and the 2021 ISDA Definitions.

Also in December ISDA issued a **Statement** relating to Canadian Dollar Offered Rate (CDOR) and responding to a paper recommending that the administrator of CDOR cease publication of remaining tenors after the end of June 2024.

Back to top

OTHER

Investor allocations

The FICC Markets Standards Board (FMSB) **Standard for the sharing of investor allocation information in the fixed income primary markets** may be useful given the current focus on investors and allocations. The Standard set out certain minimum expected behaviours of syndicate banks relating to the sharing of investor allocation information for new issuances in fixed income primary markets on the day of pricing within their institutions. The standard is primarily concerned with how information is shared between the syndicate banks and the secondary trading desks.

ICSD syndicated closing model

A quick reminder the new ICSD syndicated closing model will become effective on 14 March 2022 and no further delays are expected. The attached Euroclear newsletter confirms this timing and provides further details and graphics on the new process. It also notes that a dedicated webpage will be launched shortly.

Back to top

Subscribe

Visit our Financial Markets Toolkit

Clare Burgess
Partner
020 7006 1727

Paul Deakins
Partner
020 7006 2099

Julia Machin
Knowledge Director
020 7006 2370

Kate Vyvyan
Partner
020 7006 1940

Deborah Zandstra
Partner
020 7006 8234

Andrew Coats
Partner
020 7006 2574

Matt Fairclough
Partner
020 7006 1717

Simon Sinclair
Partner
020 7006 2977

Jessica Walker
Knowledge Director
020 7006 2880

Follow us

LinkedIn

Twitter

Browse our podcasts

View our library