ICMA
International Capital Market Association

10 January 2024

UK Retail Disclosure Framework

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Consumer Composite Investments (Designated Activities) Regulations 2024

(Near-final version)

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ICMA technical feedback

EXECUTIVE SUMMARY

From a mainstream bond market perspective:

(1) the near-final SI should not define "manufacturing" instruments as extending beyond 'issuing' them (or FCA rulemaking should be consequently limited);

(2) FCA rulemaking consequent to the near-final SI should:

(a) exclude mainstream bonds from scope given the focus on 'composite' investments (ICMA having previously commented on PRIIPs scope clarification) – for example by tracking the existing Consumer Duty exclusions;

(b) calibrate the definition of "made available" to account for (i) the absence of retail marketing/facilitation, (ii) discretionary managers of retail money being professional investors and (iii) the institutional investor exemptions under the UK prospectus and Consumer Duty regimes;

(c) not prescribe responsibility for the retail disclosure framework as necessarily residing with the 'manufacturer'; and

(3) the SI review provision seem unnecessary.

1. **Introduction** – ICMA welcomes the opportunity to provide technical feedback, from the perspective of the international mainstream bond markets, on the near-final version of the *Consumer Composite Investments (Designated Activities) Regulations 2024* ("near-final SI"). In this respect, ICMA's core focus is to ensure that the UK's replacement retail disclosure framework addresses the well-documented challenges faced by market participants in relation to the legacy PRIIPs regime (particularly in relation to scope).

2. **Feedback scope** – Whilst details of the FCA's subsidiary rulemaking are not yet known, it is somewhat difficult to be certain as to which industry concerns are relevant for the near-final SI and which are relevant for FCA rulemaking. ICMA however suggests one key amendment to the

near-final SI (namely to the definition of "manufacturing" as detailed in #5 below) and otherwise provides comments that are pertinent to the regime overall but could be addressed in FCA subsidiary rulemaking or guidance.

3. **Definition of "consumer composite investments" (Regulation 3)** – ICMA notes that the definition of "consumer composite investments" ("CCIs") broadly tracks the definition of PRIIPs in the legacy PRIIPs regime. In this respect, ICMA has historically flagged suggestions relating to PRIIPs definitional clarification in terms of potential regulatory guidance or a potential legislative amendment. These are reproduced in the Annex to this paper.

4. **Definition of "excluded products" (Regulation 3)** – ICMA notes that the focus of the new regime introduced by the near-final SI will be on CCIs, and so seemingly based upon a similar 'packaged' product concept as in the legacy PRIIPs regime. ICMA consequently continues to expect that mainstream bonds should not be covered by the new CCI regime. ICMA notes that bonds[1] are not among the specific instruments excluded from scope in the near-final SI (under its definition of "excluded products"). Whilst it would of course have been comforting to have seen an exclusion for bonds set out in the legislation itself (to the extent not otherwise clearly excluded from the definition of CCIs), this is not essential on the **assumption that the FCA provides for an unambiguous exclusion of bonds from the scope of its subsidiary rulemaking** – for example by tracking the existing Consumer Duty exclusions.[2]

5. **Definition of "manufacturing" (Regulation 2)** – Whilst not specifically defined in the legacy PRIIPs regime, it has never been doubted that the 'manufacturer' of an instrument is its issuer (and references to "manufacturer" or "issuer" in this response should be read accordingly unless otherwise stated). The concept was later specifically widened (notably to underwriters) in the distinct context of the MiFID product governance regime but purely for expediency – as many issuers are not MiFID-regulated entities and so their instruments would not otherwise have a 'manufacturer' under the scope of that product governance regime. To the extent that the new CCI regime regulates whatever interaction ultimately occurs at the point of sale facing a UK retail investor however, no such need for expediency seems to arise. **So widening the definition of "manufacturing" beyond issuing (including to "underwriting") does not seem warranted and the near-final SI should be amended accordingly (ICMA will otherwise suggest that the FCA limit its subsidiary rulemaking accordingly)**.[3]

6. **Definition of "made available" (Regulation 4)**

   (A) **General** – Broadly speaking, stakeholders under the legacy PRIIPs regime were comfortable that, combined with appropriate warning legends, the avoidance by issuer-connected parties (notably the issuer's new issuance underwriters) of retail-specific marketing and of direct retail access facilitation (such as admission to a direct retail trading platform) should not reasonably have been seen as 'making available'. This also bearing in mind that the absence of a KID amounts to a statutory prohibition on retail sales, by anyone, of in-scope instruments. In this respect, it is worth remembering that that negotiable instruments (including bonds) are intrinsically subject to an independent secondary trading market and that it would be fundamentally unjust if the illegal secondary market selling of in-scope instruments to retail investors by third parties, either unknown to the issuer or over which it has no control, caused that issuer to be in technical breach of an obligation to produce a KID. Such a result would

[1] Other than the very limited carve-out for certain non-equity securities in Regulation 3(j).

[2] #(3)(b) (i)/(ii)/(iii) in the carve out from the FCA glossary's "retail market business" definition.

[3] If the reference to "underwriting" in the near-final SI is rather intended to relate to something specific such as the insurance context (rather the underwriting of bond offerings), then this should be made explicit.

constitute an unprecedented extension of the concept of vicarious liability under the laws of the UK.

(B) **Discretionary managers not 'retail'** – ICMA also recalls that staff from the European Supervisory Authorities confirmed in 2016[4] that portfolio managers (who act on a discretionary basis) are not retail clients, which was consistent with both a plain reading of the professional client concept under MiFID II and the PRIIPs regime policy intent (focusing on decision-making by retail investors themselves).

(C) **Institutional investor exemption** – Notwithstanding (A) above, ICMA has previously noted it would be helpful for the retail scope of the legacy PRIIPs regime to align more closely to the minimum denomination and qualified investor exemptions under the legacy prospectus regime and the Consumer Duty, which should be alternative (rather than cumulative) and with the latter calibrated at £50,000 (all as in the legacy prospectus regime). The FCA's Consumer Duty exemption[5] is coherent in this respect, but the FCA legacy PRIIPs regime guidance[6] is not. ICMA acknowledges that UK prospectus requirements are themselves evolving but that these exemptions are intended to be preserved.[7]

ICMA will consequently suggest that the FCA calibrate the definition of "made available" in its subsidiary rulemaking accordingly (to the extent not already addressed in the SI).

7. **Responsibility for continuing short-form disclosure / coherence with regulated financial promotions** – ICMA considers that the legacy PRIIPs regime was mis-calibrated in making KID production a 'manufacturer' (i.e. issuer) responsibility. Such responsibility should arise instead at the point of sale and either be discharged there (those selling financial instruments by way of business are regulated professionals who should understand what they sell based on official disclosures and be able to generate short-form disclosure)[8] or in concert with the issuer (with responsibility being shared accordingly). **ICMA will suggest that the FCA calibrate its subsidiary rulemaking accordingly.**

8. **Review provisions (Regulation 14)** – The SI review provision seem unnecessary, as most material provisions will be in the subsidiary FCA rules that FCA can separately and nimbly amend as relevant.

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[4] See slide 2 of the European Supervisory Authorities' 11 July 2016 presentation.

[5] See definition of "non-retail financial instrument" in the FCA glossary (also at PDF pages 95-96 of the preceding FCA Policy Statement).

[6] See DISC 2.3 (ICMA has assumed that DISC 2.3 has not been amended to align with the prospectus and consumer duty regimes on the basis that the legacy PRIIPs regime is being replaced anyway).

[7] See 'laid not made' Public Offers and Admissions to Trading Regulations 2023, Regulation 12 and Part 1 of Schedule 1.

[8] In this respect, see further #6(B) in Annexe C of ICMA's 29 September 2023 response to FCA's Engagement Papers on the new public offers and admission to trading regime that will replace the UK prospectus regime.

ANNEX

Potential PRIIPs regulatory guidance (#7 on pp.4-5 of ICMA's September 2018 response to FCA)

<< Article 4(1) of the PRIIPs Regulation states that a packaged retail investment product:

"means an investment […] where […] the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the retail investor".

This Article should be read exclusively in the context of Recital 6 of the PRIIPs Regulation that states (underlining added for emphasis):

"For all those products," – i.e. where the amount repayable is subject to fluctuation or to the performance of non-purchased assets as noted above – *"investments are not of the direct kind that is achieved when buying or holding assets themselves. Instead these products intercede between the retail investor and the markets through a process of packaging or wrapping together assets so as to create different exposures, provide different product features, or achieve different cost structures as compared with a direct holding."*

In this respect, *"reference values"* relates to creating synthetic exposures through proprietary benchmarks. >>

Potential PRIIPs legislative amendment (Q22 on pp.10-11 of ICMA's December 2021 response to ESMA)

<< 'packaged retail investment product' or 'PRIP':

(a) means an investment[…], regardless of its legal form, (i) that intercedes between the retail investor and the markets through a process of packaging or wrapping together assets so as to create different exposures, provide different product features, or achieve different cost structures as compared with a direct holding and (ii) where the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values (i.e. synthetic exposures created through proprietary benchmarks) or to the performance of one or more assets which are not directly purchased by the retail investor;

(b) does not mean investments of the direct kind that is achieved when buying or holding assets themselves; >>