



This brief guide is designed to provide an overview of some of the main developments and trends impacting issuers and managers of debt capital markets ("DCM") products in the second half of 2022. Sustainable finance continues to dominate the 2022 regulatory agenda and the forthcoming EU Green Bond Standard will be a key feature of 2023. There is also likely to be an increasing focus on DLT and blockchain as various initiatives such as the EU's DLT Pilot Regime take shape.

SUSTAINABLE FINANCE

Regulatory Initiatives on Greenwashing

In October 2022, the Financial Conduct Authority (the "FCA") proposed a package of new measures ([CP22/20](#)) in a bid to clamp down on greenwashing. The FCA's proposals include (i) the introduction of sustainable investment product labels to distinguish between types of green investing, (ii) restrictions on how terms such as "ESG", "green" or "sustainable" can be used in product names and marketing for products that do not qualify for the sustainable investment labels, and (iii) sustainability disclosure requirements, including more detailed disclosures for institutional investors.

In addition, the FCA has also proposed a more general "anti-greenwashing rule" to ensure that the naming and marketing of financial products and services by regulated firms is clear, fair and not misleading, and consistent with the sustainability profile of the product or service (i.e. proportionate and not exaggerated). The FCA has highlighted that the explicit rule will allow them to challenge firms who may be potentially greenwashing their products or services and take enforcement action against them as appropriate.

Other regulators have also prioritised tackling greenwashing, with the European Supervisory Authorities publishing a [Call for Evidence on greenwashing](#) in November 2022 to gather input from stakeholders on how to understand the key features, drivers and risks associated with greenwashing and to collect examples of potential greenwashing practices. This follows a [request for input](#) from the European Commission (the "Commission") earlier this year.

ICMA publishes new climate resilient debt clauses

In November 2022, the International Capital Market Association ("ICMA") [published](#) new Climate Resilient Debt Clauses ("CRDCs") which can defer a country's debt repayments to private creditors for a pre-agreed period in the event of a pre-defined, severe climate shock or natural disaster. A standardised [term sheet](#) for this was produced by a sub-group of the UK-convended Private Sector Working Group (the "PSWG"). The PSWG is chaired by HM Treasury and includes international financial institutions, G7 and borrowing countries and the private sector. The ICMA highlighted that as well as supporting disaster resilience by freeing up cash flow, CRDCs could help avoid the liquidity challenges faced by low-income countries in such circumstances becoming costly payment defaults leading to protracted restructurings.

ECB to decarbonise its corporate bond holdings

In September 2022, the European Central Bank (the "ECB") provided further [details](#) on how it aims to gradually decarbonise the corporate bond holdings in its monetary policy portfolios, on a path aligned with the goals of the Paris Agreement. One goal is to reduce the Eurosystem's exposure to climate-related financial risk, following the [July 2022 decision](#) to tilt the Eurosystem's corporate bond purchases towards issuers with a better climate performance. Further details are available in the ECB's [FAQs](#) on the topic.

The EU Green Bond Standard

Looking ahead, the EU Green Bond Standard (the "EU GBS") is likely to be finalised in 2023 following ongoing trilogue discussions between the Commission, the European Council ("EC") and the European Parliament ("EP"). The final regulation will likely include elements from both the EP and EC positions, which depart in many respects from the original Commission [proposal](#). The ICMA provided an updated [analysis](#) of the EU GBS proposals earlier this year, summarising some of the key differences between the various positions adopted by the institutions.

DLT AND BLOCKCHAIN BONDS

ICMA FAQs on DLT and Blockchain

In September 2022, the ICMA published a set of [frequently asked questions](#) ("FAQs") about distributed ledger technology ("DLT") and blockchain in DCM. The FAQs are designed to raise market awareness and address some fundamental questions about DLT bonds and related terminology.

Law Commission Consultation on Digital Assets

In July 2022, the Law Commission published an important [consultation paper](#) which focuses on the legal treatment of digital assets and recommends law reform to create a third category of personal property – referred to as "data objects" – beyond things (or "choses") in possession (such as physical objects) and things in action (such as contractual rights). For more information, please see our FSR team's [blog post](#).

UK Jurisdiction Taskforce Consultation on Digital Securities

In August 2022, the UK Jurisdiction Taskforce ("UKJT") published a [consultation](#) which looks at the way in which English law can support the issue and transfer of equity or debt digital securities via blockchain and DLT. The UKJT is expected to publish a Legal Statement in the coming months to provide clarity to the market on: the availability of English law as an option for constituting digital securities; and the types of digital security models which English law will support.

Looking Ahead

Key initiatives of note for DCM market participants will be the EU pilot regime for market infrastructures based on DLT (the "EU DLT Pilot Regime") which commences in March 2023 and allows eligible firms to operate in a regulatory sandbox where certain DLT market infrastructures are temporarily exempted from EU financial services legislation. In a similar vein, in the UK, a joint initiative of the Bank of England, the FCA and HM Treasury to allow for a sandbox (the FMI Sandbox) for financial market infrastructure providers and others to test and adopt new technologies and practices (such as DLT) is expected to be up and running in 2023.

FINANCIAL SERVICES AND MARKETS BILL

The [Financial Services and Markets Bill](#) (the "Bill") is currently making its way through the UK Parliament and had its first reading in the House of Lords on 8 December 2022. The Bill was published as part of the UK Government's Future Regulatory Framework Review (the "FRF Review"). The FRF Review was established to determine how the UK's financial services regulatory framework should be amended post-Brexit. The Bill covers a wide range of topics including revoking EU retained laws relating to financial services and markets.

The most relevant aspects for DCM market participants will be that the Bill, once passed, will revoke the UK Market Abuse Regulation and UK Prospectus Regulation. The FCA will then have the power to set the detailed rules on, amongst other things, the definition and disclosure of inside information, and when a prospectus is required and what it should contain. On 9 December 2022, HM Treasury [published](#) an illustrative statutory instrument, Financial Services and Markets Act 2000 (Public Offers and Admissions to Trading) Regulations 2023, to show how the UK government will make its proposed changes to the existing UK prospectus regime using the powers set out in the Bill.

LIBOR TRANSITION

As LIBOR transition reaches its final phase, many legacy bonds have been converted to risk free rates ("RFRs") through issuers undertaking consent solicitations. In August 2022, the FCA published a [statement](#) strongly encouraging issuers and bondholders of outstanding LIBOR-linked bonds to take the necessary action to transition such bonds to fair alternative rates.

Some issuers and bondholders have benefitted from the temporary continued publication of the 1-, 3- and 6-month sterling and yen LIBOR settings using a 'synthetic' methodology. The FCA required publication of these synthetic LIBOR rates to avoid a cliff edge at the end of 2021 and to give issuers more time to arrange transition to RFRs. However, in November 2022, the FCA [announced](#) that (i) the 3 synthetic yen LIBOR settings will cease at the end of 2022, (ii) the 1- and 6-month synthetic sterling LIBOR settings will cease at end - March 2023, and (iii) the 3-month synthetic sterling LIBOR setting will cease at end - March 2024. The March 2024 deadline will be particularly relevant to issuers of legacy sterling LIBOR bonds, as the vast majority of such bonds reference a 3-month setting, who will have additional time to transition such bonds to RFRs.

For US dollar LIBOR, the FCA has previously said that it would consider the case for using its powers under the UK Benchmarks Regulation to require continued publication on a synthetic basis for certain US dollar LIBOR settings when the panel ends on 30 June 2023. In its November 2022 announcement, the FCA also confirmed that the overnight and 12-month US dollar LIBOR settings will cease at end - June 2023, and published a further consultation ([CP22/21](#)) on its proposal to require publication of synthetic USD LIBOR for the 1-, 3-, and 6-month settings until end-September 2024 as well as on the appropriate methodology for constructing such synthetic US dollar LIBOR settings, and what use of them should be permitted. Our Banking Litigation team [blog post](#) explores whether the publication of synthetic USD LIBOR may impact the litigation risks of LIBOR transition, in particular from a conflicts of laws perspective.

EU LISTING ACT

In December 2022, the Commission put forward several measures to further develop the EU's Capital Markets Union. As part of these measures, the Commission has published [proposals](#) for targeted amendments to, amongst others, the EU Prospectus Regulation (the "EU PR"), the EU Market Abuse Regulation and EU Markets in Financial Instruments Regulation (EU MiFIR) (together, the "EU Listing Act"). The proposals are intended to make the public capital markets in the Union more attractive for companies and to facilitate access to capital for SMEs. At a high level, the EU PR remains broadly the same, with some key proposed changes for DCM set out below:

- **Streamlining the prospectus:** a standardised format and sequence for prospectuses as well as the summary (with further detail expected to be set out in delegated acts). Additional amendments include streamlining risk factors (removing the current requirement to rank risk factors by materiality), making incorporation by reference mandatory, removing the requirement to provide paper prospectuses on request and providing for more flexible language requirements (to allow issuers to draw up prospectuses in English only (except for the summary)).
- **Fungible securities:** expansion of the existing prospectus exemption for fungible securities admitted to trading on a regulated market, to offers of securities to the public and securities traded on an SME growth market. The threshold is also increased from 20 per cent. to 40 per cent. There is also a new prospectus exemption for issuers of fungible securities to instead produce a summary document that includes a statement of compliance with ongoing continuing obligations.
- **Secondary issuances:** a new EU Follow-on prospectus which replaces the existing simplified disclosure regime for prospectuses for secondary issues.

Other proposals include making permanent the amendments introduced by the Capital Markets Recovery Package and further clarifying the rules on supplements (including specifying that supplements cannot be used to introduce a new type of security to a base prospectus). The proposals also set out that the Commission should be empowered to set out disclosure requirements for bond prospectuses that take into account ESG factors or pursue ESG objectives.

US SECURITIES

New interpretation of Rule 15c2-11

The US Securities and Exchange Commission (the "SEC") has issued a new interpretation of Rule 15c2-11 which will prohibit broker-dealers from providing quotations on fixed-income securities, including bonds issued for resale under Rule 144A, for secondary market trading in US over-the-counter markets unless certain information about the issuer is current and publicly available. The new interpretation of Rule 15c2-11 is being phased in over time - in the absence of any further action by the SEC, the new interpretation will apply to 144A bonds from 4 January 2025.

Rule 144A already requires similar information about the issuer to be made available to investors upon request. However, historically not all issuers have made such information publicly available. The new interpretation of Rule 15c2-11 means that any failure by an affected issuer to make relevant information publicly available could lead broker-dealers to not provide quotations for affected 144A bonds, which could materially reduce the secondary market liquidity (and thus the trading price) for such bonds.

Foreign private issuers whose equity is exempt from registration under Rule 12g3-2(b) of the Exchange Act (i.e. certain non-US companies with equity securities listed on non-US exchanges who publish information distributed to their shareholders and via the exchanges in English on public websites) generally already publish information sufficient to satisfy the public information requirements of Rule 15c2-11. Any issuers who do not already satisfy the public information requirements of Rule 15c2-11 could establish compliance by making relevant information publicly available (e.g. by posting relevant information on a public website).

For issuances of 144A bonds, offering participants will want to consider the position of the issuer under Rule 15c2-11. For example, the issuer may be asked by underwriters or other agents to provide relevant representations (e.g. regarding compliance with Rule 12g3-2(b) / Rule 15c2-11 information requirements) and undertakings / covenants (e.g. to make relevant information publicly available during any period when the issuer no longer has a class of equity securities exempt from registration under Rule 12g3-2(b)) in the subscription agreement or related documents. In the event the issuer is not otherwise compliant with Rule 15c2-11 and is unwilling to make the required information publicly available, the offering participants will want to consider adding appropriate risk factor language to the offering document regarding potential adverse effects on secondary market liquidity.

Exempt Encyclopaedia

In October 2022, HSF launched [Exempt Encyclopaedia: A Guide to US Capital Markets Jargon](#). The guide is intended to demystify jargon frequently used in connection with large securities offerings that are marketed in the United States on an exempt (unregistered) basis.

SUSTAINABILITY RELATED AMENDMENTS TO MIFID II

In August 2022, [Commission Delegated Directive \(EU\) 2021/1269](#) (the "amending MiFID II Delegated Directive") came into force, amending Delegated Directive (EU) 2017/593 as regards the integration of sustainability factors into the product governance obligations. Under the amending MiFID II Delegated Directive, EU MiFID manufacturers and distributors are required to specify, as part of the target market assessment, any sustainability-related objectives the product is compatible with. Such objectives must also be covered by the periodic review obligation. Manufacturers are not required to perform a negative target market assessment in relation to any sustainability-related objectives identified for a product. The European Securities and Markets Authority ("ESMA") also published a [Consultation Paper](#) in July 2022 to review the [Guidelines on MiFID II product governance requirements](#), in order to include guidelines on the specification of any sustainability-related objectives a product is compatible with. However, the final report is not expected until early 2023.

DCM market participants should note that no changes are expected to the form of ICMA Product Governance language that is typically included in DCM offering documents. However, EU MiFID II manufacturers may wish to update their internal processes to reflect any changes to the initial target market assessment to take into account the specific sustainability-related amendments to the amending MiFID II Delegated Directive and additional points reflected in the ESMA Consultation Paper referred to above.

FCA CONSUMER DUTY

In July 2022, the FCA [published](#) its final rules and guidance and accompanying non-Handbook guidance relating to the new Consumer Duty. The new rules comprise a new Consumer Principle that requires firms to act to deliver good outcomes for retail customers. This overarching principle will be underpinned by three cross-cutting rules requiring firms to: (i) act in good faith towards retail customers; (ii) avoid causing foreseeable harm to retail customers; and (iii) enable and support retail customers to pursue their financial objectives. For a more detailed analysis of the final rules and timeframe for compliance, please see our FSR team's [blog post](#).

DCM market participants should note that the FCA's general intention has been to exclude vanilla bonds and wholesale bonds from the scope of the new duty. The final rules make certain welcome clarifications in this regard by, for example, reducing the £100,000 threshold for non-retail financial instruments to £50,000, in line with the UK Government's proposed approach in the [UK Prospectus Regime review](#) for the exemption for wholesale debt as well as widening the definition of a "non-complex financial instrument".

IMPACT OF SANCTIONS ON RUSSIA

ESMA Statement on Prospectus Supervision

In July 2022, ESMA issued a [statement](#) to raise awareness amongst market participants of the impact of the EU sanctions regime on prospectus supervision. The statement follows the Commission publishing its view that possible infringements of EU sanctions can constitute sufficient legal basis for a National Competent Authority ("NCA") to refuse the approval of a prospectus under the EU Prospectus Regulation. Against this backdrop, ESMA warned that issuers submitting a prospectus to an NCA should be aware that they may receive questions and/or requests for additional documentation from NCAs concerning the areas and parties identified by EU sanctions.

Russian sovereign debt defaults: a disputes perspective

Our banking litigation team has published an [article](#) in the September 2022 edition of the Butterworths Journal of International Banking and Financial Law on Russia's default on its foreign currency sovereign bonds from the perspective of potential disputes and litigation from bondholders and related derivatives products.

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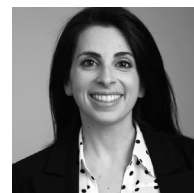
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If you would like to discuss any of the matters raised in this publication, please speak to your usual HSF contacts or see above for some of the key members of the HSF London DCM team.

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