International
Capital
Market
Association Ltd

ICMA

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August 29, 2008

Response to Discussion Paper DP 08/3: Transparency as a Regulatory Tool

Dear Ms. Raffé

The International Capital Market Association (**ICMA**) is pleased to respond to the FSA Discussion Paper DP 08/3: Transparency as a Regulatory Tool (the DP).

ICMA is the self-regulatory organisation and trade association representing constituents and practitioners in the international capital markets, with a pan-European focus. ICMA's members are located in 46 countries across the globe, including all the world's main financial centres, and currently number some 400 firms in total.

We welcome the opportunity to engage in discussion with the FSA on the use of transparency as a regulatory tool. We also welcome the concept underlying the draft Code of Practice on Regulatory Transparency (Code) – i.e. that a Code can inform, in a consistent and principled manner, the way in which the FSA will consider using transparency as a regulatory tool. However, we have concerns about not only the Statement of Intent but also the Principles that make up the Code. More fundamentally, we have serious reservations about the way in which the Code is applied to various examples as set out in Chapter 6 and the possible implications for wholesale participants and markets.

Concerns regarding the Code

Taken as a whole, we note that the draft seems considerably removed from not only the FSA's statutory objectives but also some of the principles of good regulation set out in section 2(3) of FSMA.[1] Of particular concern is the focus on "the public interest" especially when the FSA is tasked with the objective of protecting "consumers" as defined in s. 138 of FSMA. Disclosure of information may be in "the public interest" but may not serve the market well. For example, disclosure of information about a failing institution may be of interest to the public but may be damaging to the market. In particular, we note that principle 2, which sets out what is meant by "harm" to the public interest does not include risks to market confidence.

The Code, as it is applied to the some of the examples in Chapter 6, seems almost to "override" the FSA's statutory objectives. For example, the proposal to publish complaints data does not appear to take s. 5(2) of FSMA into account – which requires the FSA to have regard to (a) differing degrees of risk involved in different kinds of investment or other transaction and (b) differing degrees of experience and

[1] For example, Principle 3 mentions economy, efficiency and effectiveness, but proportionality, innovation and competitiveness are missing.

expertise that different consumers may have in relation to different kinds of regulated activity. Accordingly, we would strongly urge the FSA to consider re-drafting the Code to bring it closer in like to the four statutory objectives and all the principles set out in section 2(3).

Wholesale concerns

One of the primary justifications advanced in the DP for transparency is the aim of assisting consumers to differentiate between different firms and products leading to more suitable purchases. While the proposals appear to impact primarily on retail firms (at this stage) it is very unclear how the transparency framework would impact on wholesale firms and markets.

Paragraph 1.10 states: "there are clear advantages to using transparency to improve wholesale markets"[2]. If one of the main aims of regulatory transparency, as set out in the DP, is to assist consumers to identify better firms and products, then regulatory transparency *should* fall away in relation to wholesale firms and markets. However, given the illogical way in which the Code is made to apply to complaints handling, we are concerned that similarly illogical/spurious arguments could be used as a justification for greater transparency in relation to wholesale firms/markets. The DP makes the flawed assumption that complaints handing information will assist consumers identify better products (unlikely) or better firms (which in turn is based on the assumption that "good" complaints handling is indicative of a better firm – which is not necessarily the case).

Annex 1 then briefly considers the economic rationale for disclosure of information to wholesale markets. It is argued that in order for regulators to require disclosure to the market, the information has to be of value. A spurious comparison is then made with listed companies. The fundamental policy rationale for requiring listed companies to disclose price sensitive information to the market is so that investors (who base their investment decisions to a significant degree on share-price and other information pertinent to a company) can make informed decisions. However, it is very difficult to see how the disclosure of regulatory information about wholesale firms could improve either market efficiency or counter-party decision-making. Accordingly, we cannot see what "advantages" there would be to using transparency in the wholesale space.

Also of note

We note the lack of a market failure analysis accompanying this DP. The FSA has consistently indicated in the past that it would only take regulatory action when there is market failure and the prospect that intervention will provide a net benefit.[3] Is this no longer the case?

We would be please to discuss our position with you at your convenience.

Yours sincerely,

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[2] The use of the word "improve" would suggest that the FSA may be of the view that wholesale markets currently operate sub-optimally. If this is the case, perhaps the FSA could share its market failure analysis with us?

[3] See FSA's "A Guide to Market Failure Analysis and High Level Cost Benefit Analysis".