

# CLIFFORD CHANCE

## INTERNATIONAL REGULATORY UPDATE 08 – 12 MARCH 2021

- **Derivatives clearing: EU Commission consults on draft delegated regulation specifying conditions for FRANDT status under EMIR REFIT**
- **CSDR REFIT: EU Commission consults on review of central securities depositories rules roadmap**
- **EU Commission consults on instant payments roadmap**
- **Investment firms: EBA publishes final draft ITS on supervisory reporting and disclosures**
- **CRD 4: EBA consults on guidance on how to grant authorisation as credit institution**
- **Deposit Guarantee Schemes Directive: EBA consults on revised stress test guidelines**
- **CRR: EBA publishes discussion paper on feasibility of integrated reporting**
- **Digital finance: ECON Committee publishes draft report on proposed regulation on markets in cryptoassets**
- **Digital finance: ECON Committee publishes draft report on proposed regulation on pilot regime for DLT-based market infrastructures**
- **Credit rating agencies: ESMA publishes final guidelines on internal control**
- **CRR: Delegated Regulation regarding alternative standardised approach for market risk published in Official Journal**
- **UK EMIR: FCA and PRA consult on changes to margin requirements for non-centrally cleared derivatives BTS**
- **UK MiFIR: FCA publishes annual transparency calculations for equity and equity-like instruments**
- **FCA consults on authorisation and supervision of bidding for emissions allowances under UK Emissions Trading Scheme**
- **German Federal Government submits draft law on crowdfunding service providers**
- **SFDR: CONSOB reminds financial market participants and financial advisors of imminent application of disclosure requirements**
- **Bank of Spain consults prior to draft circular amending Circular**

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**4/2017 and Circular 4/2019 on public and confidential financial information standards and financial statement forms**

- **MAS revises circular on controls and disclosures to be implemented by licensed securities-based crowdfunding operators**
- **Australian Government consults on breach reporting regulations**
- **ARRC confirms ‘Benchmark Transition Event’ has occurred under ARRC Fallback Language**
- **Recent Clifford Chance briefings: Beyond Brexit, virtual currency, and more. Follow this link to the briefings section.**

**Derivatives clearing: EU Commission consults on draft delegated regulation specifying conditions for FRANDT status under EMIR REFIT**

The EU Commission has published for [consultation](#) a draft delegated regulation supplementing the European Market Infrastructure Regulation (EMIR) as amended by Regulation (EU) 2019/834 (EMIR REFIT). The draft delegated regulation specifies the conditions under which commercial terms for clearing services for over-the-counter (OTC) derivatives are considered to be fair, reasonable, non-discriminatory and transparent (FRANDT).

Under EU rules, certain OTC interest rate derivative contracts must be cleared through central counterparties (CCPs). EMIR REFIT introduces an obligation on clearing service providers to provide those services under FRANDT commercial terms from 18 June 2021. The draft delegated act would enter into force on the day following its publication in the Official Journal and apply from three months thereafter.

Comments on the consultation are due by 7 April 2021. The draft delegated regulation and its annex are available for download via the Commission consultation page.

**CSDR REFIT: EU Commission consults on review of central securities depositories rules roadmap**

The EU Commission has published an inception impact assessment setting out plans to amend the Central Securities Depositories Regulation (CSDR) and has launched a [public consultation](#) on the roadmap. The CSDR REFIT initiative is intended to simplify CSDR and contribute to the development of a more integrated post-trading landscape.

CSDR REFIT is intended to address problems with CSDR in the following areas:

- central security depository (CSD) authorisation and the review and evaluation process;
- cross-border provision of services within the EU;
- internalised settlement;
- technological innovation, and in particular CSDR’s compatibility with new technologies developed since its adoption such as tokenised financial instruments; and

- authorisation to provide banking-type ancillary services.

The Commission notes that the initiative will build on a report it intends to publish in the first half of 2021. The Commission announced its plan to consider amendments to CSDR in its 2021 Work Programme and 2020 Capital Markets Union Action Plan.

Comments on the roadmap are due by 5 April 2021.

## **EU Commission consults on instant payments roadmap**

The EU Commission has published an [inception impact assessment](#) setting out a roadmap aimed at fostering pan-EU market initiatives based on instant payments.

Feedback is sought on baseline, non-legislative and legislative policy options intended to allow the initiation and acceptance of instant payments domestically and cross-border (and, in the long-term, also globally). Possible policy options include:

- monitoring market evolution and assessing the effects of voluntary efforts;
- promoting the voluntary participation of payment service providers (PSPs) in relevant standardisation processes or schemes, raising awareness in consumers and merchants, setting up a structured dialogue with national payments communities to coordinate national plans, or addressing an EU Commission Recommendation to Member States; and
- 'enabling' legislative measures.

The EU Commission intends to launch a public consultation in Q1 2021, which will complement the EU Commission's consultation on its retail payments strategy.

Comments on the roadmap are due by 7 April 2021.

## **Investment firms: EBA publishes final draft ITS on supervisory reporting and disclosures**

The European Banking Authority (EBA) has published [final draft implementing technical standards](#) (ITS) on supervisory reporting and disclosures requirements under the Investment Firms Regulation (IFR).

The draft ITS set out requirements relating to:

- supervisory reporting in terms of own funds, levels of minimum capital, concentration risk, liquidity requirements and level of activity in respect of small and non-interconnected investment firms; and
- disclosures of own funds, with three fixed templates developed in accordance with the Capital Requirements Regulation (CRR).

A different set of templates and instructions are provided for class 2 and class 3 investment firms. A template defining the size and level of activity thresholds triggering a shift to reporting requirements into one or the other classification of investment firms is also included.

The first reference date for the application of the new reporting ITS is expected to be 30 September 2021 for class 2 firms and 31 December 2021 for class 3 firms.

The EBA intends to develop a data point model (DPM), XBRL taxonomy and validation rules to complement the ITS.

The draft ITS have been submitted to the EU Commission for endorsement.

### **CRD 4: EBA consults on guidance on how to grant authorisation as credit institution**

The EBA has launched a [consultation](#) on its draft guidelines on a common assessment methodology for granting authorisation as a credit institution.

The draft guidelines are addressed to all competent authorities across the EU in charge of granting authorisation as a credit institution, and cover the authorisation requirements set out in the Capital Requirements Directive (CRD 4). The draft guidelines complement the regulatory technical standards (RTS) on authorisation of credit institutions and are intended to contribute to the convergence of supervisory practices around market access for credit institutions across the EU single market.

The draft guidelines advocate for a risk-based approach and insist on the importance of consistency with the supervisory approaches applied in going concern situations. In addition, they consider the proportionality principle for all relevant assessment criteria and apply to both traditional and innovative business models and/or delivery mechanisms, as they are technology neutral.

In the context of the assessment of the application for granting an authorisation, the draft guidelines also include guidance on money laundering or terrorist financing (ML/TF) risks and highlight the importance of cooperation with the anti-money laundering (AML) supervisor and other public bodies, in accordance with CRD 4.

Comments are due by 10 June 2021.

### **Deposit Guarantee Schemes Directive: EBA consults on revised stress test guidelines**

The EBA has published a [consultation](#) on draft revised guidelines on stress tests conducted by national deposit guarantee schemes (DGSs) under the Deposit Guarantee Schemes Directive (DGSD).

The draft revised guidelines are based on the areas for improvement identified in the EBA's June 2020 peer review of the stress tests, and would repeal and replace the existing guidelines to further specify the requirements in relation to the design, execution and reporting of results. Proposed revisions include:

- extending the scope of testing to cover all the interventions DGSs are legally mandated to perform, including reimbursing depositors, contributing to resolution and, depending on national law provisions, failure prevention and insolvency proceedings;
- requiring testing of the adequacy of all funding means, including ex post contributions and alternative funding arrangements;
- strengthening cooperation between DGSs and public authorities by requiring stress test interventions where cooperation with other authorities is necessary;
- requiring DGSs to consider testing scenarios with additional business continuity challenges, such as a pandemic, ICT failures or other similar events; and

- a revised template for recording and submitting stress test results, with a proposed submission deadline of 16 June 2024.

A public hearing will take place on 26 May 2021 and comments are due by 11 June 2021.

### **CRR: EBA publishes discussion paper on feasibility of integrated reporting**

The EBA has published for consultation a [discussion paper](#) on the feasibility of an integrated reporting system under the CRR, in order to collect feedback for a final feasibility study on the same topic.

Article 430c of the CRR mandates the EBA to prepare a feasibility study for the development of a consistent and integrated system for collecting statistical, resolution and prudential data.

The discussion paper outlines possible options for the main building blocks of a system, which include the following amongst others:

- a single data dictionary;
- a central data collection point (CDCP); and
- governance arrangements.

Comments on the discussion paper are due by 11 June 2021. The EBA has also published an [‘at a glance’ factsheet](#) on the feasibility study.

### **Digital finance: ECON Committee publishes draft report on proposed regulation on markets in cryptoassets**

The EU Parliament’s Economic and Monetary Affairs (ECON) Committee has published its [draft report](#) on the EU Commission’s proposal for a regulation on markets in cryptoassets (MiCA). MiCA, which forms part of the Commission’s broader Digital Finance Strategy, is intended to establish a harmonised regulatory framework for the administration, offering and trading of cryptoassets.

The rapporteur broadly supports the Commission’s proposal, but argues that some changes could be made to the text, including:

- making the opinions of the European Central Bank (ECB) and of Member States’ central banks on a prospective issuer’s application binding (rather than non-binding as in the Commission’s proposal) with regard to monetary policy enforcement and the secure handling of payments. The draft opinion states that, if the ECB delivers a negative opinion because of monetary policy considerations, the competent authority should refuse the application for authorisation;
- expanding the definition of distributed ledger technology (DLT) and removing the reference to ‘encrypted data’, on the basis that some existing DLT-based cryptoassets are not encrypted;
- amending the definition of a ‘utility token’ to clarify their distinction from assets which use DLT but do not carry transferable content;
- amending the basis for calculating own funds requirements for issuers of asset-referenced tokens to make it more comparable to other market actors;

- assigning the responsibility for deciding whether to authorise e-money tokens to the ECB;
- specifying that cryptoasset service providers that are obliged entities under the Anti-Money Laundering Directive (AMLD) are to follow the procedures on the prevention, detection and investigation of money laundering and terrorist financing set out in AMLD, and that those providers which transfer cryptoassets for payment purposes must follow the requirements on internal control mechanisms and traceability of transfers set out in Regulation (EU) 2015/847; and
- specifying that cryptoasset service providers must have appropriate plans in place to support an orderly wind-down.

### **Digital finance: ECON Committee publishes draft report on proposed regulation on pilot regime for DLT-based market infrastructures**

The EU Parliament's ECON Committee has published its [draft report](#) on the EU Commission's proposal for a regulation on a pilot regime for market infrastructures based on DLT. The proposed regulation, which forms part of the Commission's broader Digital Finance Strategy, is intended to establish a mechanism for allowing market infrastructures to experiment with DLT. In particular, it would allow firms already authorised to operate specific market infrastructures to apply for temporary exemptions from certain aspects of financial services legislation, to allow them to restructure their activities making use of DLT.

The rapporteur broadly supports the Commission's proposal, but argues that some changes could be made to the text, including:

- lowering the individual financial thresholds for DLT transferable securities, including lowering the (tentative) market capitalisation of the issuer of DLT transferable securities to less than EUR 50 million for both shares and bonds;
- extending the scope of the regime to cover the DLT-based recording or trading of sovereign bonds and DLT exchange-traded fund units;
- using technology-neutral wording to clarify that the use of DLT by market infrastructures within the pilot regime is not restricted to proprietary DLTs;
- amendments to ensure a level playing field between the two types of DLT market infrastructures covered by the pilot regime (multilateral trading facilities (MTFs) and securities settlement services (SSSs)), under the principle of 'same activity, same risks, same rules', including requiring a DLT MTF conducting settlement services to follow the same requirements as a DLT SSS, permitting DLT SSSs to perform the roles of a DLT MTF and harmonising the arrangements for DLT MTFs and DLT SSSs that combine trading and settlement services; and
- reducing the initial duration of the pilot regime from five years to three years, which the rapporteur believes will be sufficient time to allow participants to discover what kind of legislative changes are required to encourage the development of DLT market infrastructures.

## **Credit rating agencies: ESMA publishes final guidelines on internal control**

The European Securities and Markets Authority (ESMA) has published its [guidelines](#) on internal control for credit rating agencies (CRAs).

The guidelines relate to internal control structures and mechanisms necessary to ensure a CRA's effective compliance with the Credit Rating Agencies Regulation (CRAR). In particular, they set out ESMA's expectations regarding the components and characteristics of an effective internal control framework and functions within a credit rating agency.

The guidelines apply from 1 July 2021.

## **CRR: Delegated Regulation regarding alternative standardised approach for market risk published in Official Journal**

[Commission Delegated Regulation \(EU\) 2021/424](#) amending the CRR with regard to the alternative standardised approach for market risk has been published in the Official Journal.

The Regulation will enter into force on 31 March 2021 and apply from 30 September 2021.

## **UK EMIR: FCA and PRA consult on changes to margin requirements for non-centrally cleared derivatives BTS**

The Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) have published a [joint consultation paper](#) (PRA CP6/21, FCA CP21/7) entitled 'Margin requirements for non-centrally cleared derivatives: Amendments to binding technical standards (BTS) 2016/2251'.

The paper sets out proposals to establish or extend exemptions for certain products subject to bilateral margining requirements as well as to align implementation phases and thresholds to the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) standards. The proposed changes would affect the UK version of Commission Delegated Regulation (EU) 2016/2251 supplementing the EMIR with regard to regulatory technical standards (RTS) for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty.

Comments are due by 19 May 2021. The proposed changes would be effective on publication of the final technical standards instrument, planned for 1 July 2021.

## **UK MiFIR: FCA publishes annual transparency calculations for equity and equity-like instruments**

The FCA has published the [results](#) of the annual transparency calculations for equity and equity-like instruments, as required by the UK Markets in Financial Instruments Regulation (UK MiFIR).

The calculations, available through the FCA Financial Instrument Transparency Reference System (FCA FITRS), include:

- the liquidity assessment;
- the determination of the most relevant market (MRM) in terms of liquidity;

- the determination of the average daily turnover (ADT) relevant for the determination of the pre-trade and post-trade large in scale (LIS) thresholds;
- the determination of the average value of the transactions (AVT) and the related standard market size (SMS); and
- the determination of the average daily number of transactions (ADNTE) on the most relevant market in terms of liquidity relevant for the determination of the tick-size regime.

The transparency requirements based on the results take effect on 1 April 2021.

### **FCA consults on authorisation and supervision of bidding for emissions allowances under UK Emissions Trading Scheme**

The FCA has launched a [consultation](#) on its proposals regarding the authorisation and supervision of firms intending to bid for emissions allowances under the UK Emissions Trading Scheme (ETS). On 1 January 2021, the UK's participation in the EU ETS was replaced by the UK ETS. In this consultation, the FCA proposes to reinstate the rules that were in place before the end of the transition period, with minor adjustments to reflect the fact that the new scheme is made under UK legislation. In particular, it is seeking feedback on two draft instruments:

- the UK Emission Trading Scheme Instrument 2021, which amends the FCA Handbook to reinstate provisions and definitions that were removed at the end of the transition period. The instrument should be read in conjunction with the Greenhouse Gas Emissions Trading Scheme Auctioning Regulations 2021 (which replace the EU Commission auctioning regulations with UK auctioning regulations) and the Recognised Auction Platforms (Amendment and Miscellaneous Provisions) Regulations 2021 (which modify the Financial Services and Markets Act and retained EU legislation to reflect the UK ETS); and
- the Technical Standards (Market Abuse Regulation (MAR)) (UK Emissions Trading Scheme) Instrument 2021, which amends certain technical standards under UK MAR to clarify their application to auction platforms and auctioneers under the UK ETS and/or to UK emission allowance market participants.

The UK Government has announced that auctions for the UK ETS are due to commence no later than Q2 2021. The FCA is therefore consulting for a shorter period than usual and requests comments by 6 April 2021.

### **German Federal Government submits draft law on crowdfunding service providers**

The German Federal Government has submitted a draft '[Bill on the accompanying implementation of Regulation \(EU\) 2020/1503 and the transposition of Directive \(EU\) 2020/1504 for regulating crowdfunding service providers \(Crowdfunding Accompanying Act\) and other EU financial markets provisions](#)' to the German Bundestag.

Crowdfunding service providers enable large numbers of investors to invest in particular crowdfunding projects that are offered via an internet-based



crowdfunding platform. The aim of the EU regulation is to facilitate the cross-border provision of such services.

In this context, the EU regulation stipulates an authorisation requirement for crowdfunding service providers. It also sets out rules on internal organisation, management and handling of complaints procedures. In addition, specific information and disclosure obligations are established for investor protection purposes.

The draft bill further proposes amendments to the German Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz - WpÜG) and related ordinances in order to abolish the objections committee and the takeover advisory board currently provided for therein.

Furthermore, the draft bill contains regulations for the implementation of the EU Regulation on a Pan-European Personal Pension Product (PEPP) where Germany, amongst other things, must determine the competent supervisory authority.

### **SFDR: CONSOB reminds financial market participants and financial advisors of imminent application of disclosure requirements**

The Commissione Nazionale per le Società e la Borsa (Consob) has issued a [warning notice](#) on sustainability-related disclosures in the financial services sector, which is intended to remind financial market participants and financial advisors of disclosure obligations under the Sustainable Finance Disclosure Regulation (SFDR) which came into force on 10 March 2021. Consob has also provided certain clarifications on the scope of application of the SFDR.

### **Bank of Spain consults prior to draft circular amending Circular 4/2017 and Circular 4/2019 on public and confidential financial information standards and financial statement forms**

The Bank of Spain has launched a [public consultation](#) prior to the preparation of a draft circular amending Circular 4/2017, of 27 November, to credit institutions, on public and confidential financial information standards and financial statement forms and Circular 4/2019, of 26 November, to financial credit institutions, on public and confidential financial information standards and financial statement forms.

The draft circular aims to amend Circular 4/2017 for the purposes of:

- maintaining consistency with EU-IFRS, avoiding the application of different accounting principles in the individual and consolidated annual accounts;
- avoiding overlaps and maintaining consistency with other European standards or guidelines that serve as a reference for framing and developing the criteria used in the preparation of financial information;
- updating the alternative solutions for the collective estimation of credit risk loss mitigation;
- simplifying the reserved statement requirements applicable to branches operating in Spain of foreign credit institutions whose headquarters are located in a Member State of the European Economic Area;

- updating the statistical data requirements of the Economic and Monetary Union, in line with the amendments laid down by Regulation (EU) 2021/379 of the European Central Bank of 22 January on balance sheet items of credit institutions and of the monetary financial institutions sector; and
- introducing further minor amendments to incorporate clarifications and necessary corrections identified since the last amendment to Circular 4/2017.

Likewise, in light of the aforementioned changes, Circular 4/2019 will be amended to adjust the corresponding cross-references to Circular 4/2017.

The public consultation period will end on 23 March 2021.

### **MAS revises circular on controls and disclosures to be implemented by licensed securities-based crowdfunding operators**

The Monetary Authority of Singapore (MAS) has revised its [circular](#) on controls and disclosures to be implemented by licensed securities-based crowdfunding (SCF) operators in relation to due diligence conducted on issuers, management of defaults, and disclosures to investors. Amongst other things, the circular has been revised to:

- require the licensed SCF operators to submit Annex A1 and A2 within 5 business days of last day of the preceding month (Reporting Month);
- stipulate that the expected rates of return disclosures and the non-performing loan rate disclosures should be readily accessible in the public section of the licensed SCF operator's website. Moreover, licensed SCF operators should also furnish the MAS a copy of the disclosures and an annual attestation that the disclosures have been made publicly available to investors;
- remove the requirement for all licensed SCF operators to furnish the MAS with an attestation from the Chief Executive Officer that the gaps identified from the review of their policies and processes against the measures in the circular have been fully remediated;
- require licensed SCF operators to highlight an additional warning to the investors that actual returns may be lower than the expected rates of loan return; and
- specify that once a loan is 30 days past due, it should be classified as a non-performing loan, even if the loan is subsequently restructured and paid off. If such a loan is only restructured 90 days after past due, it should be classified in the 'Past 90 days' column.

### **Australian Government consults on breach reporting regulations**

The Australian Government has launched a [public consultation](#) on the draft regulation amendments and explanatory materials for changes to regulations that support the breach reporting rules in schedule 11 of the Financial Sector Reform (Hayne Royal Commission Response) Act 2020. Schedule 11 to the Act implements the Australian Government's response to recommendations 1.6, 2.8 and 7.2 of the Royal Commission into misconduct in the banking, superannuation and financial services industry.

The draft regulations are intended to amend the Corporations Regulations 2001, the National Consumer Credit Protection Regulations 2010, the Corporations (Fees) Regulations 2001 and the National Consumer Credit Protection (Fees) Regulations 2010 to:

- prescribe civil penalty provisions that are not taken to be significant (and therefore may not be reportable) under the relevant breach reporting regime if those provisions are contravened;
- ensure certain breach reporting offences and civil penalty provisions are subject to an infringement notice; and
- make minor and technical amendments, including updating references to the Corporations Act.

The [Financial Sector Reform \(Hayne Royal Commission Response—Protecting Consumers \(2020 Measures\)\) Regulations 2021: breach reporting](#) will commence on 1 October 2021, in line with the commencement of schedule 11 to the Act.

Comments on the consultation are due by 9 April 2021.

## **ARRC confirms ‘Benchmark Transition Event’ has occurred under ARRC Fallback Language**

The Alternative Reference Rates Committee (ARRC) has [confirmed](#) that in its opinion the announcements by ICE Benchmarks Administration and the FCA on future cessation and loss of representativeness of the LIBOR benchmarks constitute a ‘Benchmark Transition Event’ with respect to all USD LIBOR settings pursuant to the ARRC recommendations regarding more robust fallback language for new issuances or originations of LIBOR floating rate notes, securitizations, syndicated business loans, and bilateral business loans.

The ARRC has published [FAQs](#) on the occurrence of a benchmark transition event.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **MiFID quick fix and what’s next for the MiFID2 review**

‘Quick fix’ amendments to MiFID2 have now been published in the Official Journal. These amendments aim to support economic recovery from the COVID-19 pandemic, including via relief from certain administrative requirements on firms. EU Member States are required to transpose the quick fix amendments into their national frameworks by 28 November 2021 and apply them by 28 February 2022. Alongside this, the scheduled MiFID2 review continues, with the EU Commission expected to publish a further legislative proposal towards the end of 2021.

This briefing discusses the amendments.

<https://www.cliffordchance.com/briefings/2021/03/mifid-quick-fix-and-what-s-next-for-the-mifid2-review.html>

### **Beyond the Brexit transition period – new deadlines for firms**

The EU, a few Member States and the UK have established some temporary transitional arrangements for financial services to mitigate some of the

immediate impact of the ending of the Brexit transition period on firms and markets.

This briefing highlights some of the deadlines created by those temporary arrangements to illustrate where firms may need to take action to meet the deadline or to address the consequences of the expiry of a relevant regime.

<https://www.cliffordchance.com/briefings/2021/03/beyond-the-brexit-transition-period--new-deadlines-for-firms.html>

## **UK FCA announcement on cessation and loss of representativeness of LIBOR benchmarks – what next for derivatives?**

On 5 March 2021 the UK FCA published an announcement on the future cessation and loss of representativeness of LIBOR benchmarks.

This announcement constitutes an ‘Index Cessation Event’ for the purposes of the ISDA IBOR Fallbacks Supplement and the ISDA 2020 IBOR Fallbacks Protocol. The publication of this announcement also triggers the fixing of the spread adjustment for each LIBOR setting under the terms of the Bloomberg IBOR Fallbacks Rate Adjustment Rulebook. The market now has a clear timetable for the cessation of LIBOR benchmarks and, for derivatives transactions that include an index cessation event trigger, confirmation of the dates from which the adjusted risk-free rate fallbacks for transactions referencing these LIBOR rates will apply as well as the quantum of the spread adjustment to be applied to these adjusted fallback rates.

This briefing discusses the announcement and what it means for derivatives.

<https://www.cliffordchance.com/briefings/2021/03/uk-fca-announcement-on-cessation-and-loss-of-representativeness-of-libor-benchmarks-what-next-for-derivatives.html>

## **FCA announcement on the end of LIBOR and implications for loan documentation**

In light of the FCA’s announcement on the future cessation and loss of representativeness of the LIBOR benchmarks, you may be wondering what this means for loan transactions.

This briefing examines the formal confirmation of the end of LIBOR and the documentary implications for English law loan transactions.

<https://www.cliffordchance.com/briefings/2021/03/fca-announcement-on-the-end-of-libor-and-implications-for-loan-d.html>

## **Virginia’s Consumer Data Privacy Act**

2021 is projected to be a pivotal year in privacy legislation and the year is off to a fast start. On 2 March, the Commonwealth of Virginia became the first state to enact a comprehensive consumer privacy law in 2021. The Virginia Consumer Data Protection Act draws heavily from the California Consumer Privacy Act and the EU General Data Protection Regulation and will impose significant new obligations on certain companies that process personal information of Virginia residents. The new law will go into effect in 2023.

This briefing discusses the new law.

<https://www.cliffordchance.com/briefings/2021/03/Virginias-Consumer-Data-Privacy-Act.html>

### **New York Attorney General warns virtual currency industry members to register under the Martin Act – do Bitlicense holders need to dual-register?**

On 1 March 2021, the Office of New York Attorney General Letitia James published an 'Industry Alert' reminding the virtual currency industry that individuals and entities dealing in virtual or cryptocurrencies that are considered commodities or securities in the state of New York must register with the NYAG. The Industry Alert comes on the heels of the NYAG's lawsuit against Coinseed, Inc., and two of its executives, filed in February, alleging that Coinseed – which offered a mobile application that functioned as a trading platform and allowed customers to trade virtual currencies – was required to register with the NYAG as a commodity broker-dealer under the Martin Act, among other violations.

This briefing discusses the Industry Alert.

<https://www.cliffordchance.com/briefings/2021/03/New-York-Attorney-General-Warns-Virtual-Currency-Industry-Members-to-Register-Under-the-Martin-Act.html>

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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