5th Capital Markets Seminar

Capital Markets in Challenging Times

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Recent Updates on IBOR-Transition

IBOR Transition - Update

- 5 March 2021
  - FCA announces date panel bank submissions for all LIBOR settings to end
    - End-2021 for Sterling, Japanese yen, Swiss franc and euro panels
    - End-June 2023 for US dollar panel submissions
- September 2021
  - FCA published notices confirming decision to compel IBA to publish 1-, 3- and 6-month sterling LIBOR for limited time after end-2021 using "synthetic methodology"
  - Synthetic LIBOR: Introduced for:
    - one, three and six month sterling and yen LIBOR
    - IBA SONIA Reference Rate for Sterling / Tokyo Term Risk Free Rate plus respective ISDA fixed spread adjustment that is published for the purpose of ISDA's IBOR fall-backs for settings
  - Restrictive use and renewal under UK Benchmarks Regulation
    - UK supervised entities restricted under the UK Benchmarks Regulation from using in new transactions and cannot use in legacy transactions without the permission of the FCA

IBOR Transition – Update (*Cont'd*)

- November 2021
  - FCA permits generally use (including by supervised entities) of synthetic LIBOR for the duration of 2022 (except in respect of cleared derivatives)
- 15 December 2021
  - Critical Benchmarks (References and Administrators' Liability) Bill
  - Enables automatic transition of LIBOR-referencing contracts to synthetic LIBOR
  - incorporate safe harbour provisions protecting users of synthetic LIBOR and IBA
- 31 December 2021
  - Publication of 24 LIBOR settings ends: all euro and Swiss franc LIBOR settings, Overnight / spot next, 1-week, 2-month and 12-month Sterling settings, Japanese Yen LIBOR settings and 1-week and 2-month US dollar LIBOR settings

IBOR Transition – Update (*Cont'd*)

- 15 March 2022
  - Adjustable Interest Rate (LIBOR) Act of 2021
    - Enables certain contracts governed by US law to move to alternative rates when US dollar LIBOR panel ends
- June 2022
  - FCA published Consultation Paper (CP22/11) to seek views:
    - on retiring 1-month and 6-month synthetic sterling LIBOR by March 2023
    - as to when to end 3-month sterling LIBOR (used in some mortgage products)
    - If use case for USD-LIBOR contracts out of scope of Adjustable Interest Rate (LIBOR) Act of 2021
- August 2022
  - FCA encourages market participants to continue transition of LIBOR-linked bonds | FCA
    - Consent solicitations for non-US law governed bonds
    - Warnings! Synthetic Yen LIBOR to cease at end of 2022 / Synthetic Sterling LIBOR is temporary / Synthetic USD LIBOR, if published, will also be temporary and so transition to a robust alternative rate should remain a market priority

US: Adjustable Interest Rate (LIBOR) Act of 2021

Section 104(a)

- *on the LIBOR replacement date*
  - the first London banking date after June 30, 2023, unless the Board of Governors of the Fed determines that any LIBOR tenor will cease to be published or representative on a different date
- *the Board-selected benchmark replacement*
  - a benchmark replacement identified by the Federal Reserve Board that is based on SOFR, including a tenor spread adjustment that is consistent with ISDA's IBOR Fallbacks Protocol
- *shall be the benchmark replacement*
  - a benchmark, interest rate or dividend rate to replace LIBOR or any rate based on LIBOR under a LIBOR contract
- *for any LIBOR contract*
  - any contract, agreement, indenture, organizational document, guarantee, mortgage, deed of trust, lease, [debt or equity] security…, instrument or other obligation or asset that, by its terms, uses LIBOR as a benchmark

US: Adjustable Interest Rate (LIBOR) Act of 2021 (*Cont'd*)

- *that, after disregarding as null and void any reference in the fall-back provisions to:*
  - a benchmark replacement based in any way on LIBOR (e.g., a fallback to the last-quoted LIBOR value), except to account for the difference between the replacement rate and LIBOR (i.e., a spread adjustment) or
  - a requirement to poll for quotes or information concerning interbank lending or deposit rates
- *either contains no fall-back provisions – terms in a LIBOR contract for determining a benchmark replacement or*
- *contains fall-back provisions that identify neither a specific benchmark replacement nor a determining person*
  - *any person with the authority, right or obligation to determine a benchmark replacement, as identified by the LIBOR contract or its governing law*

US: Adjustable Interest Rate (LIBOR) Act of 2021 (*Cont'd*)

Permissions and Contract Continuity: The Act:

- amends Section 316(b) of the Trust Indenture Act of 1939: the right a holder of an indenture security to receive payment of principal and interest on respective due dates may not be impaired or affected without the consent of that holder
- provides that benchmark replacement, selection and use and any benchmark replacement conforming changes shall constitute:
  - (i) a commercially reasonable and substantially equivalent replacement for LIBOR;
  - (ii) a reasonable, comparable or analogous rate to replace LIBOR;
  - (iii) a replacement based on a similar or comparable methodology to LIBOR;
  - (iv) substantial performance by a LIBOR contract party of a LIBOR-linked right or obligation; and
  - (v) a replacement rate with substantially similar historical fluctuations to LIBOR

A Deeper Dive Into the US Adjustable Interest Rate (LIBOR) Act | Perspectives & Events | Mayer Brown

Switching to SOFR: Proposed Rule Published to Implement the 2022 Federal LIBOR Act | Eye on IBOR Transition

UK: Critical Benchmarks (References and Administrators' Liability) Act 2021

- amends the UK Benchmarks Regulation (by adding Articles 23FA, 23FB and 23FC) to provide for the automatic transition of LIBOR-referencing contracts to synthetic LIBOR after the end of 2021
- incorporates safe harbour provisions protecting users of synthetic LIBOR and IBA
- where a particular LIBOR rate has been designated as unrepresentative or "at risk" by the FCA under Article 23A of the UK Benchmarks Regulation, contractual references to that rate will continue to be interpreted as references to the same rate, even if its calculation methodology has changed and it is being calculated on a synthetic basis
  - The rates that have been so designated are one-month, three-month and six-month GBP LIBOR and JPY LIBOR (Designated Rates)
  - contracting parties cannot argue that use of a synthetic rate constitutes breach of contract, material change to the contract, or frustration of the contract; and
- claims for damages may not be brought against IBA in respect of any action that it takes or does not take upon instruction by the FCA, such as changing its calculation methodology to produce synthetic LIBOR

UK: Critical Benchmarks (References and Administrators' Liability) Act 2021 (*Cont'd*)

- When does the Act not apply?
  - if a contract or arrangement provides expressly that it should not
  - Does not prevent or otherwise affect the operation of a fall-back provision – but Act provides that **benchmark cessation triggers** are not activated by Article 23A designation and modification
    - Where product does not contain benchmark replacement provisions at all, product should transition to synthetic LIBOR
    - Where product contains benchmark replacement provisions, but does not contain a "non-representative" (or "pre-cessation") trigger, these provisions should have not been activated and the products should have transitioned to synthetic LIBOR on 1 January 2022
    - Where product contains benchmark replacement provisions with a non-representative (or "pre-cessation") trigger, these provisions should operate as intended by the parties and default in manner provided for in Conditions

IBOR Transition – Consent Solicitations

- English law Floating Rate Notes referencing GBP LIBOR and USD LIBOR transitioning to SONIA / SOFR through consent solicitation
  - Over 100 sterling LIBOR-linked legacy bonds have successfully transitioned to SONIA using consent solicitation and there are more all the time (more than 2/3rd by value) – typically:
    - Interest Basis changes from Sterling LIBOR to Compounded Daily SONIA
    - Spread adjustment made using methodology contained in ISDA IBOR Fallbacks Supplement (applying the 5 year historical median methodology supported by ISDA members)
    - Margin remains unaltered
    - Benchmark replacement provisions customarily added
- Similar approach being taken in the market to USD LIBOR
  - FCA's current view that transition of USD LIBOR floating rate notes possible by end-June 2023
  - Consent solicitations have currently approved inclusion of ARRC fall-back provisions in terms of Notes (not an immediate transition to a SOFR rate)

EURIBOR Developments - Update

Recommendations by the working-group on euro risk-free rates on EURIBOR fallback trigger events and €STR-based EURIBOR fallback rates published on 11 May 2021:

- No immediate plan to discontinue EURIBOR (EURIBOR and €STR floating rate issuance sit alongside each other for now)
- Contracts and financial instruments referencing EURIBOR should include provisions covering trigger events related to permanent cessation, temporary non-availability and non-representativeness (pre-cessation)
  - replacement date should occur on the date on which the benchmark has effectively ceased to be provided or is no longer representative, or any other point in time to be contractually determined
  - For the cash products (including floating rate notes), working group suggests using a €STR-based backward-looking term structure – compounded €STR rate

Risk Free Rate (RFR) Conventions in Eurobond Terms

	SONIA (Sterling Overnight Index Average)	SOFR (Secured Overnight Financing Rate)	€STR (Euro Short Term Rate)
Description	SONIA reflects the average of the interest rates that banks pay to borrow sterling overnight from other financial institutions	SOFR reflects cost of borrowing cash overnight collateralised by U.S. Treasury securities	€STR reflects the wholesale euro unsecured overnight borrowing costs of banks located in the euro area
Administrator	The Bank of England	Federal Reserve Bank of New York	European Central Bank
Market Conventions	SONIA compounded in arrears over an interest period, with a margin added Lag: SONIA rate used to calculate a rate for each day in an interest period is based on the SONIA rate for a prior day (typically, five days prior) Shift: Similar to the "lag" approach, but compounding formula weights the SONIA rate to account for calendar days when the SONIA rate is not published according to the observation period itself, whereas the "lag" approach weights the SONIA rate according to the interest period SONIA Compounded Index: Administrator publishes a number representing the returns from a rolling investment earning interest each day at the SONIA rate. The change in this index between any two dates can be used to calculate the interest rate payable on a SONIA product over the relevant period	Simple average of SOFR: SOFR over an interest period, with a margin added, and a "lockout" in respect of each interest period ("lockout" means one of the daily SOFR rates is repeated for several (typically, four) days, usually at the end of an interest period) Compounded SOFR with Observation Period Shift: Market convention similar to those used in SONIA bonds SOFR Index Rate with Observation Period Shift: The administrator publishes 30-, 90-, and 180-day SOFR Averages as well as a SOFR Index employing daily compounding on business days as determined by the SOFR publication calendar Compounded SOFR with Payment Delay: Interest is paid several (typically, two) days after the end of the interest period (except for the final interest payment, which uses a two-day lockout mechanism that assumes the SOFR rate stays the same for those two days)	Compounded Daily Rate: €STR compounded in arrears over an interest period, with a margin added and a "lag" or "lookback" (typically five days) Compounded €STR Average Rate: The compounded €STR average rate for tenors of 1-week, 1-month, 3-month, 6-month and 12-monthis calculated and published by the European Central Bank using historical daily values of €STR and yields an average rate for the respective tenor over which €STR values were recorded Compounded €STR Index: published by the ECB and represents the evolving daily value of a notional instrument that accrues compounded interest on an initial sum of €100 starting on 1 October 2019

RFR Conventions in Eurobond Terms

Fall-back Rates	Bank of England's Bank Rate plus spread of SONIA to Bank Rate	See Benchmark Replacement Conditions below	EUR (ECB) Recommended Rate Eurosystem Deposit Facility Rate (EDFR) plus arithmetic mean of the daily difference between the €STR or the EUR Recommended Rate, as applicable, and the EDFR
Benchmark Replacement Conditions	Issuer makes determinations following consultation with Independent Adviser. Fallback on the permanent cessation of the relevant benchmark to a successor or alternative rate plus spread adjustment to be applied to such rate, as selected by an independent adviser on the basis of: (a) any recommendations made by relevant official bodies or (b) if no such recommendations have been made, customary market practice. In some cases, an additional "pre-cessation trigger" (being a declaration by the FCA of non-representativeness of LIBOR) has been included as a trigger to the fallbacks	Similar to SONIA for Benchmark Events (fallbacks) and process for determining replacement rate but: Issuer makes determinations alone (though may appoint an agent to assist) Benchmark replacement is either successor rate recommended by Federal Reserve, ISDA Fallback Rate or alternate interest rate selected by the Issuer giving consideration to any industry-accepted interest rate plus, in each case, spread adjustment In the US, rare to use "Screen Rate Determination" in a floating rate note. Floating Rate Notes now adopt 2021 ISDA Definitions (including their related fallbacks)	Similar to SONIA for Benchmark Events (fallbacks) and process for determining replacement rate, but, as an alternative, the above-mentioned specific Fall-back Rates may be hardwired into the terms and conditions of Notes referencing the Compounded Daily Rate. Different fall-back rates may apply to the screen rates for Compounded €STR Average Rate and Compounded €STR Index (either general benchmark replacement conditions or ISDA fallbacks)

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Section 2:

Listing Act

Overview

1. Background
2. Objectives
3. Areas of Potential Reform
4. Consultation and Legislative Process - Procedure and Status
5. Key Statements by Various Stakeholders

Background

- In November 2021, the European Commission initiated a consultation procedure on the **EU Listing Act**. The **initial proposal** of the EU Listing Act is **planned** to be published in **Q3 2022**.
- The Commission believes that **EU capital markets** remain **underdeveloped in size**, notably in comparison to capital markets in other major jurisdictions.
- Recognizing these issues, the Commission's new **Capital Market Union Action Plan** of September 2020 has as one of its main objectives to ensure that companies, in particular SMEs, have unimpeded access to the most suitable form of financing.

Background (*Cont'd*)

- The **aim of the consultations** is to **gather evidence** in the form of stakeholders' views on the need to **make listing on EU public markets more attractive** for companies and on **ways of doing so**.
- Stakeholders: Member states, national competent authorities (NCA) and ESMA, market participants, including SMEs (listed SMEs and those seeking a listing), businesses other than SMEs, stock exchanges, retail and institutional investors, consumer and investor organizations, brokers, key advisers that support companies through the IPO stage, and other service providers
- The Commission is also seeking views regarding specific ways of listing, including via Special Purpose Acquisition Companies (**SPACs**). A special focus is dedicated to **SMEs** and issuers listed on SME growth markets.

Background (*Cont'd*)

- Structure of Consultations:
  - The **open public consultation** includes seven general questions on the functioning of the EU regulatory framework, in particular with regard to the achievement of the objectives of the existing regulatory framework and on the factors responsible for the lack of attractiveness of European capital markets.
  - The **targeted technical consultation** includes over 100 additional questions on technical topics and is aimed at capital market practitioners, national competent authorities and academics. It addresses, above all, possible changes to the Prospectus Regulation, the Market Abuse Regulation (MAR), MiFID II, company law and the Listing Directive. The aim is to identify the most burdensome requirements and discuss how these could be reduced without compromising market integrity and the general transparency regime.

Background (*Cont'd*)

- Prior to the consultations, the Commission identified **three main problem areas** that were examined in more detail during the two rounds of consultations:
  - Post-listing obligations and costs
  - Regulatory flexibility
  - Stock analysis and liquidity

Objectives

- In simple terms, the EU aims to **make public markets more attractive** for EU companies and to **facilitate access to capital for SMEs**.
- According to the Commission, the main aim of the EU Listing Act is to **ensure unhindered capital market access for all companies in the EU**, in particular for SMEs.
- It is therefore worth reviewing whether the **rules for a stock exchange listing** could be **further simplified**, how access to the capital markets can be improved for companies in the EU and how the primary and secondary markets work in the EU.

Objectives (*Cont'd*)

- Ultimately, the EU Listing Act aims to enable issuers within the EU to access and utilise the capital markets by
  - **Simplifying and easing the requirements for listing and ongoing listing**, partly by reducing costs and increasing legal certainty for issuers;
  - **Removing regulatory restrictions**; and
  - **Increasing the visibility of SMEs** to investors and improving their attractiveness
- At the same time, it also aims to ensure a high level of **investor protection** and **market integrity**.

Objectives (*Cont'd*)

- The Commission wishes to achieve these aims by:
  - Making **targeted amendments** to the existing provisions in several EU legal acts (*e.g.* Prospectus Regulation, Market Abuse Regulation (MAR), MiFID II and Listing Directive), *e.g.* by simplifying (i) the documentation obligations for an IPO, (ii) preparation and maintenance of insider lists, (iii) the conditions for deferring the disclosure of inside information and (iv) the market testing rules; and
  - Introducing **new provisions**, *e.g.* on shares with multiple voting rights and simplified corporate governance standards for SMEs.

Areas of Potential Reform

- A glance at the two rounds of consultation provides an idea of the **areas of law** the Commission thinks need **to be reformed**:
  - Prospectus Regulation
  - Market Abuse Regulation
  - MiFID II
  - Transparency Directive
  - SPAC
  - Listing Directive
  - Free Float
  - Company Law
  - Gold-plating

Consultation and Legislative Process - Procedure and Status

- The Commission's **consultation process** was kicked off in **November 2021**, following the rules of the European Commission for public consultations. Respondents were invited to **reply by February 25, 2022**. Responses authorized for publication have since been published on a designated webpage.
- The **Commission's summary report** regarding the results is yet to be published.
- An **initial proposal** for the EU Listing Act is currently planned for **September 2022**.

Key Statements by Various Stakeholders

- Among the **Respondents** are
  - AFM (Dutch national competent authority, Authority for the Financial Markets)
  - AFME
  - AMAFI
  - AMF (French national competent authority)
  - BNP Paribas
  - BVI
  - Citi
  - Confederation of Danish Industry
  - Deutsche Derivate Verband
  - Deutsches Akteninstitut
  - Die Deutsche Kreditwirtschaft
  - ESMA
  - EURONEXT (Paris)
  - European Association of Independent Research Providers
  - EuropeanIssuers
  - Finance Finland
  - Ludwig-Maximilians-Universität München
  - Ministry of Finance of The Netherlands
  - Paris Europlace
  - Société Générale

Key Statements by Various Stakeholders

- ***ESMA***
  - ESMA believes that **prospectuses** generally strike an **appropriate balance** between ensuring effective investor protection and proportionate administrative burden.
  - **Prospectus Regulation** should be amended to better clarify various **thresholds** for prospectus exemptions.
  - **Simplified prospectus format** currently provides a balance between appropriate and calibrated disclosure.
  - ESMA considers that the **Transparency Directive equivalence regime** should be improved in terms of clarity.
  - **SPACs** shares and warrants may not be an appropriate investment for all investors due to their complexity; ESMA supports the inclusion of an annex including specific disclosure requirements for SPACs.

Key Statements by Various Stakeholders (*Cont'd*)

- ***Other views worth mentioning***
  - **General observation**: Current **regulatory regime** that is applicable to EU listing and to the continuing obligations of listed companies is, despite its flaws, now **well assimilated** by all stakeholders and **benefits legitimate objectives** of investor protection, transparency and market integrity
  - Most respondents opt for **regulatory stability** and prefer **only targeted / modest improvements** over a fundamental change of the regulatory framework; overhaul of pivotal regulations would be detrimental
  - Aim should be to get similar benefits, **market efficiency and depth** as those observed in other competitive markets, notably US and UK
  - **Regulation** should be as **harmonized** as possible across EU, *i.e.* remove existing diverging interpretations
  - Promoting investor participation is key, *e.g.* encouraging cornerstone investors

Key Statements by Various Stakeholders (*Cont'd*)

- More **alignment between existing ongoing disclosure requirements**, such as disclosures required under the Transparency Directive, the MAR and prospectus content requirements, and encouraging issuers to prepare those disclosures to the same standards as for a prospectus, in which case a prospectus for secondary issuances could be easily prepared by way of **incorporation by reference**
- A **streamlined or no approval requirement for well-known seasoned issuers** who are considered to meet the standards in their existing universal registration documents (URDs); ensure a complete, searchable and easily navigable single depositary for all regulated information, *i.e.*, the European equivalent to EDGAR in the US
- Reassess certain of the **content requirements** for prospectuses for **secondary offerings**

Key Statements by Various Stakeholders (*Cont'd*)

- **Simplify prospectus regime**, in particular **exempt secondary issuances**, tighten time frame for comments / feedback in approval process; widen prospectus requirement exemptions
- Others: **No need to amend prospectus regime** (right balance between effective investor protection and administrative burden); easing SME listing process not the correct way forward
- Create **greater flexibility on price range and deal size**, including the removal of 48 hour withdrawal rights where the prize and size change is not significantly altering the fundamentals of the company post-IPO
- **Regulatory prescription** on **free float** but a framework to allow for greater flexibility
- **Harmonization** on providing **guidance and forecasts** across EU
- **Shorten book-building period**; remove minimum period between publication of prospectus and end of offer (six working days thought to be "ill-suited" to situations of fast moving markets)

Key Statements by Various Stakeholders (*Cont'd*)

- Many warn against fundamentally altering **MAR** but suggest to address impracticability
  - **Repeal** the **extension of the scope of MAR** to other markets than regulated markets
  - Differentiate / clarify the **definition of inside information**
  - **Simplify regime of insider lists**, notably documentation (record keeping, written minutes) requirements for issuers
  - **Simplify regime of manager transactions**
  - **Simplify regime of market sounding**, in particular rules applying to stabilization
- **Broaden definition** of **SME**
- Enable the **adoption of dual class shares** and **multiple voting rights** across the EU

Key Statements by Various Stakeholders (*Cont'd*)

- More explicit mandate to be attributed to ESMA, *i.e.* **strengthen the independence and power of ESMA**: provide for a European prospectus to be approved directly by ESMA and to be automatically recognized in all EU markets => foster convergence among NCAs at implementation level; **uniform prospectus at EU level** akin to S-1 form in the US?
- Abolish withholding tax on dividends
- **Additional flexibility to be given to MiFID II regime** to grant more latitude to equity analysts when it comes to research related inducements; pressing need for independent research firms to be exempt from inducement rules in MiFID II; importance of stimulating and supporting high quality, independent issuer-paid research
- SPACs are welcome, being complementary to traditional IPOs, i.e. create **favorable environment for SPACs** to provide credible exit strategy
- European **ESG disclosure framework** is welcome but warning against too much complexity

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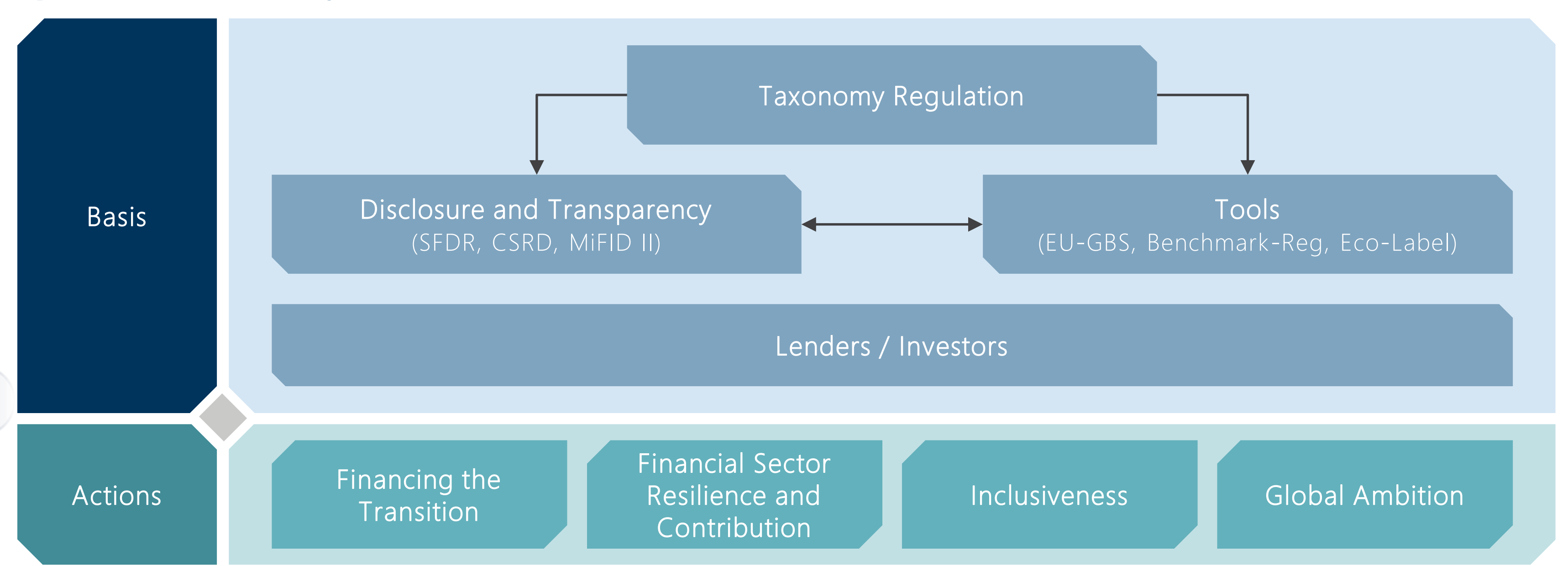
Section 3:

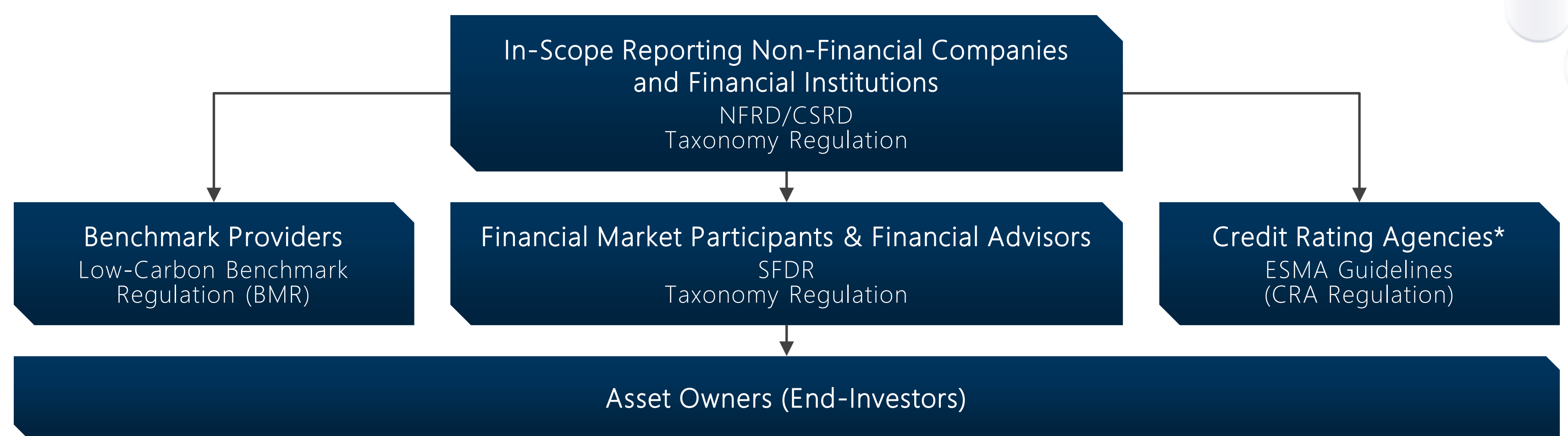
Developments in ESG and Sustainable Debt, including Sustainability-Linked Bonds, the EU Green Bond Standard, MiFID II ESG and CSRD

Overview of EU Sustainable Finance Strategy

Renewed Strategy for Financing the Transition to a Sustainable Economy, published in July 2021 (COM(2021) 390 final)



The Major Regulatory Pillars for Data Flows



GLOSSARY

NFRD = Non-Financial Reporting Directive (Directive 2014/95/EU)

CSRD = Corporate Sustainability Reporting Directive (Proposal COM(2021) 189 final)

SFDR = Sustainable Finance Disclosure Regulation (Regulation (EU) 2019/2088)

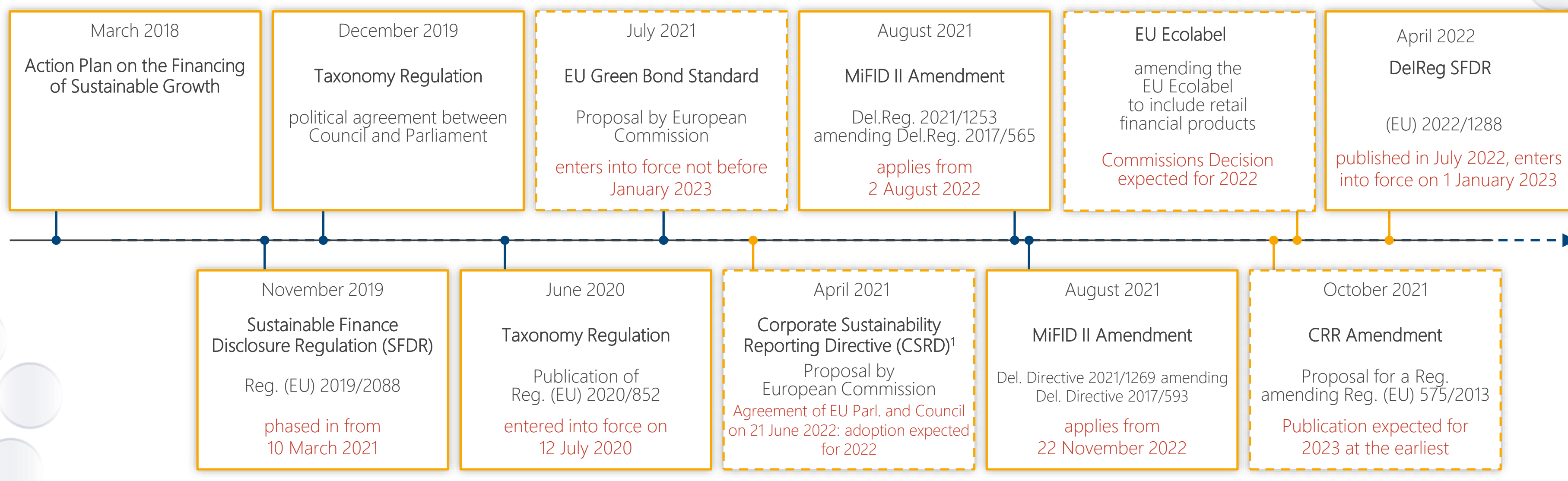
BMR = Benchmark Regulation (Regulation (EU) 2016/1011)

CRA = Credit Rating Agencies Regulation (Reg. (EU) No 462/2013)

* Reported data will also be required for ESG ratings. It is unclear whether and to what extent the EU will envisage a regulation for ESG ratings.

Overview of Selected EU Regulations

- In March 2018 the EU published a comprehensive **Action Plan on the Financing of Sustainable Growth** (COM/2018/097 final) which laid out a master plan to be implemented by a variety of individual regulatory measures:



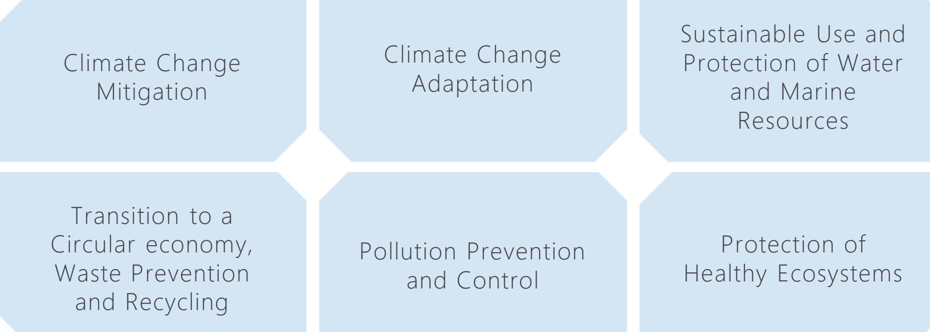
- „Fit for 55“ package aims to amend EU legislation and policy to ensure that the EU is able to meet its new climate targets by 2050

1. Exact timing currently uncertain

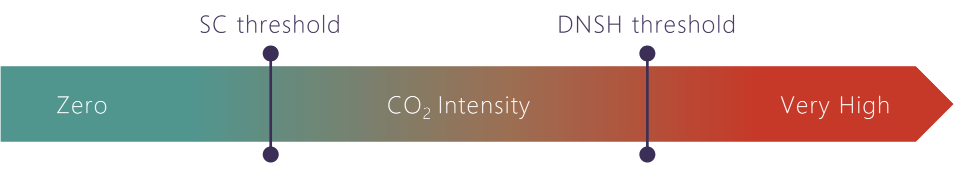
Taxonomy Regulation – Overview

- An investment is environmentally sustainable if it finances one or more **economic activities** that are considered environmentally sustainable under the Taxonomy Regulation (Art. 3)
- According to the Taxonomy Regulation, an **economic activity** is environmentally sustainable when it:
  - substantially contributes to one of the six defined **environmental objectives**
  - **does no significant harm** to any of the other five objectives
  - complies with **minimum safeguards**
- For the time being, the regulation is limited to the determination of environmental sustainability (at a later stage the objectives "social" and "governance“ will be included)
- Suggested details can be found in the Technical Report of the TEG on Sustainable Finance and its Technical Annex

THE SIX ENVIRONMENTAL OBJECTIVES UNDER THE TAXONOMY REGULATION



EXAMPLE OF QUANTITATIVE DNSH ANALYSIS[1]



1. Source: Taxonomy – Final report of the Technical Expert Group on Sustainable Finance, March 2020.

Taxonomy Regulation – Scope

- Scope of the Taxonomy Regulation through references in the Non-Financial Reporting Directive and the Disclosure Regulation (SFDR) and the upcoming EU Green Bond Regulation:
  - **Who?** EU and its Member States as well as companies already required to report under the Non-Financial Reporting Directive and financial market participants and financial products pursuant to the Disclosure Regulation
  - **What?**
    - Transparency for environmental and sustainable financial products (Art. 5 and 6): pre-contractual documentation and periodic reports
    - Transparency for environmental corporate bonds (via the EU GBS)
    - Transparency for non-financial reporting (Art. 8): disclosure of KPIs/Green Asset Ratio for financial institutions
- Required compliance for activities related to climate change mitigation and adaptation starts in 2022 and for other environmental objectives in 2023

Taxonomy Regulation – Level 2 Measures

- Technical Screening Criteria - Climate Delegated Act ((EU) 2021/2139):
  - Provides for the first technical screening criteria for companies and financial market participants on which economic activities can be considered to make a substantial contribution to climate mitigation and adaptation objectives
- On 15 July 2022, the European Commission published a Complementary Climate Delegated Regulation including, under strict conditions, specific nuclear and gas energy activities in the list of economic activities covered by the EU taxonomy, which will apply as of 1 January 2023
- Taxonomy Disclosure Delegated Act ((EU) 2021/2178):
  - undertakings subject to Articles 19a or 29a of Directive 2013/34/EU
  - reporting of Taxonomy eligibility and alignment by way of 'key performance indicators' (KPIs)
  - for banks the main metric is the Green Asset Ratio (GAR), and secondary KPIs (like fee or commission based)
  - For 2022, the proportion of Taxonomy-eligible and non-eligible economic activity has to be reported by non-financial undertakings (for financial undertakings this will apply in 2023),
  - As of 2023, full-scale KPI-based disclosure on the degree of alignment with the Taxonomy will become mandatory for non-financial undertakings (for financial undertakings this will apply as of 2024)

Sustainability-Linked Bonds - ICMA Principles

1. Selection of KPIs

The KPIs should be:

- **relevant**, core and material to the issuer's overall business, and of high strategic significance to the issuer's current and / or future operations;
- **measurable or quantifiable** on a consistent methodological basis;
- externally **verifiable**; and
- able to be **benchmarked**.

2. Calibration of Sustainability Performance Targets (SPTs)

The process for calibration of one or more SPT(s) per KPI will be the expression of the level of ambition the issuer is ready to commit to. The SPTs should:

- **represent a material improvement in the respective KPIs** and be beyond a "Business as Usual" trajectory;
- where possible be compared to a **benchmark** or an external reference;
- be **consistent** with the issuers' overall strategic sustainability / ESG strategy; and
- be **determined on a predefined timeline**, set before (or concurrently with) the issuance of the bond.

3. Bond characteristics

The bond's financial and/or structural characteristics can vary depending on whether the selected KPI(s) reach (or not) the predefined SPT(s). The SLB will need to include a financial and/or structural impact involving trigger event(s). It is recommended the variation of the bond financial and/or structural characteristics should be commensurate and meaningful relative to the issuer's original bond financial characteristics.

4. Reporting

Issuers of SLBs should publish (at least annually) and keep readily available and easily accessible:

- up-to-date **information on the performance of the selected KPI**(s);
- a verification **assurance report relative to the SPT**; and
- any **information enabling investors to monitor the level of ambition of the SPTs** (e.g. any update in the issuers sustainability strategy) and more generally any information relevant to the analysis of the KPIs and SPTs.

5. Verification

Issuers should seek independent and external verification of their performance level at least annually against each SPT for each KPI by a qualified external reviewer with relevant expertise.

The verification of the performance against the SPTs should be made publicly available.

Ten tips for Sustainability-Linked Bonds

1. **Additional guidance from ICMA available** (including updated ICMA Q&A document and KPI registry)
2. **Risk factors and disclaimers** are increasingly detailed and sophisticated
3. **Sustainability Agent/Coordinator** – Not "Advisor"; increasing prevalence of Sustainability Agent mandate letters
4. **Are the SLB Terms and Conditions clear?**
5. **Failure to report** as Event of Default "by mistake"?
6. **Recalculation language** increasingly popular
7. **ECB Eligibility** – Take care with statements around ECB eligibility
8. **EBA Monitoring Report June 2021** – SLBs not appropriate for EU regulatory capital issuances
9. **"Most ambitious target"**
10. **Not just step-ups** – Also step-downs, redemption premia, charitable donations, purchase of carbon credits

Proposal for an EU Green Bond Standard

- The European Commission aims to adopt an EU-wide **Green Bond Standard**
  - EU Technical Expert Group on Sustainable Finance published a proposal in June 2019 with recommendations
  - On 6 July 2021 the Commission proposed a Regulation on a Voluntary European Green Bond Standard (EUGBS)
  - in January 2022 numerous amendments were tabled by members of the Committee on Economic and Monetary Affairs (ECON)
- Proposal by EC:
  - Any EU Green Bond Proceeds will have to be aligned with the environmental objectives set out in the Taxonomy Regulation
  - Adherence shall remain <u>voluntary</u> (in contrast, some ECON members want to make the EU GBS mandatory for all bonds marketed as environmentally sustainable)
  - Registration and supervision of external reviewers
- Documentation and reporting
  - Before the EU Green Bond issuance, the issuer must have an EU Green Bond factsheet (similar to a framework)
  - Pre-issuance review of the factsheet by an external reviewer
  - Publication of annual allocation reports is required
  - Post-issuance review by an external reviewer
  - Issuers will need to draw up an impact report on the environmental impact of the use of proceeds

EU Green Bond Standard – Changes to the Green Bond Principles

	ICMA Green Bond Principles	EU Green Bond Standard
What Are They?	Voluntary guidelines for the issuance of (non regulated) Green Bonds	Proposed voluntary standard for the issuance of EU Green Bonds
How Do They Define Green Bonds?	Bond instruments where the proceeds will be applied to finance eligible green projects	• Bond instruments where the proceeds are used to finance EU green projects • To be eligible as EU green project, project must align with economic activities in EU Taxonomy Regulation
Requirements upon Issuance	Non-mandatory communication of sustainability objectives and eligible green projects to investors through publication of green bond framework aligned with ICMA GBP	Publication of EU Green Bond Factsheet: a document through which issuer confirms alignment to EU standards and consequently to the Taxonomy Regulation
Requirements after Issuance	• Implementation of internal processes to track and adjust use of proceeds and allocation • Disclosure of proportion of proceeds used for refinancing is recommended	• Assessment of alignment of bond with EU Standard must be externally reviewed by accredited verifier • Disclosure of proportion of proceeds used for refinancing is required
Impact Monitoring & Reporting	Information on list of eligible projects and use of proceeds to be released annually	Allocation and impact report to be released at least annually
External Review	• Publication of external review is recommended in full or only partly • Accreditation of external reviewers is not addressed in GBP	• Publication of external review is required with a minimum of the alignment of the EU green bond with all four core components* of the EU GBS • Accreditation requirements for external reviewers are set out in EU GBS

* the four core components are:
1. use of proceeds; 2. process for project evaluation and selection; 3. management of proceeds; 4. reporting

European Parliament - Report on the Proposal for a Regulation on European Green Bonds

- On 20 May 2022, the European Parliament's Committee on Economic and Monetary Affairs (ECON Committee) published its **report on the EU Commission's proposal on the EU Green Bond Standard (GBS)** of 6 July 2021 with **several amendments**.
- **Key aspects**:
  - Scope extended to the entire Green Bond market, not only establishing the European Green Bond Label (EuGB)
  - Alignment with EU Taxonomy: stronger transparency requirements regarding the allocation of proceeds for activities related to nuclear energy or fossil gas
  - Transition plans
  - Full integration into the prospectus
  - Rules about the recognition of third country taxonomies
  - Supervision: stronger power to prohibit an issuer from issuing a bond if transparency requirements are not met

European Parliament – Report on the Proposal for a Regulation on European Green Bonds (*Cont´d*)

Article 7c

Disclosures for bonds marketed as environmentally sustainable

1. Issuers of bonds marketed in the Union as environmentally sustainable and of sustainability-linked bonds that are marketed in the Union, shall publish and maintain on their websites a statement on due diligence policies with respect to principal adverse impacts of investment decisions on sustainability factors, taking due account of their size and the nature and scale of their activities.

2. The ESAs shall develop, through the Joint Committee, draft regulatory technical standards in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 on the content, methodologies and presentation of information referred to in the first subparagraph.

When preparing the draft regulatory technical standards referred to in the first subparagraph, the ESAs shall, where relevant, seek input from the European Environment Agency and the Joint Research Centre of the European Commission.

The ESAs shall submit those draft regulatory standards to the Commission by [12 months after the date of entry into force of this Regulation].

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

3. Issuers of bonds marketed as environmentally sustainable in the Union that do not use the designation 'European green bonds' or 'EuGB' shall disclose in their pre-contractual disclosures:

(a) a clear and reasoned explanation of how the bond takes account of principal adverse impacts on sustainability factors;

(b) information on how the environment characteristics of the bond are met, including the information outlined in Annex 1.3;

(c) information about the intended allocation of bond proceeds, including the information outlined in Annex I.4;

(d) information about the percentage of expected taxonomy-alignment of the use of proceeds of the bond.

4. Issuers of bonds marketed as environmentally sustainable in the Union that do not use the designation 'European green bonds' or 'EuGB' shall include a description in annual periodic reports of the extent to which environmental characteristics are met, including the information as outlined in point 3 of Annex II.

5. The ESAs may develop, through the Joint Committee, draft regulatory technical standards to specify the details of the content and presentation of information referred to in paragraphs 3 and 4.

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

6. The pre-contractual disclosures and annual periodic reports shall be reviewed by external reviewers that are registered in accordance with Articles 14 to 17, that meet the requirements of Titles II and III and that are subject to supervision pursuant to Title IV, Chapter III, of this Regulation.

Overview of main political aspects related to the EU Green Bond Standard

Key issues	European Commission	Council	EP
Grandfathering	Partial 5 years	Full	Partial 5 years for UoPs other than debt (with no forced re-allocation of already allocated proceeds) and 10-years (for debt financing)
Flexibility on Technical Screening Criteria	No	Up to 20% applicable only for activities where there is no Technical Screening Criteria and some official sector climate finance flows	No, but a "Taxonomy equivalency" mechanism has been proposed
Voluntary/ Mandatory	Voluntary	Voluntary	Voluntary (with a review clause)
Scope	EU GBS + External Reviewers (ERs) of EuGBs	EU GBS + ERs of EuGBs	EU GBS + all ERs (practically) + Mandatory disclosure requirements for all green UoPs bonds and SLBs with environmental themes

Source: ICMA

MiFID II Suitability Assessment / Target Market

- With regard to the distribution of financial instruments (i.e. not only financial products in the narrower sense of the Taxonomy Regulation), Delegated Regulation (EU) 2021/1253 amends the **MiIFD II DelReg** (DelReg (EU) 2017/565) by introducing **Sustainability Factors** into **Suitability Assessments**:
  - Investment firms providing investment advice or portfolio management shall as part of their suitability assessment also ask the client for its “sustainability preference” and investment firms should offer such products that corresponds with such preference
  - Sustainability preferences relate to (at the investors choice)
    - Financial instruments with a certain minimum proportion of environmentally sustainable investments pursuant to Art. 2 (1) EU Taxonomy
    - Financial instruments with a certain minimum proportion of sustainable investments pursuant to Art. 2(17) SFDR or
    - Financial instruments that consider principal adverse impacts on sustainability factors

MiFID II Suitability Assessment / Target Market (*Cont´d*)

  - Investment firms shall also provide clients in good time before the provision of investment services with a general description of the nature and risks of financial instruments, also taking into account in particular any "ESG considerations"

- In addition, Delegated Directive (EU) 2021/1269 (amending DelDir 2017/593) integrates **sustainability factors** into the **product governance obligations**. Correspondingly, **target market determinations** are to be amended with respect to "ESG" financial instruments.
  - In Germany, the German Banking Industry Associations, together with the the German Association of Investment and Asset Management and the German Derivatives Association (DDV) have agreed on a common minimum standard for determining the target market agreed for the German market.

German Standard for determining the Target Market

Bundesverband der Deutschen Volksbanken und Raiffeisenbanken e. V.
Bundesverband deutscher Banken e. V.
Bundesverband Öffentlicher Banken Deutschlands e. V.
Deutscher Sparkassen- und Giroverband e. V.
Verband deutscher Pfandbriefbanken e. V.

Application for certificates and bonds

Other products - Not part of the MiFID target market		Products which may be addressed to customers with sustainability-related objectives pursuant to Art. 9 No 9 subpara. 1 MiFID II Delegated Directive[1]		
Basic	**ESG strategy product**	**PAIs (Consideration of significant adverse impacts, lit. c)[2]**	**Sustainable investments as defined by the SFDR (ES, lit. b)**	**Ecologically sustainable investments (Taxonomy, lit. a)**
Company[3] takes into account the UN Global Compact + has a sustainability rating + Company[3] takes into account ESG product and transparency standard[4]	Underlying(s): dedicated ESG strategy, + Company[3] takes into account the UN Global Compact and Company[3] achieves the status of a sustainable company with at least one rating agency + Company [3] takes into account ESG product and transparency standard[4]	Company[3] takes into account standard PAIs[5] and the UN Global Compact; Company[3] achieves the status of a sustainable company with at least one rating agency + Underlying(s)[6]: dedicated ESG strategy with selective consideration of standard PAIs[7] through the minimum exclusions + Company takes into account a recognised industry standard[4]	Impact-related investments as defined by the SFDR: specific percentages[9] + Company[3] takes into account the UN Global Compact and Company[3] achieves the status of a sustainable company with at least one rating agency[8] + Underlying(s)[6]: dedicated ESG strategy; no serious violations of the UN Global Compact and democracy/human rights + Company takes into account a recognised industry standard[4]	Impact-related investments as defined by the Taxonomy Regulation: specific percentages[9] + Company[3] takes into account the UN Global Compact and Company[3] achieves the status of a sustainable company with at least one rating agency [8] + Underlying(s)[6]: dedicated ESG strategy; no serious violations of the UN Global Compact and democracy/human rights + Company takes into account a recognised industry standard[4]

Review of the Guidelines on certain Aspects of the MiFID II Suitability Requirements

- **Consultation Paper**: Guidelines on certain aspects of the MiFID II suitability requirements dated 27 January 2022
  - Consequence of the adoption of the changes of the MiFID II Delegated Regulation (EU) 2021/1253 to integrate sustainability factors, risk and preferences into certain organizational requirements and operating conditions for investment firms
  - Considering the amendments introduced through the Capital Markets Recovery Package to Art. 25(2) of the MiFID II ensuring a consistent and harmonized application of the requirements in the area of suitability and an efficient achievement of the objectives of the MiFID II
- The relevant hearing took place in March 2022
- **Letter** from ISDA and ICMA (including other associations) dated 19 July 2022: Call for ESMA guidance to NCAs to not prioritize their supervisory actions in relation to the implementation of the MiFID II Delegated Act before data become available, especially based on the obligation of the CSRD

Review of the Guidelines on MiFID II Product Governance Requirements

- On 8 July 2022, ESMA published a **Consultation Paper** concerning a **Review of the Guidelines** on MiFID II product governance requirements
- **Key aspects:**
  - ESMA acknowledges that the target market for structured products not subject to the SFDR may be subject to different criteria than those for financial products
  - No "negative" target market needs to be defined for sustainability preferences
  - Consistency of the Product Governance Guidelines with the Suitability Guidelines to the effect that the definition of sustainability preferences in Art. 2 No. 7 MiFID II DelReg shall also be authoritative for the target market.

Review of the Guidelines on MiFID II Product Governance Requirements (*Cont´d*)

ESMA Consultation Paper

Guideline No. 20,

8 July 2022

20. Within the broad category of clients' objectives and needs, the firm should also specify any sustainability-related objectives the product is compatible with. To ensure a sufficient level of granularity of the target market, when identifying sustainability-related objectives, firms may specify, where relevant, the following aspects (in line with the definition of "sustainability preferences" according to Article 2(7) of the MiFID II Delegated Regulation[23] and as further detailed in the ESMA Guidelines on certain aspects of the MiFID II suitability requirements):

- The minimum proportion of the product that is invested in environmentally sustainable investments as defined in Article 2, point (1), of Regulation (EU) 2020/852[24];
- The minimum proportion of the product that is invested in sustainable investments as defined in Article 2, point (17), of Regulation (EU) 2019/2088[25];[26]
- Whether, where relevant, the product has a focus on either environmental, social or governance criteria or a combination of them;
- Which principal adverse impacts (PAI) on sustainability factors are considered by the product, including quantitative or qualitative criteria demonstrating that consideration. Firms could use the categories presented in the SFDR RTS (instead of an approach based on each PAI indicator) such as "emissions", "energy performance", "water & waste", etc.

CSRD – Revision of NFRD

- So far, Directive 2014/95/EU – also called the Non-Financial Reporting Directive (**NFRD**) – applies and lays down the rules on disclosure of non-financial and diversity information by certain large companies
- This directive amends the Accounting Directive 2013/34/EU
- EU rules on non-financial reporting **currently apply to large public-interest companies** with **more than 500 employees**. This covers approximately **11 700** large companies and groups **across the EU**, including
  - listed companies
  - banks
  - insurance companies
  - other companies designated by national authorities as public-interest entities
- '**public-interest entities**' means undertakings within the scope of Article 1 and Annex I, II of NFRD. According to Art. 1(1), 2(1) and Annex I and II, the following types of undertakings are defined as public-interest companies in Germany:
  - *"die Aktiengesellschaft, die Kommanditgesellschaft auf Aktien, die Gesellschaft mit beschränkter Haftung"*
  - *"die offene Handelsgesellschaft, die Kommanditgesellschaft"*

CSRD – Revision of NFRD (*Cont´d*)

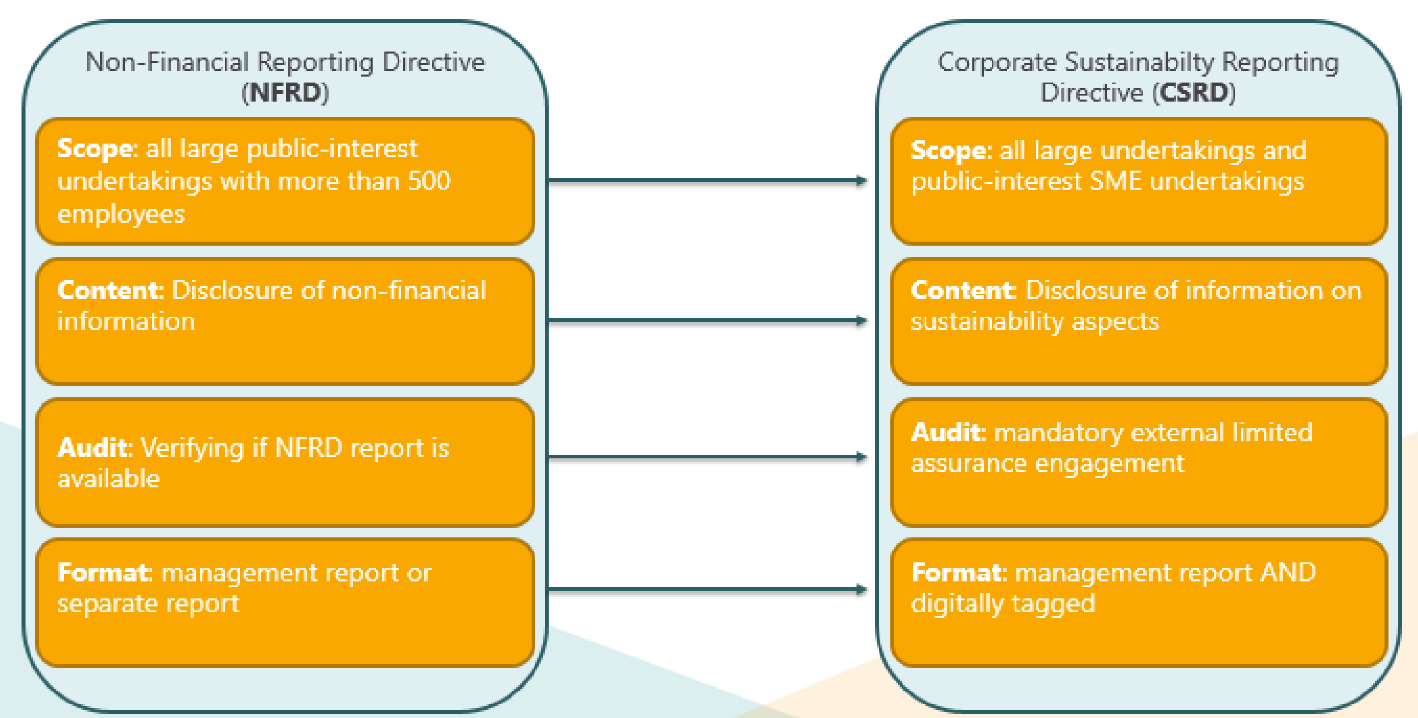
- Under the NFRD, large companies have to publish **information related to**
  - **environmental matters**
  - **social matters and treatment of employees**
  - **respect for human rights**
  - **anti-corruption and bribery**
  - **diversity on company boards (in terms of age, gender, educational and professional background)**
- Germany had transposed the EU Directive NFRD into national law with the CSR Directive Implementation Act (CSR-RUG)
- In Germany, capital market-oriented corporations, insurance companies, credit institutions, limited partnerships and cooperatives are required to submit this report if they either have
  - **more than 500 employees**
  - **or meet two of three size criteria - 40 million euros in turnover, 20 million euros in total assets, number of 250 employees**
- The main provisions in this respect are sections 289b to e of the German Commercial Code (HGB)

CSRD – Revision of NFRD (*Cont´d*)

- In April 2021, it was decided to extend the scope of the NFRD to smaller companies as well and the proposal for the Corporate Sustainability Reporting Directive (CSRD) was issued: The CSRD
  - Would amend the existing reporting requirements of the NFRD since the information companies report is not sufficient
  - Ensures that companies report the information that investors and other financial market participants subject to the SFDR need
  - **Extends the scope to all large companies and all companies listed on regulated markets without the previous 500-employee threshold (except listed micro-enterprises)**
  - **Requires the audit (assurance) of reported information**
  - Introduces more detailed reporting requirements, and a requirement to report according to mandatory EU sustainability reporting standards
  - SMEs will be allowed to report according to standards that are simpler than the standards that will apply for large companies
  - Requires companies to digitally ‘tag’ the reported information, so it is machine readable and feeds into the European single access point envisaged in the capital markets union action plan

- In addition, the CSRD would amend the Transparency Directive 2004/109/EC to extend the scope of the sustainability reporting requirements to companies with securities listed on regulated markets, and to clarify the supervisory regime for sustainability reporting by these companies

CSRD – Revision of NFRD (*Cont´d*)



CSRD – Development of Reporting Standards

- The European Financial Reporting Advisory Group **(EFRAG)** is responsible for developing draft standards
- The standards will be tailored to EU policies, while building on and contributing to international standardisation initiatives
- Besides, the International Sustainability Standards Board (**ISSB**) published on 31 March 2022 proposals that build upon the recommendations of the Task Force on Climate-Related Financial Disclosures (**TCFD**) and incorporate industry-based disclosure requirements derived from SASB (Sustainability Accounting Standards Board) Standards
- The EFRAG and ISSB standards are based on different objectives:
  - EFRAG considers the **dual materiality** perspective, i.e. that companies must report on the impact of business activities on the value of the company or on the three sustainability dimensions of environment, social and governance.
  - The ISSB focuses on the investor perspective for assessing the value of the company.
- Duplication of effort? Convergence or mutual recognition by EFRAG/ISSB?

CSRD – European Council's Proposed Amendments as of 21 June 2022

- Extra-territorial scope

For **non-European companies**, the requirement to provide a sustainability report applies to all companies generating a net turnover of EUR 150 million in the EU and which have at least one subsidiary or branch in the EU. These companies must provide a report on their ESG impacts, namely on environmental, social and governance impacts, as defined in this directive.

- Relation to Equivalence Decisions?

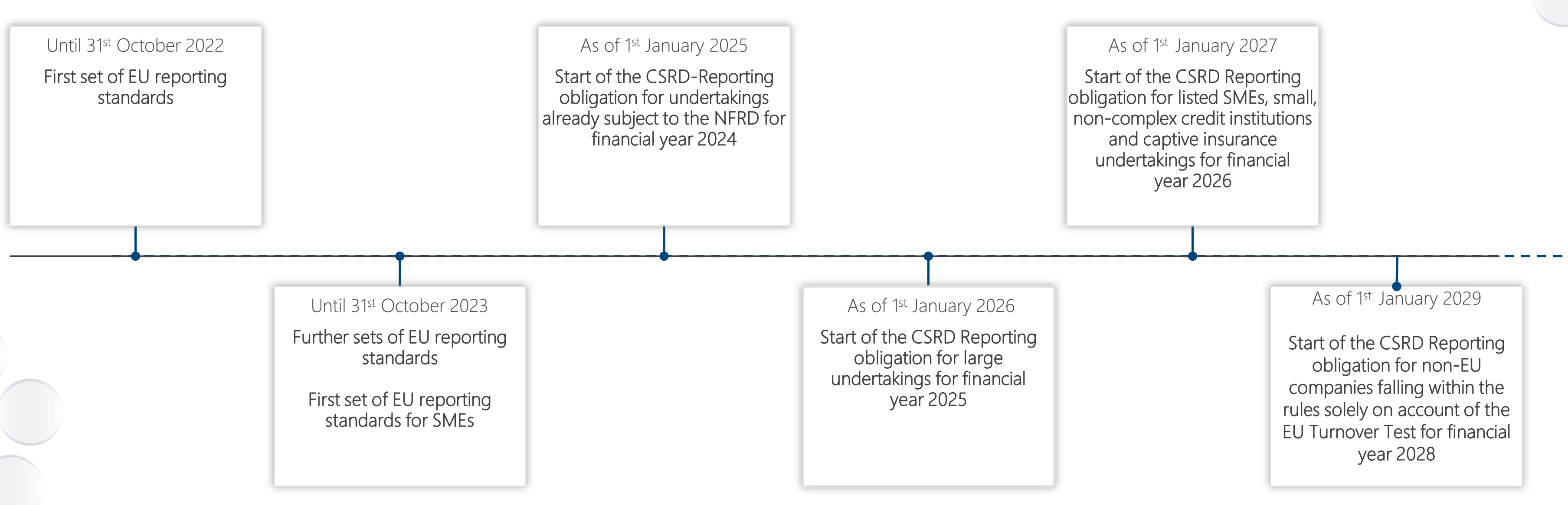
CSRD – Timetable – European Council's proposed amendments

Adjustment of deadlines *(Article 5 of the proposal)*

Some deadlines were considered too ambitious by many delegations. Several delegations requested that the transposition deadline be set in relation to the entry into force of the Directive, while other delegations suggested that the date of application be put back in order to give undertakings sufficient time to adapt. With this in mind, the Presidency suggests the following deadlines:

- deadlines for transposition by Member States (18 months after entry into force);
- deadlines for implementation by undertakings:
  - 1 January 2024 for undertakings already subject to the NFRD (reporting in 2025 on 2024 data);
  - 1 January 2025 for large undertakings not currently subject to the NFRD (reporting in 2026 on 2025 data)
  - 1 January 2026 for listed SMEs, as well as for small and non-complex credit institutions and for captive insurance undertakings (reporting in 2027 on 2026 data)
  - 1 January 2028 for non-EU companies falling within the rules solely on account of the EU Turnover Test (reporting in 2029 on 2028 data)

CSRD – Timetable



Navigating Risk in ESG Transactions - Workshop

Our workshop looking at financial risk in ESG transactions:

- ❑ Understanding the EU/UK/US ESG regulatory environment
- ❑ A look at ESG litigation cases in a range of jurisdictions
- ❑ Mitigating "greenwashing" and other reputational risks
- ❑ Technical deep-dive into best practices for ESG financial products focussing on disclosure, disclaimers, structuring, risk factors and institutional best practices for financial institutions

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Section 4:

UK Regulatory Divergence and Legislative Changes in the UK Financial Services Sector

Current UK Financial Services Regime

- End of Brexit-transition period (11pm (London time) on 31 December 2020
- European Union (Withdrawal Act) 2018 (EUWA) preserved UK legislation implementing EU financial services law and regulation
- Conversion of directly applicable EU legislation into domestic law (so called “on-shoring”)
- Statutory instruments (SIs) made by Her Majesty’s Treasury (HMT) enabled on-shored-EU law to function effectively

Current UK Financial Services Regime (*Cont'd*)

- Coverage of SIs includes all critical UK financial services law relating to securities issues:
  - Official Listing of Securities, Prospectus and Transparency (Amendment) (EU Exit) Regulations 2019 (Prospectus Regulation/Transparency Directive)
  - Packaged Retail and Insurance-based Investment Products (Amendment) (EU Exit) Regulations 2019 (PRIIPs Regulation)
  - Market Abuse (Amendment) (EU Exit) Regulations 2018 (Market Abuse Regulation)
  - Benchmarks (Amendment) (EU Exit) Regulations 2018 (Benchmarks Regulation)
  - Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 (Markets in Financial Instruments Directive II) – so called "UK MiFIR"
- Approach of SIs:
  - EU member states treated as third (non-EU) countries
  - Passport rights of EU financial services firms revoked
  - Functions of European Securities and Markets Authority (ESMA) transferred to UK regulators (FCA or PRA) and functions of European Commission transferred to HMT

Current UK Financial Services Regime - Offers of Securities in the UK / Admission of Securities to UK Regulated Market

- Regulation (EU) 2017/1129 (as amended) – EU Prospectus Regulation
- Regulation (EU) 2017/1129 (as amended) as it forms part of UK domestic law by virtue of the European Union (Withdrawal) Act 2018 (as amended) – the UK Prospectus Regulation
- On-shored EU Prospectus Regulation and relevant Delegated Regulations
  - Adjusted by statutory instrument, so that EU Member States became Third Countries for the purposes of the UK Regime
  - Passporting rights disapplied to EU Member State competent authority approved prospectuses
  - No equivalence regime and so UK prospectuses approved by Financial Conduct Authority (FCA) need to be re-approved for an offer to the public of securities in an EEA Member State or an admission of securities to a regulated market in the EEA
- No Home / Host Member State concept – also applies to ongoing transparency requirements under the Transparency Directive and Market Abuse Regulation (separate UK / EU regimes)

Modelling a Post-Brexit UK Financial Services Regime

- EU equivalence regime? Level playing field vs sovereignty and politicization of decisions by EU
- Equivalence regime "patchwork" (40 areas across 17 pieces of legislation) and can be removed at very short (30-days) notice – e.g. Switzerland (share-trading) withdrawn in July 2019 as part of negotiation of broader EU-Swiss relationship
- "Rule based approach" (EU rule-book) vs "outcome based approach" to financial regulation - More power transferred to UK regulators, rather than prescribed rules in primary legislation (drives innovation and ability to respond flexibly)
- Feeling that EU financial services regime is, in parts, not "fit for purpose"
  - Andrew Bailey: "*there are bits of European legislation that just do not work particularly well for the UK*"
  - PRIIPs Regulation: Michael Dobson (Chairman of Schroders): "*it has been very expensive to implement*" and "*hard to represent to clients*"
- No "bonfire of regulations", but targeted adjustments to EU financial services rules (divergence) that do not prevent cross-border financial services?
- Regulators given a " secondary competitiveness objective" – generates attractiveness for the City of London
- New areas such as fin-tech and existing areas such as asset management / insurance where divergence will benefit UK industry and passporting rights less critical, and UK will take the lead as principal financial services market

Proposals for changes to Existing Prospectus Regime

- Chancellor launches UK Listing Review on 19 November 2020
- Lord Hill's Listing Review makes proposals on 3 March 2021 to:
  - Enhance functioning of UK's capital markets
  - Create jobs and support businesses
  - Power growth across all of the UK
- 1 March 2022 HM Treasury publishes outcomes of its review
- Financial Services and Markets Bill published 20 July 2022
- HM Treasury – UK Prospectus Regime – Consultation set four specific objectives:
  1. Facilitate wider participation in ownership of public companies
  2. Simplify regulation of prospectuses and remove duplicative disclosure requirements
  3. Improve quality of information investors receive under the prospectus regime
  4. Make regulation of prospectuses more agile and dynamic by empowering FCA to make rules to replace the UK Prospectus Regulation tailored to the UK markets

Proposals for changes to Existing Prospectus Regime (*Cont'd*)

HM Treasury flags:

- Ever-growing size of prospectuses without any apparent utility for the reader
- Detailed disclosure requirements that are inappropriate for many companies / types of offering
- Lack of flexibility for competent authority to change / update requirements as they are hardwired into EU Regulations

Proposals for changes to Existing Prospectus Regime – Admission to Trading on a UK Regulated Market

- FCA to be empowered to make and change the rules for admission to trading of securities
- Removal of requirement for publication of a prospectus before admission to trading of securities:
  - Regulated Market Offence removed
    - Cease to be a criminal offence under Section 85(2) of the Financial and Services and Markets Act 2000 (as amended, "FSMA")
    - FCA to have power to require publication of a prospectus prior to admission of securities to trading but, if not required by the FCA, market participants can decide whether required or not
  - FCA can determine:
    - Relevant content of a prospectus so that there is "*appropriate, relevant and timely disclosure to the market*"

Proposals for changes to Existing Prospectus Regime – Offers of Securities to the Public in the UK

- Prospectuses not required for offers to the public of securities in the UK
- General prohibition on public offers of securities against which there will be exemptions derived from Article 1(4) of the Prospectus Regulation:
  - Offers of securities which are, or will be, admitted to UK Regulated Markets
  - Offers of securities to those who already hold equity securities in the offering company, subject to certain conditions, including that the offer is made pro-rata to a person's existing holding
  - Offers only to qualified investors
  - Offers to no more than 150 persons (other than qualified investors)
  - Offers of securities with a minimum denomination of at least [£50,000]

Proposals for changes to Existing Prospectus Regime – Content of Prospectus / Liability Standards

- Retention of "necessary information" test as a basic standard
- UK Prospectus Regulation (Article 6(1)) provides that the necessary information may vary dependent on nature and circumstances of the issuer, type of securities and denomination of the securities
- Necessary information test to be adjusted:
  - Denomination will NOT be a factor for differing disclosure for debt prospectuses (HM Treasury believes denomination creates an artificial incentive to issue high-denomination securities)
  - Test applying to debt securities to focus on issuer / guarantor creditworthiness, rather than their prospects
  - necessary information may vary according to whether an offer of securities relates to a first-time admission to a market or a secondary issuance
  - FCA to be empowered to decide on the minimum content that would meet the necessary information test
  - Liability provisions would remain: investors who can provide they have suffered losses as a result of false or misleading information in, or omission of information from, a prospectus will be able to seek compensation in court (Section 90 FSMA)

Proposals for changes to Existing Prospectus Regime – Mutual Recognition

- HM Treasury considers existing powers in Articles 29 – 30 of UK Prospectus Regulation insufficient:
  - Basis of assessment of equivalence of prospectus regimes too narrow
  - No ability for regulators to look at wide investor protection (i.e. general transparency laws and ongoing reporting requirements that apply to Overseas Companies)
  - FCA empowered to assess effectiveness of overseas regulation / market
  - Overseas companies required to notify the FCA of an offer and FCA empowered to terminate an offer at any time in exceptional circumstances

Financial Services and Markets Bill 2022

- Published 20 July 2022 (second reading on 7 September 2022)
- Framework legislation giving powers to HM Treasury, Bank of England and FCA to effect changes in many regulatory areas:
  - Establishes framework for revocation of financial services retained EU law
  - Reforms legislative framework for UK capital markets – changes described above
  - Creates Designated Activities Regime (DAR)
  - Reforms financial promotion framework
  - Gives FCA / PRA secondary objective to advance economic growth and international competitiveness

Financial Services and Markets Bill 2022 – Revocation of retained EU law

- Legislative framework for revocation of EU retained law (over 200 instruments)
  - Level 1 on-shored-EU regulation, statutory instruments domesticating EU-law, provisions made under EU directives and specified provisions in FSMA (32 specified EU Regulations / 25 specified EU Directives and 189 SIs)
  - Recognition in UK "*ship has sailed on regulatory equivalence with the EU*"?
  - UK move to a principled (outcomes-based) approach to financial services rules
- Slow transition to new requirements under FSMA regime or regulators' rules (once available)
  - HM Treasury make targeted changes during transitional period
  - Regulators may replace EU retained law with similar regulations without conducting consultation
  - Concerns that Parliament will not be consulted (HMT Treasury make changes using statutory instruments to amend Acts of Parliament – so called "*Henry VIII Powers*" or a "Power Grab")

Financial Services and Markets Bill 2022 – Designated Activities Regime

- Designated Activities Regime (DAR) established to allow activities related to financial services to be regulated within FSMA framework (e.g. wholesale capital markets)
  - HMT power to designate activities relating to financial markets, exchanges, instruments, products or investments as in-scope the regime
  - prohibit carrying out of DAR or must take place in accordance with rules
  - provide powers to FCA to make rules for DAR

Financial Services and Markets Bill 2022 – Financial Promotion

- Establish regulatory gateway for authorised firms to pass through before being able to approve financial promotions
  - Suitability (competency) of firm approving
  - FCA maintain a record of approvers
- Authorised firms apply to FCA for permission (or fall within an exemption)
- Authorised firms with permission will be required to approve financial promotions under COBS4
- HM Treasury empowered to make regulations setting out exemptions (including for high net worth persons and sophisticated investors, updated to protect investors)
- Launch by March 2023

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Section 5:

Amendments to the PRIIPs-KIDs Regimes in the EU and the UK

Introduction

- In 2017, the PRIIPs Regulation came into force to provide investors with **more transparency** on investment products through standardized information on risks, future performance and costs.
- Following a consultation in 2019 addressing difficulties encountered after the entry into force of the PRIIPs regulation, the ESAs published a final report on proposed amendments to Delegated Regulation 2017/653 (the PRIIPs KID RTS) on 30 June 2020.
- The **European Commission adopted the proposed amendments** as Commission Delegated Regulation (EU) 2021/2268 of 6 September 2021 (the Amended PRIIPs KID RTS).
- Following the extension of the transitional arrangement referred to in Article 32 of the PRIIPs Regulation until 31 December 2022 the **application** of the Amended PRIIPs KID RTS **was postponed to 1 January 2023** (see Delegated Regulation 2022/975).

Key Amendments to the PRIIPs KID RTS

- Amendments relating to the **application of the PRIIPs regime by UCITS** and relevant non-UCITS funds as the temporary exemption for such funds from the requirements of the PRIIPs Regulation expires on 31 December 2022.
- **New methodologies** to calculate appropriate **performance scenarios** and a revised presentation of these scenarios
  - Annex IV (Performance scenarios) and
  - Annex V (Methodology for the presentation of performance scenarios).
- **Revisions to the summary cost indicators** and changes to the content and presentation of information on the costs of PRIIPs
  - Annex VII (Presentation of costs); see esp. tables for "Costs over time" and "Composition of costs".
- Modifications to the methodology to calculate transaction costs
  - Annex VI (Methodology for the calculation of costs).
- Refinements relating to PRIIPs offering a range of options for investment (MOPs).
- Rules for publication of **information on the past perfomance** for certain types of investment funds and insurance-based investments.

Main Purposes of the Amendments to the KID RTS

- Ensure that retail investors are not provided with **inappropriate expectations about the possible returns** they may receive.
- Disclosure in simple terms of additional details about the **assumptions** on which **performance scenarios** are based are aimed to reduce the risk of unreasonable expectations about possible future returns.
- Provide retail investors with information that is understandable, not misleading, and relevant to the different types of PRIIPs.
- **Enhance disclosure of total cost indicators** so that retail investors can better understand those total cost indicators.
- Enhance information on costs in the KIDs to allow retail investors to better understand the different types of cost structures, as well as to better facilitate the use of this information by persons selling or advising on PRIIPs.
- Address **practical challenges** that have arisen when **applying the previous KID RTS**, and address issues regarding the application to certain types of underlying investments.

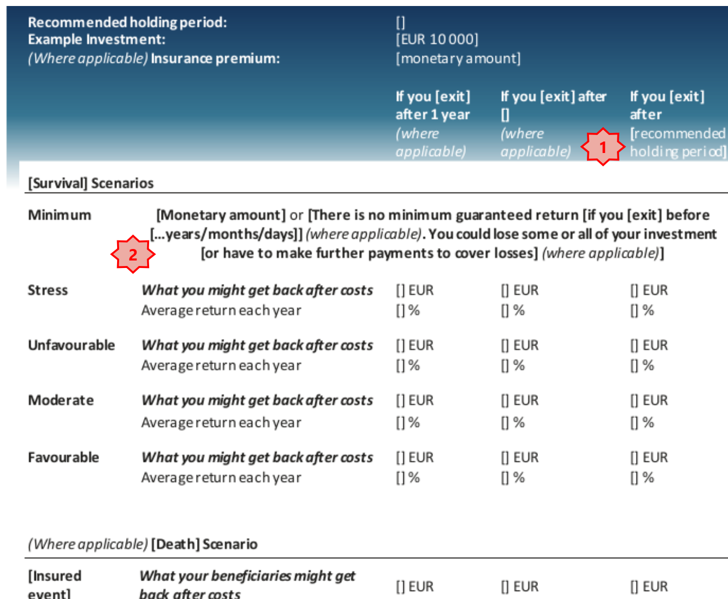
Calculation Methodology for Performance Scenarios

Performance Scenarios Calculation for category 2 PRIIPs	
Length of historical data (for PRIIPs with sufficient historical data)	• RHP ≤ 5 years → scenarios to be calculated over the last 10 years • RHP > 5 years → scenarios to be calculated over a time period equal to RHP + 5 years
Scenarios calculation	• The unfavourable scenario represents the worst evolution of the PRIIPs value • The moderate scenario represents the median evolution of the PRIIPs value • The favourable scenario represents the best evolution of the PRIIPs value
PRIIPs without sufficient historical data	Supplement the values of the PRIIP using data of an appropriate benchmark or proxy. The manufacturer must demonstrate the consistency of the benchmark with the objectives of the PRIIP and shall document its decision.

No significant change was introduced on performance scenarios for category 1, category 3 and category 4 products.

Presentation of Performance Scenarios

- Changes introduced on the **content of narratives**; especially regarding category 2 PRIIPs
- 1 : The **intermediate holding period** is only to be disclosed if RHP > 10 years
- 2 : New narrative included in the table on the **minimum guaranteed return**
- Different templates for **Autocallables**



Recommended holding period:		[]		
Example Investment:		[EUR 10 000]		
(Where applicable) **Insurance premium:**		[monetary amount]		
		If you [exit] after 1 year *(where applicable)*	**If you [exit] after []** *(where applicable)*	**If you [exit] after [recommended holding period]**
[Survival] Scenarios				
Minimum	**[Monetary amount]** or **[There is no minimum guaranteed return [if you [exit] before [...years/months/days]]** *(where applicable)*. **You could lose some or all of your investment [or have to make further payments to cover losses]** *(where applicable)*]			
Stress	***What you might get back after costs***	[] EUR	[] EUR	[] EUR
	Average return each year	[] %	[] %	[] %
Unfavourable	***What you might get back after costs***	[] EUR	[] EUR	[] EUR
	Average return each year	[] %	[] %	[] %
Moderate	***What you might get back after costs***	[] EUR	[] EUR	[] EUR
	Average return each year	[] %	[] %	[] %
Favourable	***What you might get back after costs***	[] EUR	[] EUR	[] EUR
	Average return each year	[] %	[] %	[] %
(Where applicable) **[Death] Scenario**				
[Insured event]	***What your beneficiaries might get back after costs***	[] EUR	[] EUR	[] EUR

Presentation of information on the costs

- To avoid presenting unnecessary information for investors, the **number of period presented in Table 1** (Costs over time) in Annex VII will depend on the recommended holding period of the PRIIP:
  - RHP ≤ 1year → Disclose costs at RHP only
  - 1 year < RHP < 10 years → Disclose of costs at 1 year and at RHP
  - 10 years ≤ RHP → Disclose cost at 1 year, RHP/2 and RHP
- Changes in relation to the **cost breakdown disclosure in Table 2** (Composition of costs) in Annex VII:
  - To facilitate the use of the disclosures in the KID with the MiFID II framework by distributors, RIY will not be used for PRIIPs falling in the scope of MiFID II
  - Review of all narratives included in table 2
  - Disclosure of management fees collected in % of the value of investment
  - Merger of incidental costs' rows (performance costs and carried interest)

Joint ESA Supervisory Statement on expectations regarding the „What is this product?“ section – Objectives and Context

- Objective of the Supervisory Statement is to achieve a **consistent level of regulation** and to provide a **level playing field**.
- As „What is this product?“ section is regarded as an **essential part of the document** to understand key features of the product the ESAs consider it important to clarify their expectations regarding this section.
- ESAs note **different approaches** taken by PRIIP manufacturers to describe main features of the product.
- ESAs note that the standards relating to the use of **clear and understandable language** are often **not adhered to** by PRIIPs manufacturers.
- **ESAs expect improvements** in relation to the identified issues hereby enhancing clarity and comparability of KIDs.

Joint ESA Supervisory Statement on expectations regarding the „What is this product?“ section – Main Expectations

- Use of **clear, understandable and non-generic language** and layout for the retail investor balancing the potential risks and benefits.
- More accurate and understandable presentation and description of the product to ensure better comparison and distinguishing of products, avoidance of long narratives.
- Reduce use of **automated descriptions** resulting in too generic information.
- **Technical jargon** should be kept to a minimum and technical terms should always be defined.
- Clear, precise and direct **specification of** implicated **capital loss** by identification of adverse scenarios and possibility of losses.
- Reconsideration of and placement of information regarding **early redemption**, the possibility of **early termination**.
- Clarification of information on coupon payments, underlying assets, leverage factors, description of the target retail investor.
- Various **specific expectations** relating to the description of the product.

ESA advice on the review of the PRIIPs Regulation – Summary of Main Proposals

- Published on 29 April 2022 following a request from the Comission dated 27 July 2021.
- Ensure **better accessibility** of KID on the PRIIPs manufacturers website.
- Provide appropriate contact details of PRIIP manufacturers for consultation and complaints
- KID to **be more tailored or personalized** to the relevant type of product.
- Rule out inconsistencies in reported risks, performance scenarios and scenario value.
- Remove **misleading disclaimers** (e.g. in the section on „other information“).
- Establish a more explicit **link between nature of KID and target market** and product type due to the target market being too broad, which results in KIDs being too long and detailed for many types of retail investors.

PRIIPS KIDs – Key Developments in the United Kingdom

- An example of EU and UK regulatory divergence in financial services.
- Amendments to the UK PRIIPS regime have been made by way of the "**Packaged Retail and Insurance-Based Investment Products (Scope Rules and Technical Standards) Instrument 2022**".
- The Instrument came into force on **25 March 2022**. It amends the FCA Handbook rules and Guidance and UK PRIIPS Regulatory Technical Standards. Firms must apply the new rules by the end of a transition period ending on **31 December 2022**. Main changes:

1. **Clarify the scope of the PRIIPs Regulation for corporate bonds**
2. **Guidance on when a PRIIP is not 'made available' to a retail investor**
3. **Ensuring the summary risk indicator in the KID does not "mislead"**
4. **Deletion of Performance Scenarios to be replaced by narrative Performance Information**

PRIIPS KIDs – Key Developments in the United Kingdom

Amendment 1 – Clarifying the scope of PRIIPs

Amendments to FCA Product Disclosure Sourcebook		
Amendment 1 – Clarify the scope of the PRIIPs Regulation for corporate bonds	FCA Product Disclosure Sourcebook Paragraph 2.2	The intention is to make it clearer that certain common features of corporate bonds do not make them into a PRIIP. The key point is that the following features: • fixed coupons (including pre-defined step-ups), • "vanilla" floating rate notes without caps or floors, • put options, conversion/exchange options, • call options with makewholes (but not call options exercisable in response to fluctuations, price movements or performance of an index, benchmark, specified asset or underlying assets), • perpetual notes, and; • subordinated notes, do not, **of themselves**, cause a debt security to be defined as a PRIIP.

PRIIPS KIDs – Key Developments in the United Kingdom

Amendment 2 – Clarifying the scope of PRIIPs (again….)

Amendments to FCA Product Disclosure Sourcebook		
Amendment 2 – Guidance on when a PRIIP is not 'made available' to a retail investor	FCA Product Disclosure Sourcebook Paragraph 2.3	A PRIIP is not made available to a UK retail investor where: • marketing materials make it clear that it is being offered only to eligible counterparties and professional clients and not intended for retail; • reasonable steps are taken to ensure offer and promotional communications are made only to eligible counterparties and professional clients; **and** • denomination or minimum investment of £100,000 or equivalent applies.

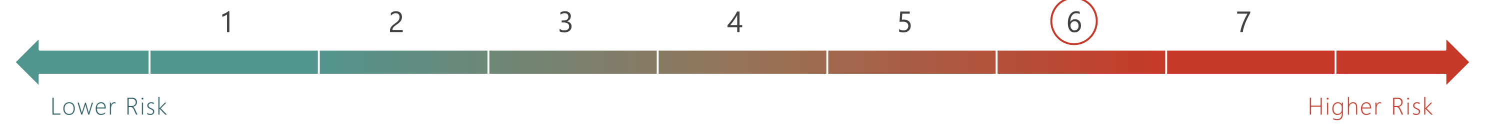
PRIIPS KIDs – Key Developments in the United Kingdom

Amendment 3 – Don't understate the risk indicator….

Amendments to UK PRIIPs RTS		
Amendment 3 – Ensuring the summary risk indicator in the KID does not "mislead"	Article 3(1A)	A PRIIP manufacturer must ensure the summary risk indicator produced via application of the methodology set out in Annex II of the RTS is appropriate and unlikely to mislead investors in the PRIIP, if necessary by increasing the summary risk indicator that would otherwise be assigned to the PRIIP under that methodology.

What are the risks and what could the investor get in return?

Risk Indicator



The risk indicator assumes the investor keeps the product until the Redemption Date. The actual risk can vary signigicantly if the investor cashes in at an early stage and the investor might get back less. The investor may not be able to cash in early.

PRIIPS KIDs – Key Developments in the United Kingdom

Amendment 4 – New, narrative Performance Scenarios

Amendments to UK PRIIPs RTS		
Amendment 4 – Deletion of Performance Scenarios to be replaced by narrative Performance Information	Annex 4 A	• The section entitled 'What are the risks and what could I get in return?' of the PRIIP's key information document must include appropriate performance information summarising, in narrative form, the main drivers of investment performance for the PRIIP. • The PRIIP manufacturer must ensure the performance information is – accurate, fair, clear, non-misleading and likely to be understood by the retail investors to whom the PRIIP may be offered; – compatible with the information stating the objectives of the PRIIP disclosed in accordance with article 2(2); – likely to be useful to retail investors in assessing the prospects for future returns of investment in the PRIIP as well as comparing it with other PRIIPs; and – supported by objective data.

PRIIPS KIDs – Key Developments in the United Kingdom

Amendment 4 – New, narrative Performance Scenarios

Amendments to UK PRIIPs RTS		
Amendment 4 – Deletion of Performance Scenarios to be replaced by narrative Performance Information	Annex 4 A	The information must, as a minimum, include the following elements: • a description of the main factors likely to affect future returns for the investor, identifying those most likely to determine the outcome of the investment and other factors which could have a material impact on performance; • identification of the most relevant index, benchmark, target, or proxy, as applicable, along with an explanation of how the PRIIP is likely to compare in terms of performance and volatility; • under a sub-heading 'what could affect my return positively?', a brief explanation of the kinds of conditions that would be conducive to the PRIIP generating higher returns; • under a sub-heading 'what could affect my return negatively?', a brief explanation of the kinds of conditions whereby the PRIIP is likely to generate lower returns or lead to investment loss; and a brief description of what outcome the investor may expect where the PRIIP matures or is redeemed or encashed under severely adverse market conditions.

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Section 6:

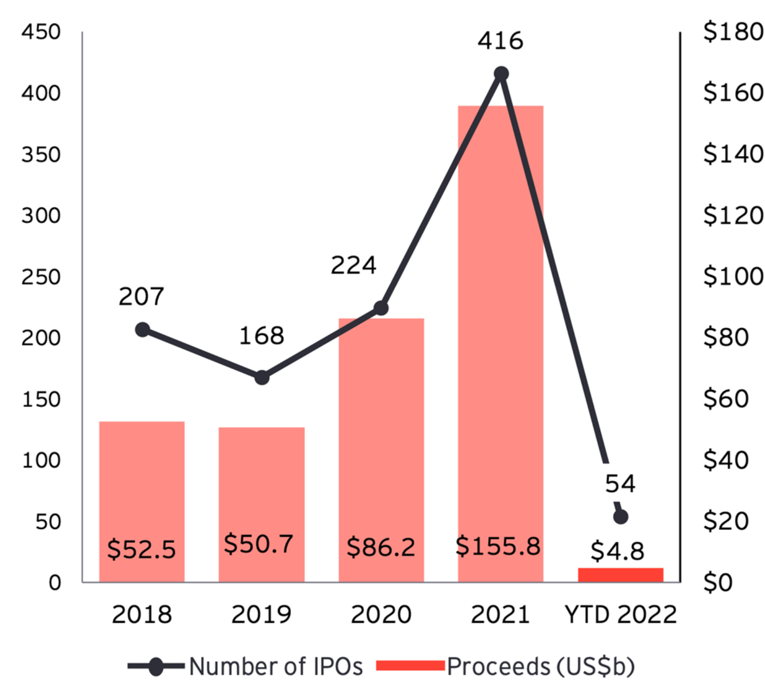
Current US ECM/DCM Market Developments

Table of Contents

1. IPO market
2. Follow on offerings
3. SPAC market
4. Discussion of SPAC developments
5. Late stage private placements
6. Debt capital markets
7. SEC updates

US IPO activity

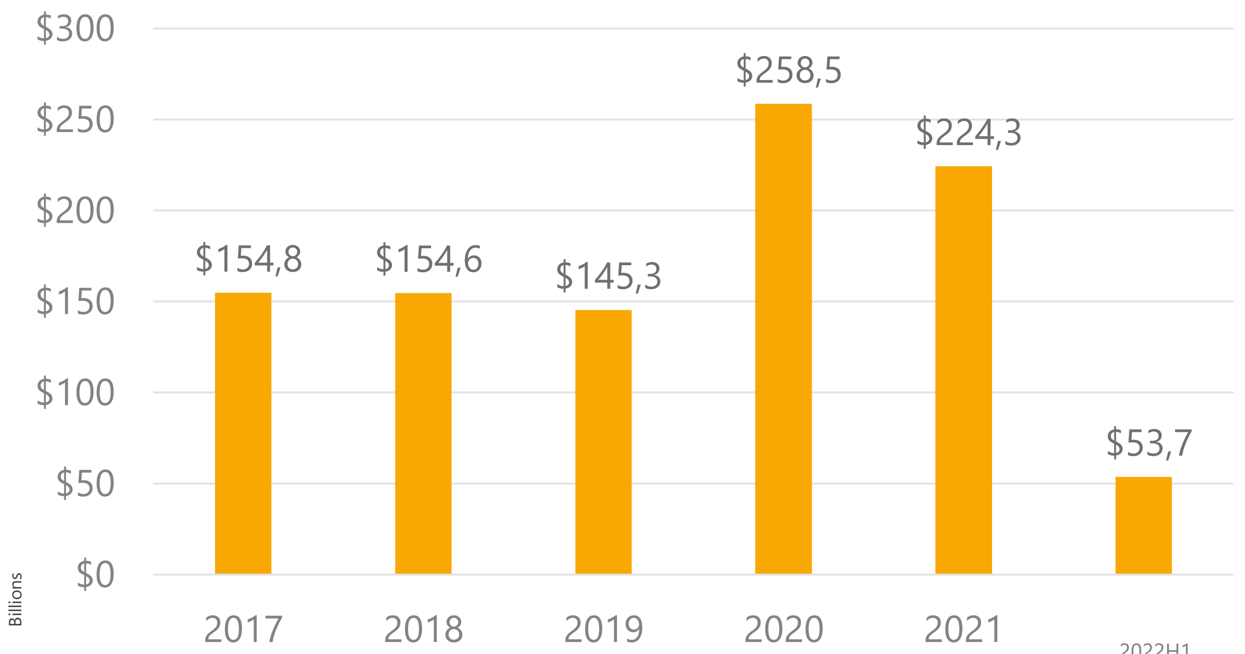
- There has been a significant decline in IPO activity in the first half of 2022 compared to record breaking years in 2021 and 2020
- The first half of 2022 saw **54 IPOs, which raised $4.8 bn in offering proceeds**
- 48 IPOs listed on Nasdaq and 6 listed on the NYSE
- **Life sciences & healthcare** companies made up approximately 41% of all IPOs in 2022
- The SEC just recently amended the definition of emerging growth company to adjust for inflation, now $1.235 bn in revenues



Source: EY

Follow on offerings

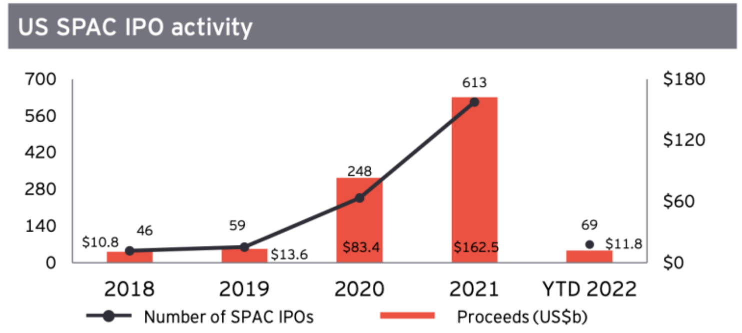
- Follow-on offering activity has declined in 2022, as well; activity has been concentrated as ATMs

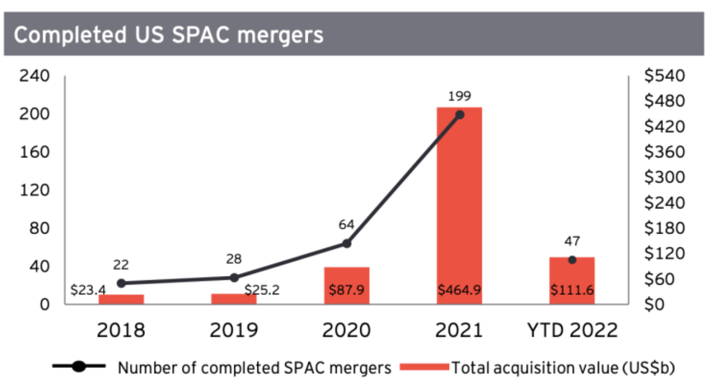


Source: SIFMA

SPAC market in the US

- SPAC activity has plummeted
- SPAC IPOs have dwindled down to **69 SPAC IPOs** in the first half of 2022, raising $11.8 bn.
- **47 SPAC mergers** have been completed in the first half of 2022, compared to 199 in 2021





Source: EY

SPAC developments

- Several pending and announced SPAC mergers that have terminated their agreements due to increased redemptions and uncertain market conditions
- Since the start of the SPAC craze in 2020, **10 SPACs** have been liquidated due to the inability to find and merge with a target company according to *Institutional Investor*
  - SPACs have 18-24 months to find a target and complete a merger
  - Upon liquidation, the SPAC returns the capital it raised in its IPO. The sponsors, warrant holders, and founders lose their investment amounts
- The SEC has increased its focused on SPACs. Throughout 2021, the number of SPAC-related statements and enforcement actions increased
- On March 30, 2022, the SEC proposed amendments and new proposed rules relating to SPACs, shell companies and projections
- Private securities class action lawsuits targeting SPACs, their directors, and operating company executives are increasingly common in light of regulatory scrutiny and a proliferation of short seller attacks

De-SPACs and Related Financings

- An area of focus to close a de-SPAC transaction often relates to minimizing (or reversing) redemptions, a process that allows investors to get back their money at the SPAC IPO price
  - The SPAC sponsor may consider offering a portion of their securities to the SPAC's public shareholders in order to obtain a non-redemption commitment
  - The SPAC sponsor might instead (or as an added supplement) consider offering cash consideration to the SPAC shareholders as an inducement in exchange for a non-redemption guarantee
  - Another option would be for the SPAC sponsor (or a third party) to enter into a backstop agreement against some or all shareholder redemptions
  - If the shareholder has already redeemed, the SPAC sponsor may offer consideration in exchange for an agreement to reverse their redemption decision
- Many SPACs have chosen to issue convertible debt in order to provide investors with both a certain defined return and some upside from the equity conversion feature
- Certain de-SPAC transactions have been restructured to include a forward purchase agreement

De-SPACs and Related Financings (*Cont'd*)

- Many SPACs (and former SPACs) have recently entered into equity line financing arrangements
  - Financing provides the issuer with the right to tell the investor when to buy securities from the issuer over a set period of time (typically three years)
- Another alternative is for the target company to conduct its own mezzanine or late-stage private placement

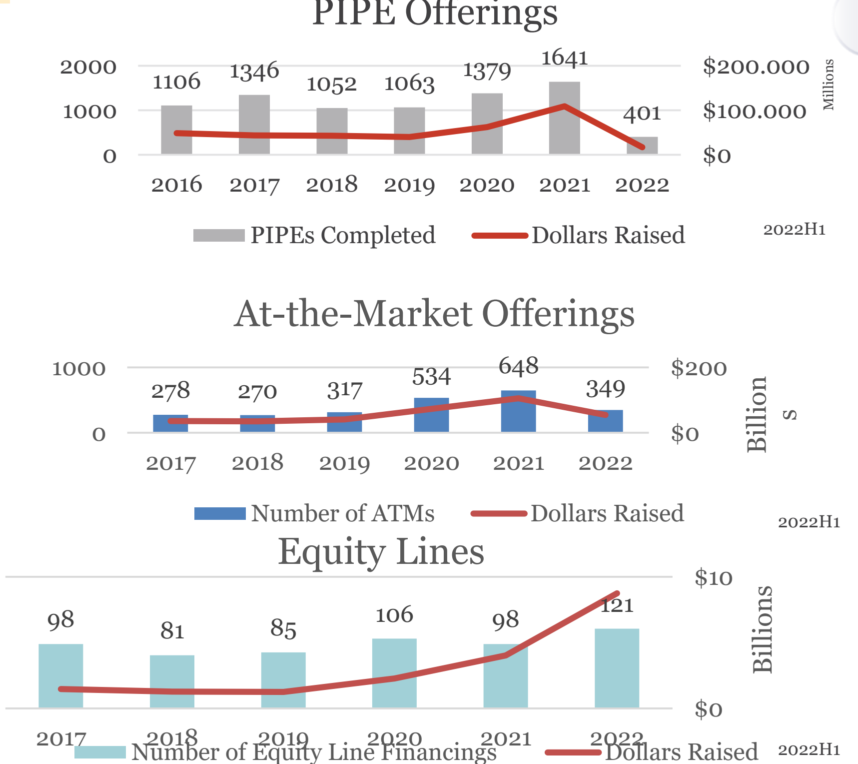
Late stage private placements

- Companies raising private capital continue to do so at a pace surpassing that of pre-COVID years
- Over $93.8 billion of private capital has been raised in the first half of 2022 through late stage private placements
- More than 100 late stage mega rounds (which raise over $100 million) were closed for the sixth consecutive quarter, but the final tally for Q2 is the lowest during that streak by roughly 26%

Source: NVCA/Pitchbook

ATMs, PIPEs, and equity line financings

- Public companies have turned to alternative methods of financings including **private investments in public equity** (“PIPEs”), **at-the-market** (“ATM”) offerings, and **equity line financings**
- The pandemic steered companies towards PIPEs (SPAC PIPEs, included) and ATM offerings



Source: PrivateRaise

The PIPE market

- A PIPE (private investment in public equity) is the privately negotiated sale (i.e., a private placement) of a public issuer's equity or equity-linked securities to selected accredited investors, where the PIPE investors will have available to them a resale registration statement covering the resale from time to time of the securities purchased in the PIPE transaction
- Often, especially during periods of heightened market volatility (this was the case during 2020-early in the pandemic, and likely will be the case late in 2022 and early in 2023), an issuer may consider raising capital from: financial sponsors, such as private equity investors, credit funds, etc., or from its existing stockholders, including directors, officers, as well as significant stockholders
  - These transactions often may be highly structured—as convertible preferred stock with warrants, or first lien debt with warrants, or nonredeemable preferred stock that is debt-like with warrants—and, in addition, raise a number of legal and regulatory concerns for US listed companies, including change of control issues, securities exchange approval requirements, shareholder approval requirements

Equity lines of credit

- Like at-the-market ("ATM") offerings, equity lines of credit (which we will refer to as equity lines) are continuous offerings but, as we will discuss, the two financing approaches are otherwise quite different
- In a typical "equity line" financing arrangement, an investor and the company enter into a written agreement under which the company has the right to put its securities to the investor. Under this put, the company has the right to tell the investor when to buy securities from the company over a set period of time and the investor has no right to decline to purchase the securities. The dollar value of the equity line is set in the written arrangement, but the number of shares that the company will actually issue is determined by a formula tied to the market price of the securities at the time the company exercises its put. [Compliance and Disclosure Interpretations ("C&DI") Question 139.12 Nov. 26, 2008]
- Equity lines may be:
  - "Private" equity lines: where the issuer conducts a private placement of its common stock to the equity line investor and subsequently registers the resale by the investor of the shares (albeit as an indirect primary, as we discuss later)
  - Public equity lines: where the issuer offers shares of common stock pursuant to a shelf registration statement to the investor in takedowns

At the Market Offering Programs

- An ATM offering is a follow-on offering of securities utilized by publicly traded companies in order to raise capital over a period of time
- An issuer sells newly issued shares into the trading market through a designated sales agent at prevailing market prices
- ATM offerings tend to be substantially smaller than traditional follow-on offerings; however, these allow issuers to quickly raise capital without having to market and/or announce the offering
- The distribution costs for ATM offerings (usually 1-3%) typically are lower than the fees associated with traditional follow-on offerings
- ATM offerings are particularly useful for issuers that frequently need to raise additional capital, including REITS and life science companies
- Establishing an ATM offering is often impractical for a de-SPAC'd company until it becomes S-3 eligible and is able to rely on Regulation M's ADTV exemption
- Many ATM offerings have been structured to incorporate a forward sale option
  - A forward sale allows an issuer to sell its securities through the ATM offering at the current trading price without actually issuing any securities to satisfy the forward commitment until a future settlement date

Debt issuance activity in the US

- Companies have issued over $951.7 billion of investment grade debt in 2022, which is already over 70% of the total issuance of investment grade debt in 2021
- High yield bond activity remains low, with $92.1 billion raised, compared to $442 billion in 2021

Source: SIFMA

SEC developments of note affecting US and foreign issuers

- **December 2, 2021:** SEC adopted **amendments to Form 10-K**, including an overview of new Item 9C of the Holding Foreign Companies Accountable Act and data tagging, and disclosure practices
- **January 10, 2022:** Effective date of SEC's Final Rule to implement auditor disclosures under the **Holding Foreign Companies Accountable Act**
- **February 9, 2022:** SEC proposed to shorten the **standard settlement cycle** for most broker-dealer transactions from two business days after the trade date ("T+2") to one business day after the trade date ("T+1")
- **February 10, 2022:** SEC proposed amendments to Schedules 13D and 13G relating to **beneficial ownership reports**
- **March 9, 2022:** SEC proposed new rules to enhance and standardize disclosures relating to **cybersecurity** risk management, strategy, governance and incident reporting by public companies subject to Exchange Act
- **March 21, 2022:** SEC proposed its highly anticipated **climate change disclosure** rules. Proposed rule includes extensive required reporting by covered companies of climate-related financial and non-financial disclosures and related attestation
- **March 30, 2022:** SEC proposed amendments and new proposed rules relating to **SPACs, shell companies and projections**. Among other things, the proposed amendments would require additional disclosure of conflicts of interest, financial statement and IPO-like disclosures, and impose underwriter liability for various financial intermediaries that participate in the SPAC IPO and in the De-SPAC process

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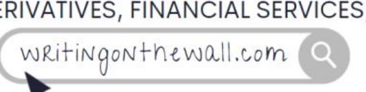

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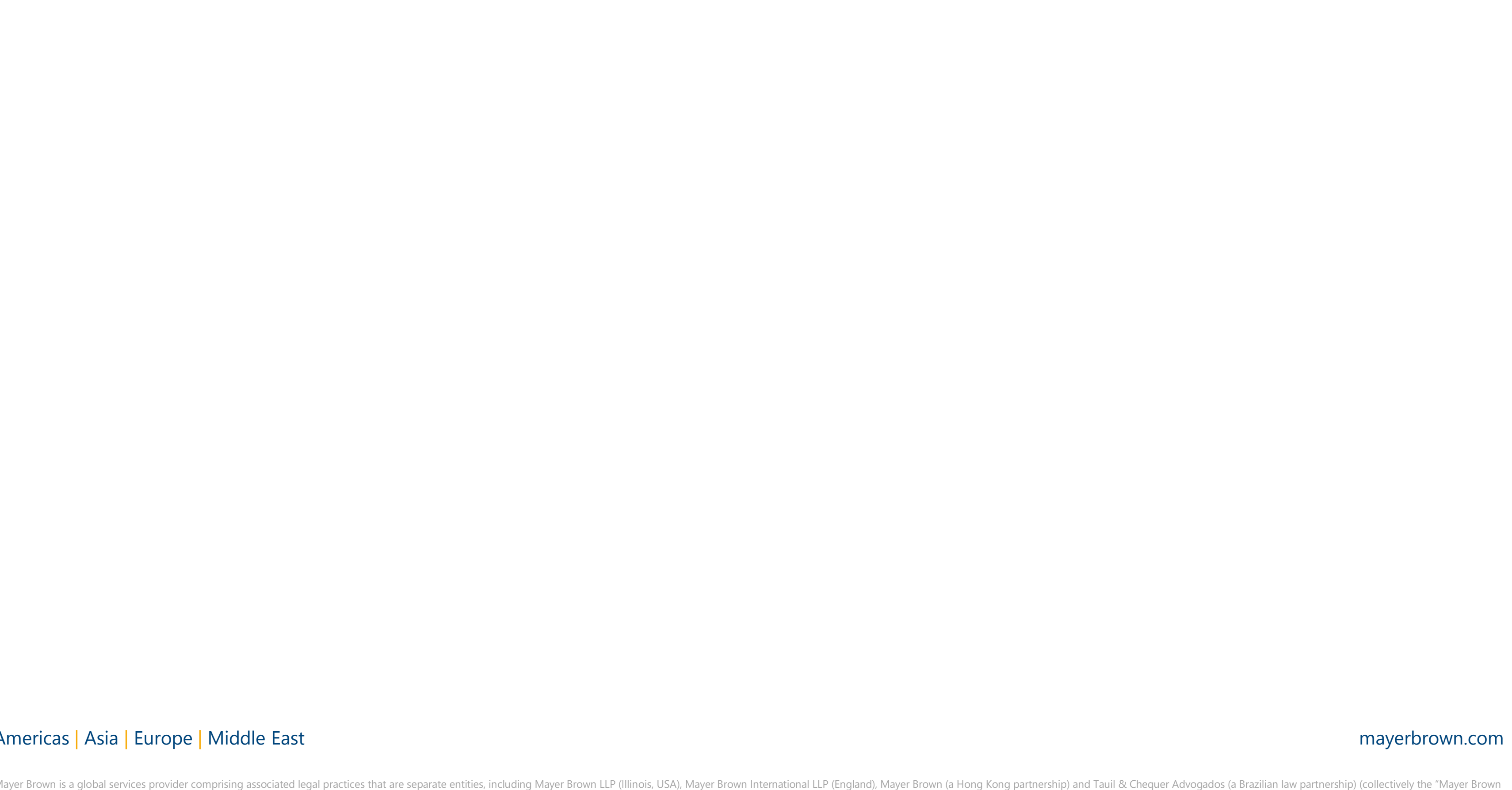

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