Debevoise & Plimpton

Debevoise In Depth

2023 International Capital Markets Outlook

January 26, 2023

While economic and geopolitical conditions continue to disrupt and challenge global capital markets, 2023 is also poised to introduce a number of potentially significant regulatory developments for both issuers and investors. In this Debevoise In Depth, we provide an outlook of the key regulatory developments anticipated to impact international capital markets in the coming year, with a focus on issues impacting the U.S. market for foreign private issuers[1] ("FPIs") and the United Kingdom.

[1] For U.S. securities law purposes, a "foreign private issuer" is an issuer that has 50% or less of its outstanding voting securities held directly or indirectly by U.S. residents; or if more than 50% of its outstanding voting securities are held directly or indirectly by U.S. residents, (i) less than a majority of its executive officers or directors are U.S. citizens or residents, (ii) 50% or less of the issuer's assets are located in the United States and (iii) the issuer's business is administered principally outside of the United States.

U.S. Developments

10b5-1 Trading Plans

On December 14, 2022, the U.S. Securities and Exchange Commission (the "SEC") adopted amendments to Rule 10b5-1 under the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act").[2] The amendments, which will become effective on February 27, 2023, add a number of new conditions to the availability of the affirmative defense to insider trading liability and transactions in securities pursuant to trading arrangements that satisfy the requirements of Rule 10b5-1(c)(1) under the Exchange Act, including mandatory cooling-off periods between entry into or amendments of plans and transactions. The amendments also preclude overlapping plans, with certain exceptions, and more than one single trade plan in any 12-month period. In addition, an FPI will now be required to disclose in its annual report on Form 20-F (beginning with the annual report on Form 20-F covering the first full fiscal period that begins on or after April 1, 2023) its policies and procedures governing the purchase, sale and other dispositions of the FPI's securities by its directors, officers and employees, and the FPI itself, that are reasonably designed to promote compliance with insider trading laws, rules and regulations and any applicable listing standards (or, if no such policies exist, the FPI will be required to explain why it does not have such policies). FPIs will also be required to file a copy of their insider trading policies and procedures as an exhibit to Form 20-F.

Disclosure Developments

Guidance on Non-GAAP Financial Measures

On December 13, 2022, the staff of the Division of Corporation Finance ("CorpFin") of the SEC (the "Staff") released several new and updated Compliance & Disclosure Interpretations ("C&DIs") relating to the use of non-GAAP financial measures, particularly to misleading non-GAAP measures and prominence of non-GAAP measures compared to GAAP measures.[3] Among other things, the C&DIs clarify that adjustments that are not explicitly prohibited may nonetheless cause a non-GAAP measure to be misleading based on the issuer's individual circumstances. For example, an expense may be "recurring" even if it occurs occasionally. Further, adjustments that have the effect of changing the recognition and measurement principles required to be applied in accordance with GAAP, or a measure that utilizes a label that does not reflect the nature of the non-GAAP measure, such as pro forma, could be misleading. In addition, the C&DIs remind companies that whether a non-GAAP measure would be considered more prominent than the corresponding GAAP measure also depends on the facts and circumstances in which the disclosure is made, including a consideration of the related

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[2] Refer to the Debevoise Update dated December 16, 2022 (accessible here).

[3] Refer to the Debrief dated December 14, 2022 (accessible here).

discussion and analysis of the non-GAAP measure. Disclosures of non-GAAP measures that the Staff would consider more prominent now include presenting a ratio where a non-GAAP measure is a numerator and/or denominator, without also presenting the measure using the most directly comparable GAAP measures and presenting charts, tables or graphs of non-GAAP measures, without such disclosures of GAAP measures being presented with equal or greater prominence.

Guidance on Crypto Asset Disclosures

On December 8, 2022, and following the collapse of FTX, CorpFin released a sample comment letter regarding recent developments in crypto asset markets.[4] CorpFin's letter represents an increased focus of the SEC on crypto asset activities of public companies, especially on risks implicated by the recent bankruptcies in the crypto industry. The letter asks generally for disclosure of any significant crypto asset market developments material to understanding or assessing the issuer's business, financial condition and results of operations, or share price, including any material impact from the price volatility of crypto assets, and then asks the issuer to update its "Description of Business," "Management's Discussion and Analysis of Financial Condition and Results of Operations" and "Risk Factors" disclosures with various specific topics (each if, and to the extent, material), including the impact or potential impact of the recent bankruptcies and the downstream effects of those bankruptcies on the issuer's business, financial condition, customers and counterparties, either directly or indirectly, and measures the issuer has undertaken to safeguard customers' crypto assets and any policies and procedures that are in place to prevent self-dealing and other potential conflicts of interest or regarding the commingling of assets (including any material changes to such procedures).

Guidance on Ukraine-Related Disclosures

On May 3, 2022, CorpFin provided guidance to issuers on their disclosure obligations with respect to the impact that Russia's invasion of Ukraine and the international response have had or may have on their business.[5] The guidance was accompanied by a sample letter outlining the questions the SEC may ask an issuer in this regard. The guidance focuses on direct or indirect exposure to Russia, Belarus or Ukraine through: (i) an issuer's operations, employees or investments in those countries; (ii) securities traded in Russia; (iii) sanctions against Russian or Belarusian individuals or entities; or (iv) legal or regulatory uncertainty associated with operating in or exiting Russia or Belarus; direct or indirect reliance on goods or services sourced in Russia or Ukraine (or in countries supportive of Russia); actual or potential disruptions in the issuer's supply chain and whether and how business segments, products, lines of service, projects or operations are materially impacted by supply chain disruptions; and business

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4 Refer to the Debevoise Update dated December 13, 2022 (accessible here).

5 Refer to the Debevoise Update dated May 10, 2022 (accessible here).

relationships, connections to or assets in Russia, Belarus or Ukraine. During 2022, the SEC issued a number of comment letters to companies listed on the New York Stock Exchange (the "NYSE") and Nasdaq in line with its sample letter. If the issuer's business or supply chains are connected to Russia, Belarus or Ukraine, the issuer should carefully review the guidance and include appropriate risk factor and other disclosure focusing on the impact of the Russia-related sanctions on its business and financial condition.

Proposed Climate-Related Disclosure Rules

On March 21, 2022, the SEC proposed new rules concerning climate-related disclosures.[6] The proposed rules are intended to require consistent, comparable and decision-useful information on climate-related disclosures and, if adopted, would constitute one of the most dramatic changes ever made to SEC's disclosure requirements. Information to be disclosed by issuers in their filings under the proposed rule would include, among other things, greenhouse gas emissions, the impact of climate-related risks on business outlook, risk assessment processes, oversight and governance of climate-related risks and the impact of climate-related risks on consolidated financial statements. In addition, on September 22, 2021, CorpFin released a sample letter to companies regarding climate change disclosures, a version of which has since been issued to a number of issuers. A few issuers have already enhanced their periodic reporting by adding climate change risks to their regulatory disclosure following the SEC's comments.

Proposed Cybersecurity Disclosure Rules

On March 9, 2022, the SEC proposed new cybersecurity disclosure rules.[7] The SEC continues to prioritize cybersecurity disclosures, placing particular emphasis on timely and detailed disclosures of material cybersecurity incidents, as well as on periodic disclosures about cybersecurity risk management and governance. FPIs would be required to make additional cybersecurity risk management disclosures in their annual reports on Form 20-F and furnish a current report on Form 6-K in the event of material cybersecurity incidents when they are otherwise reportable under home country law.

Compensation Clawback Policies

On October 26, 2022, the SEC adopted final rules on clawbacks of executive compensation required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, effective January 27, 2023.[8] The final rules direct the U.S. national securities exchanges, including the NYSE and Nasdaq, to adopt listing

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6 Refer to the Debevoise Update dated March 24, 2022 (accessible here) and Debevoise In Depth dated April 25, 2022 (accessible here). The comment letter period expired on June 17, 2022. The proposed climate-related disclosure rules have not been adopted.

7 Refer to the Debevoise In Depth dated March 14, 2022 (accessible here). The comment letter period expired on May 9, 2022. The proposed cybersecurity-related disclosure rules have not been adopted.

8 Refer to the Debevoise In Depth dated October 28, 2022 (accessible here).

standards that require most exchange-listed issuers—including FPIs—to adopt and comply with written clawback policies and to provide disclosure regarding those clawback policies and amounts recovered.

Under the adopted rules, an issuer's written clawback policy—which will be required to be filed as an exhibit to annual report—must provide that if an issuer is required to prepare an accounting restatement (including both "Big R" and "little r" restatements), the issuer must recover all incentive-based compensation that was erroneously received by any current or former executive officer during the three years preceding the date such a restatement was required. There are a number of exceptions to the rule, including where the recovery would violate home country law that existed at the time of adoption of the rule and the issuer provides an opinion of counsel to that effect to the exchange. The recoverable amount is the amount of incentive-based compensation received on a pre-tax basis in excess of the amount that otherwise would have been received had it been determined based on the restated financial measure. Form 20-F will also include a new disclosure on the FPI's action to recover erroneously awarded compensation. In addition, the final rules also add check boxes to the cover page of Form 20-F that indicate separately whether the financial statements included in the filing reflect correction of an error to previously issued financial statements or whether any of those error corrections are restatements that require a recovery analysis of incentive-based compensation received by any of the applicable executive officers during the relevant recovery period.

U.S. securities exchanges have until February 26, 2023 to file their proposed listing standards implementing the SEC's final rules, with the listing standards becoming effective no later than November 28, 2023. Issuers will then have 60 days after the applicable listing standards become effective to amend their existing clawback policies or adopt new policies in compliance with the listing standards.

Public Reporting for Issuers of 144A Bonds

In 2021, the SEC for the first time interpreted Rule 15c2-11 under the Exchange Act ("Rule 15c2-11")[9] to apply to fixed-income securities and, on December 16, 2021, published a no-action letter introducing the phased compliance regime for fixed-income securities. Under Phase 1 of the SEC's Rule 15c2-11 phased compliance regime for fixed-income securities ("Phase 1"), which was to initially expire on January 3, 2023, regular practices required for securities to trade among qualified institutional buyers under Rule 144A ("Rule 144A") under the Securities Act were also deemed to satisfy Rule 15c2-11 (i.e., it was sufficient for an issuer of Rule 144A securities to undertake to make

[9] Rule 15c2-11 requires a broker-dealer that wishes to publish a quotation for an issuer's securities in a quotation medium other than a U.S. national securities exchange (i.e., over-the-counter, or "OTC") to first establish that certain information about the issuer is current and publicly available.

certain financial information about the issuer available to current and prospective investors on request). On November 30, 2022, the staff of the SEC's Division of Trading and Markets issued a no-action letter delaying implementation of Rule 15c2-11, noting that it would not recommend enforcement action for quotations published by broker-dealers that are compliant with Phase 1 through January 4, 2025.[10]

Proxy Advisor Updates

On November 30, 2022, Institutional Shareholder Services ("ISS") issued its 2023 policy update for issuers listed in the Americas, including FPIs. The updated guidelines recommend generally voting against or withholding from voting for the chair of the nominating committee at companies where there are no women on the issuer's board (an exception will be made if there was at least one woman on the board at the preceding annual meeting, and the board makes a firm commitment to return to a gender-diverse status within a year). The updated guidelines also set out an updated approach with respect to poison pills, dual-class share structures and quorum requirements and set out a more restrictive approach towards appropriate greenhouse gas emissions reduction targets.

Glass Lewis's updated 2023 guidelines for U.S.-listed issuers include new policies to address cybersecurity risks, board oversight of environmental and social issues and changing regulations around director exculpation. Similar to ISS, Glass Lewis updated its policies on board composition and both gender and underrepresented-community diversity. Glass Lewis also introduced a new voting policy on board accountability for climate-related issues at companies with material risk exposure and made updates to its approach on proposals requesting racial equity audits and severance payments.

Nasdaq Board Diversity Rules

On August 6, 2021, the SEC approved new board diversity rules for issuers listed on Nasdaq that require such issuers to disclose whether they have, or explain why they do not have, diverse directors on their board by the end of certain phase-in periods and to disclose, within one year of listing, a board-diversity matrix.[11] FPIs enjoy somewhat relaxed requirements, compared to those applicable to U.S. domestic issuers. In particular, FPIs may apply different criteria for diverse board members (i.e., at least one diverse director who self-identifies as female, and the second director that self-identifies as female, LGBTQ+ or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the issuer's

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[10] Refer to the Debrief dated November 30, 2022 (accessible here).

[11] Refer to the Governance Update dated December 10, 2021 (accessible here). Companies listed before August 6, 2021 must disclose the board diversity matrix on or before December 31 of the applicable year either in a proxy statement or any information statement (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), or on the issuer's website.

principal executive offices) and may use a shortened format for disclosure of the board-diversity matrix. Companies must have, or explain why they do not have, at least one diverse director by December 31, 2023 and at least two diverse directors by December 31, 2025 (for companies listed on The Nasdaq Global Select Market or The Nasdaq Global Market) or December 31, 2026 (for companies listed on The Nasdaq Capital Market).

SPACs

On March 30, 2022, the SEC announced proposed rules and amendments aimed at enhancing disclosure and investor protection in IPOs by SPACs and in SPAC business combination transactions ("de-SPAC transactions").[12] The proposed rules and amendments, if adopted, would significantly alter the SPAC landscape by imposing new and extensive disclosure requirements for SPACs and expanding potential liability under the U.S. federal securities laws for SPACs and participants in SPAC IPOs and de-SPAC transactions. In a major change, the SEC proposed new Rule 140a, which would provide that any underwriter in a SPAC IPO be deemed an underwriter in a subsequent de-SPAC transaction if the underwriter takes steps to facilitate the de-SPAC transaction or any related financing transaction or otherwise participates, directly or indirectly, in the de-SPAC transaction. This change would subject SPAC IPO underwriters to potential liability under Sections 11 and 12 of the U.S. Securities Act of 1933, as amended (the "Securities Act"), with respect to any de-SPAC transaction registration statement. In 2022, SPACs also reacted to the potential impact of the new 1% excise tax on certain corporate stock buybacks by publicly traded companies, included in the U.S. Inflation Reduction Act, which is effective beginning January 1, 2023. On December 27, 2022, the U.S. Treasury issued notices that effectively provide relief to SPACs that issued shares to the public for cash but did not acquire an operating business within a specified time frame and are subsequently required to be liquidated. However, repurchases in connection with a de-SPAC transaction, in which the repurchasing company generally does not liquidate, would still be subject to the buyback tax.[13]

Chinese and Russian Issuers

During 2022, several major state-owned Chinese companies initiated voluntary delisting and deregistration processes from the SEC in response to the Holding Foreign Companies Accountable Act ("HFCAA"), and the SEC's rules thereunder, which required companies identified by the SEC as having filed an annual report with an audit report issued by a registered public accounting firm located in a foreign jurisdiction that prevents PCAOB inspections to make additional disclosures in their annual reports on Form 20-F. On December 15, 2022, the PCAOB announced that it had secured complete access to inspect and investigate audit firms in China for the first time in history. While

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[12] Refer to the Debevoise In Depth dated April 18, 2022 (accessible here).

[13] Refer to the Debevoise In Depth dated January 3, 2023 (accessible here).

this implies that Chinese companies whose securities are registered in the United States will not currently be subject to involuntary delistings under the HFCAA, the risk may re-emerge in the upcoming years if the PCAOB fails to complete its inspection and investigation procedures going forward.

Meanwhile, Chinese issuers are increasingly seeking to list on exchanges outside of the United States. For example, on July 28, 2022, the Chinese and Swiss authorities announced the launch of the China-Switzerland "Stock Connect" program, which provides Chinese companies with additional, or alternative, access to international capital markets on the SIX Swiss Exchange. Chinese companies that are listing depositary receipts ("DRs") on the SIX Swiss Exchange are subject to similar transparency requirements as other primary listed equity securities such as *ad hoc* publicity obligations, financial reporting and disclosure of management transactions,[14] and SIX Swiss Exchange accepts the use of the Accounting Standard of the People's Republic of China for Business Enterprises by Chinese companies.

Russian issuers have also experienced significant disruptions in trading on international exchanges. On February 28, 2022, the NYSE and Nasdaq halted trading in securities of Russian and Russia-related issuers, while the London Stock Exchange (the "LSE") implemented a similar trading halt on March 3, 2022. The trading halts were implemented following the continuing deterioration of the markets in Russia-linked securities in light of Russia's invasion of Ukraine and due to potential regulatory concerns following new economic sanctions imposed on Russia and Russian businesses. Among other issues caused by the trading halts, several Russian issuers with outstanding convertible bonds experienced technical events of default and had to undertake complex restructurings and consent solicitations. In April 2022, Russia passed a law that required Russian companies to terminate their DR programs and delist DRs from foreign stock exchanges unless a permission to retain the DR program was obtained. While most Russian and Russia-related issuers are now terminating their DR programs, they may continue to have ongoing reporting obligations under the relevant securities laws and stock exchange rules until they are able to meet the applicable delisting and/or deregistration requirements.

Share Repurchase Disclosures

On December 15, 2021, the SEC released a new proposed rule that would significantly expand required disclosures concerning an issuer's repurchases of its equity securities listed on a U.S. exchange or otherwise registered under Section 12 of the Exchange

[14] Such DRs, however, are not deemed to be mainly listed in the sense of the Financial Market Infrastructure Ordinance.

Act.[15] The proposed rules, if adopted, would most significantly require issuers to disclose repurchases on a daily basis on a new Form SR, which would be furnished to the SEC one business day after execution of the issuer's share repurchase order. In addition, issuers would be required to make additional disclosures about the structure of a repurchase program and disclose its share repurchases in its annual reports.

Section 13 Beneficial Ownership Reporting

On February 10, 2022, the SEC proposed significant amendments to the rules governing beneficial ownership reporting requirements under Sections 13(d) and 13(g) of the Exchange Act.[16] The proposed amendments, if adopted, would shorten various deadlines for Schedule 13D and 13G filings, including initial Schedule 13Gs for investors qualifying under Rule 13d-1(c) (five days), initial Schedule 13Gs for investors qualifying under Rule 13d-1(b) or Rule 13d-1(d) (five days from month end), initial Schedule 13D filings (five days) and amendments to Schedule 13D (one business day). In addition, the proposed rules would amend the definition of "beneficial ownership" to include ownership of certain cash-settled derivative securities and clarify the circumstances under which a "group" is deemed to exist for purposes of beneficial ownership reporting obligations. The proposed rules, which are widely expected to be adopted in some form in the near future, are also set against the backdrop of a heightened focus by the SEC and investors on compliance with beneficial ownership reporting requirements under Sections 13 and 16 of the Exchange Act.

UK Developments

Proposed Reforms to the London Listing Regime

On May 26, 2022, the Financial Conduct Authority (the "FCA") published a discussion paper proposing significant reforms to the London listing regime, including: (i) replacing the current standard and premium segments with a single segment for equity shares; (ii) having one set of eligibility criteria for issuers listing on the proposed single segment; (iii) requiring issuers to follow a set of mandatory continuing obligations once listed, with the option of opting into a supplementary set of continuing obligations at the issuer's election; and (iv) maintaining the current sponsor regime.[17]

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[15] Refer to the Debrief dated December 17, 2021 (accessible here). The comment period initially expired on April 1, 2022, but on December 7, 2022, the SEC reopened the comment period again, which expired on January 11, 2023. The proposed share repurchase disclosure rules have not been adopted.

[16] Refer to the Debevoise In Depth dated February 16, 2022 (accessible here). The comment letter period expired on April 11, 2022. The proposed Section 13 amended rules have not been adopted.

[17] Refer to the Debevoise Update dated June 23, 2022 (accessible here). The FCA solicited comments on its proposals from market participants, which were due on July 28, 2022. The FCA is now in the process of reviewing the comments received.

The proposals mark a significant change to the current listing regime and intend to remove the complexity of the UK listing regime and provide access to listing to a broader range of companies while continuing to set clear and robust ongoing reporting requirements for listed issuers and empowering investors to assess whether listed issuers meet their investment needs through high-quality disclosure.

Additionally, the FCA, following the UK Listing Review led by Lord Hill, has made important changes to the listing rules to attract more SPAC listings on the LSE, such as the removal of automatic suspension of trading upon the announcement of a business combination, which have led to an increase in the number of SPAC listings. In 2022, 14 SPACs listed on the LSE (both Main Market and AIM) with proceeds of approximately $720 million, overtaking Euronext both in terms of number of listings and amount raised. While the changes have made London a more attractive venue for SPAC listings, it is yet to be seen whether London will be the venue of choice for SPAC listings in Europe.

Recommendations for UK Secondary Capital Raising Reform Published

On July 19, 2022, a review of the United Kingdom's secondary capital raising regime (the "SCRR") was published, setting out a number of recommendations to reform and update the United Kingdom's secondary capital raising regime.[18] The SCRR was launched as a result of the recommendations contained in Lord Hill's UK Listing Review, published on March 3, 2021. The objectives of the SCRR are to make the regulatory regime more flexible, efficient and cheaper while increasing participation by retail investors in secondary capital raisings. The key recommendations by the SCRR include: (i) maintaining and enhancing the pre-emption rights regime; (ii) increasing the flexibility for companies to carry out smaller fundraisings; (iii) involving retail investors in all capital raisings; (iv) reducing regulatory involvement in larger fundraisings; (v) possibly adding features of pre-emptive fundraising structures for companies; and (vi) starting an ambitious "Drive to Digitisation."

The recommendations contained in the SCRR are ambitious and wide-ranging, and some recommendations will require legislation or broader policy development to enact. The FCA has noted that many of the SCRR recommendations directly relate to existing prospectus rules, and they will consider them when proposing future changes to such rules, which would be subject to further consultation and cost-benefit analysis (although no timeframe has been provided). The Pre-Emption Group, which is an industry body comprising listed companies, investors and intermediaries, has accepted the recommendation to enhance its governance and provide new guidance on when shareholders are likely to accept companies raising further capital without observing

[18] Refer to the Debevoise Update dated August 4, 2022 (accessible here).

full pre-emption rights. These changes are likely to be implemented in 2023, providing further balance between access to capital for issuers and adequate investor protections. The enactment of other proposals that require legislative or regulatory changes, or broader policy development, will take longer.

If adopted, the United Kingdom would substantially streamline its current secondary market regime, and it would create a less expensive and more efficient secondary capital raising regime. Coupled with the recommended reforms in the FCA's Primary Markets Effectiveness Review, changes to the UK Secondary Capital Raising Regime could help make London a more attractive listing venue for international companies.

Potential for Further Divergence between UK MAR and EU MAR

Effective January 1, 2021, the EU Market Abuse Regulation (596/2014) ("EU MAR") was "onshored" into UK law ("UK MAR"). While the onshoring exercise was not intended to introduce a new policy approach to tackling market abuse, it is likely that certain divergences will develop between the two market abuse regimes over time. This has already been seen with the United Kingdom's decision not to implement the new market soundings safe harbor for qualified investors and the lighter requirements with respect to insider lists for issuers with financial instruments admitted to trading on SME growth markets in the United Kingdom (such as AIM) that were introduced to EU MAR by the SME Growth Markets Regulation (EU) 2019/2115.

ESG Legislation and Further Divergence from EU

Reforms to the environmental, social and governance ("ESG") regulatory landscape gathered pace in 2022, with specific focus on tackling greenwashing by firms and investors, a trend that is highly likely to continue in 2023. The FCA kicked off 2022 with its final rules and guidance on climate-related financial disclosures, effective January 1, 2022, which requires issuers of premium-listed shares, standard-listed shares or DRs to include a statement in their annual financial reports confirming whether or not they have met the recommendations of the Taskforce on Climate-related Financial Disclosures. Non-compliance can result in fine of a minimum of £2,500 and a maximum of £50,000. In October 2022, the FCA opened a consultation on its proposed new rules to tackle greenwashing in investment funds, which include: (i) the introduction of sustainable investment product labels to provide confidence to consumers that they are choosing the right products for them; (ii) restrictions on marketing products using sustainability-related terminology, such as "ESG," "green" or "sustainable," to retail investors where such products do not qualify for the proposed new sustainable investment labels so as to help avoid misleading marketing of products; (iii) more detailed disclosures to consumers (including institutional investors or retail investors) to help them understand the sustainability features of the advertised products; and (iv) introducing requirements for distributors of products to ensure that such disclosure

and ESG labels are accessible and clear to consumers. The consultation ended on January 25, 2023, and the FCA intends to publish its final rules by the end of the first half of 2023.

In the European Union, Level 2 requirements under the Regulatory Technical Standards ("RTS") for the EU Sustainable Finance Disclosure Regulation ("SFDR") went into effect on January 1, 2023. The RTS introduces detailed disclosure requirements for financial market participants ("FMPs"), including final prescribed form templates to be used by FMPs for their: (i) pre-contractual disclosures for Article 8 products; (ii) annual reports for Article 8 products; (iii) pre-contractual disclosures for Article 9 products; (iv) annual reports for Article 9 products; and (v) principle adverse sustainability impacts statement. FMPs marketing financial products in the European Union must comply with the disclosure requirements. For an FMP to be in scope of Article 8, it must promote environmental or social characteristics while investing in companies with good governance. To be in scope of Article 9, an FMP should only be making "sustainable investments," which are investments that contribute to a specific and measurable environmental or social objective. Although the RTS is not intended to create a product-labeling regime, the European Securities and Markets Authority ("ESMA") is concerned that certain firms may use SFDR as a means of labeling their products. It is likely, therefore, that there will be a further review of SFDR that could lead to further regulatory changes, including the potential addition of a new minimum criteria for Article 8 and 9 products.

With continuing divergence in the regulatory development of ESG in the United Kingdom and the European Union, investment firms, issuers and other market participants will need to keep abreast of upcoming regulatory changes so that they are well positioned to navigate the increasingly fragmented global ESG regulatory framework.

Proxy Advisor Updates

The updated ISS guidelines for the United Kingdom and Ireland for 2023 address board diversity by recommending voting against the chair of the nomination committee of standard- and premium-listed companies if the company has not met the targets set out in the FCA's Listing Rules (at least 40% of the board are women, and a woman occupies at least one of the following senior positions: Chair, CEO, Senior Independent Director or CFO). The updated ISS guidelines also focus on certain transactions that do not provide for pre-emption rights by generally recommending voting against a resolution to authorize the issuance of equity securities if: (i) the routine authority to disapply pre-emption rights exceeds 20% (10% in the previous version) of the company's issued share capital; or (ii) any disapplication above 10% (5% in the previous version) is not used for an acquisition or specified capital investment and set out a more restrictive approach

towards appropriate greenhouse gas emissions reduction targets consistent with those in the United States.

For the United Kingdom, the updated policy guidelines of Glass Lewis outline situations where a director may be potentially overcommitted, such as where the director serves as an executive officer of another public company while serving on more than one additional external public company board or as a non-executive director on more than five public company boards in total. In addition, the updated guidelines strengthen Glass Lewis's previous position on director accountability for climate-related issues and provide for clarifying amendments on the existing policies, including those on employee representatives, cybersecurity risk oversight and pensions and incentive plans.

The Edinburgh Reforms

On December 9, 2022, the Chancellor of the Exchequer, Jeremy Hunt, announced the Edinburgh Reforms, a package of measures targeting reform of the UK financial services sector. The reforms include a framework for repealing retained EU legislation following the United Kingdom's exit from the European Union, including the proposed Financial Services and Markets Bill 2022-3 ("FSMB"), which, if enacted in its current form, would repeal and replace retained EU financial services law in the United Kingdom. The proposals, particularly the proposed legislative framework under the FSMB, represent a throwback to the United Kingdom's legislative approach to financial services before the rapid expansion of EU financial services legislation by granting the Prudential Regulation Authority and the FCA greater responsibility to introduce and implement financial services regulation in the United Kingdom. There are 30 measures within the package, the key proposals of which are set out below.

Secondary Legislation Introduced by the UK Government Following FSMB

A key component of the framework being introduced by the FSMB to repeal retained EU financial services legislation is the introduction of secondary legislation for each repeal to come into effect. One such proposed instrument put forward is the draft Financial Services and Markets Act 2000 (Public Offers and Admissions to Trading) Regulations 2023, which is intended to commence the repeal of the onshored EU prospectus regulation in line with the recommendations of Lord Hill's UK Listing Review. The draft instrument proposes several significant reforms to the UK prospectus regime, including: (i) expanding the definition of transferable securities so that issuers will not be able to circumvent the requirement to publish a prospectus by incorrectly marketing securities as non-transferable; and (ii) granting the FCA the authority to introduce new legislation regarding the rules for admission of securities to trading and rules governing public offers of securities that are not being admitted to trading and allowing them to determine when a prospectus is required. The UK government hopes that the delegation of such powers to the FCA would boost investors' interest in UK

public companies and, more generally, that the new regime would be more flexible to adapt to new opportunities.

Consultation on the Repeal of the PRIIPs Regulation

The Packaged Retail and Insurance-based Investment Products ("PRIIP") Regulation was onshored into UK legislation in 2018, and its aim is to provide greater efficiency in the UK and EU markets through retail disclosure by helping investors to understand better and compare the key features of different PRIIPs such as their risks and costs. The UK government announced that it will repeal the PRIIPs Regulation as it considers the form of the PRIIPs disclosure to be inflexible and to have tended to discourage retail offerings. The UK government, therefore, commenced a consultation on an alternative framework for retail disclosure on December 9, 2022. Key questions being asked are, among others, whether: (i) disclosure requirements should be flexible, with the FCA deciding on a case-by-case basis whether the prescriptive requirements for format and structure are necessary; (ii) there is a method of removing obstacles that would hinder firms in different jurisdictions from offering investment products to UK retail investors; and (iii) there are other suggestions that could complement the changing landscape of retail disclosure. The UK government hopes that this repeal will encourage issuers to offer their securities to retail investors by removing the challenges of the current regime. The closing date for comments to the consultation is March 3, 2023.

MIFID Framework: Wholesale Markets Review

As a continuation from the Wholesale Markets Review by the FCA building on from the provided suggestions, the UK government has published a draft statutory instrument titled The Markets in Financial Instruments (Investor Reporting) Amendment Regulations 2022 (the "SI"). The SI intends to address, among other things: (i) digitizing the process of providing information on investment services to retail investors to prevent reporting difficulties; (ii) relaxing certain reporting requirements when reporting to professional clients; and (iii) removing the requirement for investment firms providing portfolio management services to inform retail clients where the portfolio or value of the instruments depreciates by 10%.

Next Steps

As of the date of this Debevoise in Depth, the FSMB is currently at the committee stage in the House of Lords and is likely to be given Royal Assent in the first half of 2023. However, due to the scale of the remaining Edinburgh Reforms, the need for the UK government to hold discussions with other jurisdictions to ensure that the United Kingdom remains in compliance with international standards and the uncertainty over whether the European Union will grant the United Kingdom equivalence status for passporting and other types of market access, it is unlikely that the bulk of the reforms will be implemented before the next UK general election (to be held no later than January 2025) notwithstanding the UK government's stated intention to do so. We

expect further developments and discussions on the proposed reforms in 2023, in particular following the end of the consultation on the repeal of the PRIIPs Regulation and the expected enactment of the FSMB.

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Please do not hesitate to contact us with any questions.

LONDON

Alan Kartashkin
akartashkin@debevoise.com

Nicholas P. Pellicani
nppellicani@debevoise.com

James C. Scoville
jcscoville@debevoise.com

Vera Losonci
vlosonci@debevoise.com

Laurence Hanesworth
lhanesworth@debevoise.com

Evgenii A. Lebedev
ealebedev@debevoise.com

Timur G. Ochkhaev
tgochkhaev@debevoise.com

Toby Wenham Rogers
twenhamrogers@debevoise.com