UK Financial Conduct Authority

(Submitted by e-mail to POATR@fca.org.uk)

29 September 2023

ICMA response to FCA Engagement Papers

The International Capital Market Association (ICMA) welcomes the opportunity to give feedback on the FCA's Engagement Papers on the new public offers and admission to trading regime that will replace the UK prospectus regime.

ICMA is a not-for-profit membership association, headquartered in Switzerland, that serves the needs of its wide range of member firms in global capital markets. Among its members are private and public sector issuers, banks and securities houses, asset managers and other investors, capital market infrastructure providers, central banks, law firms and others. ICMA currently has over 600 members located in 66 jurisdictions. See: www.icmagroup.org.

This feedback is given by the ICMA primary market constituency comprised of borrowers and banks that lead-manage syndicated debt securities issues throughout Europe and beyond. This constituency deliberated principally through:

- the ICMA Legal and Documentation Committee (LDC), which gathers the heads and senior members of the legal transaction management teams of a number of ICMA member banks active in lead managing syndicated debt securities issues in Europe.

- the ICMA Prospectus Regulation Working Group, which gathers members of the legal documentation and transaction management teams of member firms from the LDC and ICMA Legal/Transaction Management Group Heads group, and related senior lawyers from member law firms who are concerned with the EU and UK Prospectus Regulation and related documentation practices.

- the ICMA Financial Institution Forum, which gathers the heads or senior members of the capital raising, funding and treasury departments of a number of ICMA member banks active in capital markets issuance in Europe.

We set out our feedback below and would be pleased to discuss it with you at your convenience.

Yours faithfully,

Miriam Patterson, Senior Director, Primary Markets
miriam.patterson@icmagroup.org / +44 20 7213 0321

INTRODUCTION

(Abbreviations: P=FCA Engagement Paper number, #=paragraph)

A. We welcome the FCA engaging with market participants in advance of a formal consultation period on the new rules for which the FCA will have responsibility under the new Public Offers and Admissions to Trading regime that will replace the current UK prospectus regime. We appreciate the FCA's openness to hearing feedback and ideas from the market in the focus group meetings that it has held with ICMA.

B. We commented on HMT's 11 July near-final version of the statutory instrument {draft HMT SI) on 21 August (ICMA's comments on near-final HMT SI (21.08.23)). We refer you to the comments made in that response, in particular issues on which we noted we would be engaging with the FCA (section 8 of response, relevant points below are cross-referenced to it). We had also previously commented on the illustrative SI (ICMA response to illustrative draft SI (14.02.23), relevant points below are cross-referenced to it).

C. We appreciate the FCA's acknowledgement that the UK debt capital market is part of a global debt capital market, and issuers want to access debt funding globally with ease (P4, #7).

D. We appreciate the FCA noting that the current UK debt capital market regime works well and does not need a major overhaul, so in the new regime the FCA intends to maintain the status quo but look for opportunities to make improvements. (P4, #6, #8) Ensuring no new burdens but only improvements are added to the UK debt capital market regime also facilitates the international competitiveness of the UK economy (including in particular the financial services sector), in accordance with the FCA's new secondary objective under section 25 of the Financial Services and Markets Act 2023 (FSMA 2023).

E. As our members are mainly active in institutional offerings of vanilla debt instruments, we will primarily focus our comments in that context. Our comments will cover the following topics:

   a. Institutional offerings of non-equity securities on regulated markets
   b. Sustainable finance
   c. Protected Forward Looking Statements
   d. Primary MTFs
   e. Retail offerings of non-equity securities

   This is a combined response on the FCA Engagement Papers and some of the comments below may be relevant to more than one paper (e.g. both P1 and 4).

KEY POINTS

- We welcome the FCA's acknowledgement that the current UK debt capital market regime works well. In the new regime, the FCA intends to maintain the status quo but look for opportunities to make improvements. Ensuring no new burdens but only improvements are added to the UK debt capital market regime will help to facilitate the international competitiveness of the UK economy, which is one of the FCA's new objectives under FSMA 2023.

- We support maintaining the status quo or making incremental changes that would help facilitate the efficient issuance and documentation of institutional bond offerings, including:
  - **Scope:** Giving technical comments to ensure that money market instruments are exempted from admission prospectus requirements (as is currently the case), and that the SSA admission carve-outs are not limited to UK entities only.
  - **Single standard of disclosure for bonds based on wholesale standard with no summary:** Welcoming the proposal to adopt one standard of bond disclosure in the prospectus regime which is based on the existing wholesale disclosure annexes. Summary sections should not be mandatory but remain voluntary, as they are under the current wholesale disclosure regime.
  - **Incorporation by reference:** Permitting the incorporation by reference of future information into base prospectuses. However, incorporation by reference (of past or future information) should not be made mandatory.
  - **Base prospectus supplement regime:** Base prospectus supplement regime to be made more flexible in terms of the changes that can be made via a supplement.
  - **Withdrawal rights:** Urging the FCA to maintain the status quo in relation to withdrawal rights not arising in the context of admission-only prospectuses for wholesale non-equity securities in the new prospectus regime.
  - **Validity and public availability of prospectus:** Keeping the length of validity for a prospectus at maximum 12 months and changing the current 10 year public availability requirement to the shorter of 10 years or redemption.
  - **Follow-on issuances:** advocating keeping to the UK prospectus regime status quo, but the FCA should continue to monitor potential EU changes to fungible issuance thresholds.

- In relation to sustainable finance:
  - **ESG disclosure**: Currently, ICMA does not advocate alignment of ESG sustainable finance prospectus disclosure with future corporate reporting requirements This area is evolving, so the FCA should wait to make changes to sustainable finance disclosure requirements. ICMA strongly advocates that there be no requirement for the mandatory inclusion of an issuer's sustainable finance framework in sustainable bond prospectuses.
  - **Use of Proceeds bonds/Sustainability-linked bonds disclosure standard:** For Use of Proceeds bonds, ICMA supports following the disclosure standard set out in option 2 (fuller disclosure, as described in P4#61), so long as the list of disclosure requirements is not too prescriptive. For sustainability-linked bonds, ICMA supports following the option 1 standard (as described in P4#59) for now.

- **Protected Forward-Looking Statements (PFLS):** ICMA suggests the FCA adopt a PFLS regime that is as similar as possible to the US forward-looking statement safe harbour regime which has been in place for some time and is well understood by the market. ICMA requests that the FCA extend PFLS status to historical as well as forward-looking estimates.

- **Primary MTFs:** ICMA requests that the FCA maintain the status quo and not extend withdrawal rights or the advertising regime to primary MTFs, or at the least not to non-retail MTFs where wholesale debt is listed.

INSTITUTIONAL OFFERINGS OF NON-EQUITY SECURITIES ON REGULATED MARKETS

Admission prospectus exception / excluding money market instruments

1. ICMA suggests that the FCA address through its admission rules that money-market instruments are exempt from its admission prospectus requirements, in line with the current position under the UK Prospectus Regulation where a prospectus for MMIs is not required, and in line with how MMIs are excluded from the public offer prohibition under the draft HMT SI. An explicit exclusion for MMIs from the admission prospectus requirements is needed, and ICMA would be happy to discuss how this is achieved when the FCA is drafting rule proposals. This could either be by way of an exemption or through a definition which excludes MMIs, as is the current approach under the UK Prospectus Regulation. See ICMA's comments on near-final HMT SI (21.08.23), 8(D) for further detail on the relevant definitions set out in the draft HMT SI.

Scope of transferable securities/SSA exemptions

2. ICMA strongly agrees with the FCA's starting position of not requiring prospectuses for "excluded securities" (securities excluded from "transferable securities" under the draft HMT SI), mirroring the effect of the current exemptions from the scope of the UK PR. (P1#36). ICMA notes that the SSA admission carve-outs described in P1#33 appear to be limited to the UK-only (i.e. "regional or local authorities, by public international bodies of which the UK is a member or the Bank of England"), but we understand that the intention is not to limit the exclusion to the UK but to mirror the current exemptions, which would enable SSAs to continue to access UK markets as they have done since the end of the Brexit-transition period and the onshoring of the EU Prospectus Regulation. This has been positive in attracting a wider range of issuers to choose London as a venue for listing their debt securities. See also ICMA response to illustrative draft SI (14.02.23), 9(a).

Single standard of bond prospectus disclosure based on wholesale standard with no summary

3. ICMA supports the proposal to move to one standard of bond disclosure in the prospectus regime which will be based on the existing wholesale disclosure annexes. We emphasise that the single standard should not be more onerous than the requirements under the existing wholesale annexes, to avoid (i) disrupting the institutional/wholesale bonds markets that have been reliably providing trillions in financing to the global economy over the years and (ii) undermining the competitiveness of the UK as a listing venue in these markets. This would also seem to be aligned with the FCA's new secondary objective introduced by the FSMA 2023 to facilitate the international competitiveness of the UK economy. (P4, #25)

4. ICMA strongly advocates that there be no mandatory summary requirement, especially as currently there is no such requirement in the wholesale debt context. (P1#54) For summaries in the retail context, see Annexe C, para 6(B).

Forward incorporation by reference

5. ICMA supports permitting the incorporation by reference of future information into base prospectuses. (P1, #64)

6. Currently, the "incorporation by reference" mechanism allows certain information (such as annual financial information) to be incorporated into a prospectus by including a reference to

it. However, this information is limited to previously or simultaneously published information. To incorporate by reference information which is published after approval of the prospectus, an issuer must draw up, have approved and publish a supplement. To extend incorporation by reference to permit the incorporation of future information, such as annual and interim financial information, would limit the need for base prospectuses to be supplemented during the year, thereby avoiding additional costs for issuers. This approach is permitted in other jurisdictions such as the US and under the London Stock Exchange's International Securities Market Rulebook. See ICMA's similar response in support of future incorporation by reference in the EU context (ICMA response (11.02.2022) to the EC's targeted consultation on the Listing Act, Question 17). (For a discussion of when withdrawal rights apply, for the institutional context see paras 14-18, for the retail context see Annexe C, para 6(c).)

No mandatory incorporation by reference

7. ICMA does not support making incorporation by reference (of past or future information) mandatory. Incorporation by reference does occasionally raise the risk that a document may become more complicated and difficult to understand, so should not be mandatory. For example, it may sometimes be more comprehensible, in a 'drawdown' prospectus for an issue under a programme, for terms and conditions from the base prospectus to be set out in full with changes reflecting the individual issue the subject of the drawdown – rather than having to incorporate by reference terms and conditions from a base prospectus and then list many individual amendments to them. Another example could be where the document containing the information to be incorporated by reference was not drafted to the appropriate standards of clarity. The comprehensibility concern would become even more acute if several different documents were required to be incorporated by reference. ICMA made similar points in relation to proposed mandatory incorporation by reference under the EU Listing Act (see ICMA's response to EU Listing Act proposals, (13.03.23), para 3). (P1, #65)

8. Mandatory incorporation by reference also carries the risk of information being inadvertently included in a prospectus. This may lead to confusion with other information deliberately included in the prospectus and also to liability attaching to information which was not prepared, and not intended to be prepared, to prospectus standard.

9. It should be for the person who bears legal responsibility for the prospectus to decide if it is appropriate to incorporate any information by reference into a prospectus, or whether it is more appropriate to set out that same information in full in the prospectus, perhaps in a different way. Information published at some other time and for some other purpose may not be presented in a way that is most appropriate in the context of a prospectus prepared for a particular securities offering or programme. It should ultimately be for the person who bears legal liability for the prospectus to decide what is the most comprehensible way to present that information in the overall context of the prospectus.

Base prospectus supplements

10. ICMA agrees with the FCA's position that base prospectuses do not need to be supplemented or updated unless and until an issuer wants to issue listed securities. Since this reflects current market practice, it may not be essential to amend the current language. (P4,#18)

11. ICMA believes the base prospectus supplement regime should be made more flexible as this would enable base prospectus information to be updated more efficiently and to reduce the time and costs required for updating, as alternatives to supplements (i.e. drawdown prospectuses and programme updates) require more time and expense. A more permissive supplement regime could also support the competitiveness of the UK as a listing venue.

12. In this regard, it would be helpful to have the FCA alleviate some restrictions it has placed on supplements in the past (notably in PMB 30). In particular, a flexible base prospectus supplement regime should allow for inclusion of:
    a. **"Old"/less recent information** (e.g. if a supplement is not prepared until shortly before an issuance, the content of the supplement may reflect information several months old). This would support the FCA's view that base prospectuses do not need to be supplemented unless and until an issuer wants to issue listed securities.
    b. **Non-significant information.** Such information could include updates to risk factors or disclosure sections (e.g. adding a recent developments section). This may be the case if, among other things:
        - An issuer is accumulating information to do a supplement, as it would be more likely to have changes it wishes to make to refresh its disclosure.
        - The issuer wishes to align disclosure across different markets which may result in the inclusion of what may be considered to be non-significant information in a prospectus.
    c. **Changes to securities note information** (e.g. changes to T&Cs) that do not introduce a new security.
    d. **Introduction of new forms of security**. (It would be helpful to allow for this rather than having to prepare a drawdown prospectus.) Preparing a supplement rather than a new base prospectus or drawdown prospectus would still require compliance with the relevant securities note annexes.

13. ICMA acknowledges that if the base prospectus supplement regime were expanded, review times may be lengthened and use of the SDS (Same Day Service) may not apply in certain contexts.

Withdrawal rights

14. ICMA urges the FCA to maintain the status quo in relation to withdrawal rights not arising in the context of admission-only prospectuses for wholesale non-equity securities in the new POATR regime.

15. ESMA provided clarification in 2018 that withdrawal rights do not apply to prospectuses for the admission to trading of wholesale non-equity securities (see ESMA's July 2018 Final Report on draft regulatory technical standards under the Prospectus Regulation (#238 on p.63 and #268 on pp.68-69)). This is the approach that continues to be adopted under the UK prospectus regime.

16. In order to preserve the current approach under the new POATR regime, ICMA asks the FCA to confirm that any public offers that benefit from any of the exceptions in Schedule 1, Part 1, paragraphs (1) – (5) and paragraph (12) of the draft HMT SI would not be subject to withdrawal rights even if the securities the subject of such offers are intended to be admitted

to trading on a regulated market or a primary MTF (that is, offers which are otherwise excepted, over and above the conditional-on-admission exception in paragraph 6(a)). Applying regulatory withdrawal rights in the aforementioned contexts would mean new administrative burdens inconsistent with the understood policy approaches underpinning the replacement of retained EU law with the new POATR regime (improving the efficiency of public capital-raising and facilitating international competitiveness). It may also put the UK at a competitive disadvantage to apply withdrawal rights more broadly than the status quo.[1]

17. To the extent there is any perceived overriding concern from an investor protection perspective, then this would presumably be in a retail context. Under the approach set out in para 16 above, withdrawal rights would apply to issuances that fall within the exception for offers that are conditional upon admission to trading (Schedule 1, Part 1, paragraph (6)(a)) but **not also** one of the other listed exceptions (Schedule 1, Part 1, paragraphs (1) – (5)), enabling retail offers that are admitted to trading to benefit from withdrawal rights. (For more on withdrawal rights in the retail context, see Annexe C, para 6(c).)

18. Regulation 32(4) of the draft HMT SI indicates that the FCA may adopt rules that provide that transactions that do not comply with the withdrawal rights notification requirements be void and unenforceable. The FCA should consider that there are risks that arise with automatic transaction voiding; for example, investors may not be aware that the transaction has been voided, and some investors may not want their transactions to be voided.

Validity and public availability of prospectus

19. ICMA supports keeping the length of validity for a prospectus at maximum 12 months (see ICMA Primary Market Handbook 2.12 which provides that programme documentation should not be dated more than a year prior to closing date of a drawdown). There are many reasons for keeping the maximum validity length at 12 months, including:
    a. To prevent a build-up of multiple supplements over a long period of time, which might impact comprehensibility.
    b. To avoid qualitative disclosure getting out of date.
    c. Good discipline for issuers and to keep due diligence up-to-date. Annual updates are a helpful discipline, giving parties the opportunity to reflect on legal and regulatory developments and best practice on an annual basis. Longer validity periods risk undermining robust due diligence practices associated with periodic updates.

20. Currently prospectuses are required to be publicly available for 10 years. Fundamentally, the prospectus is mainly necessary for the offer period/admission period of the bonds, so ICMA advocates changing the current 10 year public availability requirement to the shorter of 10 years or the date of redemption/maturity of the relevant securities.

[1] P6#55 discusses that the new regime will allow for withdrawal rights in contexts where there is no prospectus/MTF admission prospectus or prospectus supplement. It would be helpful to have clarification as to how withdrawal rights mechanically will operate outside a prospectus supplement context, as currently that is what triggers withdrawal rights. For withdrawal rights in the retail context, see Annexe C, para 6(c).

Financial information requirements in prospectus

21. ICMA has previously raised the points that some financial statement requirements are too prescriptive or onerous (e.g. Pro forma requirements in Annex 20; Legal and arbitration proceedings disclosure requirements in Level 2 annexes (see ICMA response (11.02.2022) to the EC's targeted consultation on the Listing Act)), or terms could be clarified ("financial performance" vs "financial position" in Annexes 7, 8 and 9 (see ICMA feedback (21.12.18) on the draft EC delegated regulation and annexes supplementing the new PR)). See Annex A for further information.

22. ICMA understands that the proposal to require issuers to include quarterly information in prospectuses only applies to equity securities, not non-equity. We would not want the proposal to apply to non-equity securities as this could be a significant additional burden. (P1#60).

Voluntary prospectuses

23. ICMA supports allowing issuers to retain the right to publish a voluntary prospectus. Some issuers value the option of having an approved prospectus, even where one is not mandated. It can help to demonstrate to investors that a robust standard has been met. (P1#94-95)

24. ICMA recommends that the FCA approve voluntary prospectuses to give them official status as prospectuses. The benefit of producing a voluntary prospectus would be minimised if it were not recognised as an approved prospectus. (P1#96) See also ICMA's comments on near-final HMT SI (21.08.23), 8(C).

25. ICMA queries what requirements would be followed by an SSA exempt issuer wishing to produce a voluntary prospectus. Would it be just the necessary information test or some type of annexe (which exists under EU PR regime)? Any annexe should include proportionate disclosure requirements; ICMA would be happy to discuss this further with the FCA. (P1#94-96)

Annexes subject to Necessary Information Test

26. ICMA welcomed the clarification in the draft HMT SI that the reference to "prospects" for debt securities be read as a reference to "creditworthiness" when determining the necessary information material to an investor for making an informed assessment (draft HMT SI Regulation 23(1)(aa) and 23(3), see also ICMA's comments on near-final HMT SI (21.08.23)).

27. Consequently, ICMA wishes to reiterate a point it has made in the past that a provision be included in the new rules stating that the information items in the Annexes only need to be disclosed to the extent they meet the necessary information test (see ICMA's response to the UK Prospectus Regulation CP, para 25 (Sept 2021)).

Secondary/Follow-on issuances

28. As the FCA has noted, the UK debt capital market is part of a global capital market, and therefore international consistency is important. Consequently, in relation to follow-on issuances of debt, ICMA advocates keeping to the UK PR status quo. However, the FCA should keep an eye on potential EU changes to fungible issuance thresholds to consider if an alignment of the relevant thresholds is desirable.

29. ICMA notes that one of the proposals for simplifying follow-on offerings for debt is to have a simple offer document similar to final terms under a base prospectus with some additional requirements. Query whether such a simplified document would be used much as currently it is straightforward to issue follow-on debt under final terms under a base prospectus or to do a repeat stand alone issuance after a first issuance. (P4#49)

Exemption from disclosure

30. FCA rules should reflect the current omission from disclosure exemptions in the UK PR (Article 18). See also ICMA response to illustrative draft SI (14.02.23), 9(d).

Equivalence/approval for regulated market admission prospectuses

31. HMT has the power to determine equivalence of non-UK prospectuses for public offer purposes. However, the FCA has the power to approve non-UK prospectuses for admission. ICMA encourages the FCA to provide a process for non-UK prospectuses to be approved or deemed equivalent in this first transposition of rules instead of waiting to address it at a later time. (P1#107) See also ICMA response to illustrative draft SI (14.02.23), 9(f). For example, this could apply to a base prospectus approved in the EU where the issuer wants to do a drawdown admitted solely in the UK or on a dual basis.

Universal Registration Documents (URDs)

32. ICMA supports keeping the URD. It is used by some EU issuers to issue retail and wholesale debt in the UK. (P1#93)

Responsibility for prospectus

33. ICMA supports keeping the current statutory liability regime in respect of responsibility for prospectuses for the reasons set out in P1#98.

Structured finance

34. ICMA believes no further differentiation between types of non-equity is needed other than what is already in PR Annex 17, which is based on whether debt is linked to an underlying asset. (P4#39-47)

Professional Securities Market (PSM)

35. ICMA has no objection to the PSM being closed to new listings and supports the position that existing securities could remain listed under transitional provisions. (P4#64)

SUSTAINABLE FINANCE

ESG disclosures

36. The level and nature of ESG disclosure included in prospectuses for non-equity securities has been evolving as the market and legal/regulatory backdrop has developed. Issuers are typically including more ESG disclosure in their debt prospectuses now than they were before. However, the appropriate level of ESG disclosure continues to be fact specific based on the nature of the issuer, type of securities and investor base. It is appropriate that the disclosure requirements retain this level of flexibility and that ESG disclosure rules are not unduly prescriptive given the rapidly developing nature of the wider legal and regulatory backdrop across multiple jurisdictions as well as the evolving scientific and reporting regimes.

37. Currently, ICMA does not advocate alignment of ESG debt prospectus disclosure with future UK corporate reporting requirements (P1#79). This accords with the current FCA approach which does not require debt issuers to make ESG disclosures as part of their continuing obligations.

    a. The current Necessary Information Test (NIT) for determining what is disclosed in a prospectus works well and requires relevant ESG disclosure to be included when appropriate.

    b. A requirement to align with future UK corporate reporting requirements would be problematic for SPVs and issuers that have their equity listed outside the UK. Issuers with equity listed elsewhere may be following disclosure requirements in other jurisdictions; having to follow additional disclosure requirements for admitting debt in the UK may be a barrier to their doing so.

38. As ICMA has stated previously, certain aspects of UK corporate reporting apply only to equity and should not be extended to debt as this would likely impact the attractiveness of the UK as a listing venue for debt securities.. (See ESG disclosure for new bond issues, Quarterly Report article July 2021 and Q3-Q4 of ICMA response to the UK FCA consultation paper CP21/18).

39. ICMA acknowledges that in the future, it may be appropriate to consider aligning prospectus disclosure with future annual report disclosure. However, it is not until the issuer's applicable corporate reporting regime has been amended to require sustainability/ESG reporting, and the systems and data which enable such reporting are well-established, will alignment be the most beneficial for the purpose of providing reliable information on which investors can use to make investment decisions. Assurance standards (such as second party opinions) will need to develop also. This area is evolving, so the FCA should wait to make changes to disclosure requirements.

40. The EU Commission, when adding CSRD disclosures to items to be considered in the context of its Level 2 powers (under the Listing Act proposed changes to the EU PR), has confirmed that this only applies to equity. The UK market should not be more prescriptive which could hamper its competitiveness.

41. Since the rules will be incorporated in the FCA Handbook, the FCA can be nimble in making changes to ESG debt disclosure in the future when corporate ESG reporting is better established.

No mandatory inclusion of sustainable framework

42. ICMA strongly advocates that there be no requirement for the mandatory inclusion of an issuer's sustainable finance framework (framework) in a prospectus (nor mandatory references to such framework or hyperlinks to it) for issuances of sustainable bonds (use of proceeds or sustainability-linked bonds). Frameworks are often drafted to cover a wide range of finance products including, for example, loans and not just bonds. The information in a framework is not necessarily drafted to a prospectus standard and will often contain information that may not be capable of being diligenced and verified to prospectus standard. Issuers should retain the flexibility to include summary information about or from a framework in the prospectus as necessary on each transaction in accordance with existing disclosure requirements. (NB: ICMA Quarterly Report Article from January 2023 is still a good summary of current practice: ICMA Quarterly Report article: European prospectus disclosure for green, social and sustainability bonds.)

Use of Proceeds bonds disclosure standard

43. For Use of Proceeds bonds, ICMA supports following option 2 (fuller disclosure, as described in P4#61), so long as the list of disclosure requirements is not too prescriptive.

Sustainability-linked bonds (SLBs) disclosure standard

44. For SLBs, ICMA supports following the option 1 standard (as described in P4#59) for now. The list of disclosure items proposed in option 2 (P4#62) is more subjective and may be challenging for issuers to prepare. This is particularly true in the context of transition plans which are not uniformly prepared by issuers (for example, in the UK the transition plan framework is not expected until October 2023).. This area is evolving, and as ESG transition plans become more prevalent, some of this information may become more appropriate to include in the future. It is likely that the FCA will be able to make targeted and appropriate rules once such information becomes more widely and better prepared by issuers.

PROTECTED FORWARD-LOOKING STATEMENTS

Mainly relevant for sustainability disclosure in debt context

45. The new POATR regime will have a concept of Protected Forward-Looking Statements (PFLS) to encourage issuers to include forward-looking statements in their prospectuses—mainly with equity in view, but it will also be applicable to debt. PFLS is less relevant in the debt context but could be relevant for sustainability/climate related information, and particularly for the disclosure requirements that will be developed for SLBs (see para 44 above, in response to P4#62). A well-calibrated safe harbour consistent with existing international market practice could encourage more and better disclosure.

Adopt a PFLS regime similar to the US forward-looking safe harbour

46. The US forward-looking statement safe harbour under the US Private Securities Litigation Reform Act of 1995 (PSLRA) works well. A legend is included upfront in offer documentation

identifying that certain words denote a forward-looking statement (e.g. expect, intend, plan, etc). A similar "Cautionary Language Regarding Forward-Looking Statements" legend is typically included in the front of Regulation S prospectuses (i.e. where securities are not being targeted at US investors), which is based on the US PSLRA wording. If the UK were to adopt a similar regime, this legend could be adapted to refer to the UK PFLS regime where appropriate. For instance, there are examples in the market of the legend being adapted to refer to relevant EU regulation.

47. ICMA strongly emphasises the benefits of the existing US regime and the advantages of following a well-trodden path and the benefit for issuers of a consistent approach across different markets. Given that the US regime has been in place for some time and is understood by the market, and the US is one of the most litigious jurisdictions in the world, what works there to encourage forward-looking disclosures whilst maintaining investor protection should be a good model for the UK to consider.

Wider liability concerns

48. It is important to also consider other potential liability regimes applicable to forward-looking statements. With this in mind, it would be beneficial to have flexibility to develop a legend that could work for different jurisdictions. It should also be noted that whilst a PFLS regime may support increased forward-looking disclosure, market participants will be mindful of other heads of liability (not just the statutory regime) and liability across different jurisdictions when drafting disclosure, so the PFLS regime may not result in a significant increase in forward-looking information.

Potential criteria for defining the limits of PFLS

49. **SI recklessness standard provides sufficient limits:** ICMA believes that the draft HMT SI itself provides the necessary guard rails for PFLS through the condition in Schedule 2, Part 3 (i.e. no false or reckless statements allowed as a condition of the reduced lability regime). Using this as the main standard allows the PFLS regime to remain flexible and not unduly prescriptive. (P3#21)

50. **Using the IAS 1 criteria for PFLS definition:** Apart from the recklessness standard, the criteria that the FCA is considering for defining the limits of PFLS may not work. For example, ICMA is not confident that the IAS 1 criteria would work well for PFLS. For example, it is difficult to have comparable historical information for a risk factor, or for a new green technology that has not been used/developed before. (P3#18)

Scope of information included as PFLS

51. **"Prominent risk factor"/"short term activities":**
    a. References to "prominent" risk factors are not helpful as all risk factors are material, and it is difficult to assess which ones would be considered more prominent. Even the mere ordering of risk factors by materiality has been challenging and burdensome for issuers (see ICMA response to European Commission targeted consultation on the Listing Act (11.02.22) at 9(c).)
    b. ICMA notes that the ESMA Guidelines on Risk Factors (version dated 01.10.19 relevant in a UK PR context) require disclosure of the negative impact of a risk. This

may include forward looking information and, especially where disclosure is met through provision of quantitative information, could be considered for coverage as PFLS.

c. "Activities to be carried out in the short term" are still forward-looking and may not come to fruition; they should still benefit from protection as PFLS. (P3#35)

52. **Inclusion of quantitative information:** ICMA notes PFLS can include quantitative information (P3#15). In the debt context, this may be useful for ESG data (e.g. CO2 targets, etc). (P3#15) See also paragraph [#53] above regarding quantitative information in risk factor disclosure.

53. **Historical estimates**: The proposed definition of forward-looking statements contemplates including estimates, though in the sustainability context many historical emissions metrics are also estimates and should be protected if accompanied by appropriate cautionary disclosure. See Annexe B for more information on historical estimates (also previously provided to the FCA by email).

PFLS legend

54. **Legend vs. disclaimer:** ICMA recommends that the statement that accompanies PFLS should be called a legend as opposed to a disclaimer. (P3#38)

55. **Location of legend/PFLS:** In terms of administrative burden, it would be preferable to have just a legend upfront in the disclosure document and there not to be a requirement to denote something as a PFLS every time it appears in a document. It would be preferable not to have to include all the PFLS in one section, but to have the PFLS be included where appropriate in the prospectus which will aid overall comprehension. (P3#39)

PRIMARY MTFs

56. The International Securities Market (ISM) is the only primary MTF that is commonly used for admission of institutional debt securities in the UK**.** This response assumes that the ISM will continue to be a qualified investors (QI)-only MTF and not be treated as a retail MTF under the new regime. The LSE will need to consider how Regulation 16 of the draft HMT SI applies to the ISM. (See ICMA's comments on near-final HMT SI (21.08.23), para 5.)

57. Assuming that the ISM is considered as a QI-only MTF and not a retail MTF, the FCA will not have the power to specify circumstances in which the ISM must require issuers to publish an MTF prospectus (P6, #11, 14). ICMA notes that the FCA will have powers in relation to MTF admission prospectus responsibility (in the context of QI-only MTFs, where the MTF operator requires in its rules that an MTF admission prospectus is produced), withdrawal rights and advertising which apply to all primary MTFs, including QI-only MTFs. (P6 # 15)

58. ICMA will limit its main response to issues relevant to the ISM/non-retail MTFs and will not address points raised in P6 that apply only to retail MTFs.

59. **Withdrawal Rights (P6, #49-61):** ICMA reiterates the points made in Withdrawal Rights, paras 14-18 above, that any public offers that benefit from any of the exceptions in Schedule 1, Part 1, paragraphs (1) – (5) and paragraph (12) of the draft HMT SI should not be subject to withdrawal rights even if the securities the subject of such offers are intended to be admitted to trading on a primary MTF. Extending withdrawal rights to primary MTFs for the aforementioned excepted offers would impose additional administrative burdens and could negatively impact the competitiveness of the UK markets compared to EU (and other) markets and therefore appear to be contrary to the FCA's new secondary objective introduced by FMSA 2023 to facilitate the international competitiveness of the UK economy. At the very least, withdrawal rights should not be extended to QI-only MTFs where wholesale debt is listed (P6#61).

60. **Q8 Advertising regime**: ICMA has previously noted its concerns about difficulties with the current advertising regime. ICMA strongly urges the FCA not to extend the advertising regime to MTFs, or at the least not to non-retail MTFs. (See ICMA's comments on near-final HMT SI (21.08.23), paras 8(A)-(B)). The FCA should be mindful not to create rules that would put UK MTFs at a competitive disadvantage to non-UK MTFs as similar platforms elsewhere are not subject to an advertising regime.

RETAIL OFFERINGS OF NON-EQUITY SECURITIES

61. ICMA is primarily focussed on institutional debt offerings, but we have set out some comments about the FCA's retail offering proposals as they relate to debt offerings in Annexe C below.

62. Some UK corporate issuers are active in raising finance through the institutional debt market but for various reasons have not raised finance from retail investors (see Annexe C, para 2 for a discussion of some of these reasons), while other corporate issuers have not accessed the bond markets at all. To the extent that the FCA would like to would encourage high quality corporate issuers who are less familiar with the international bond market, and do not already have an issuance profile, to issue low denomination bonds which could be sold to institutional and retail investors, among other things, a significant education programme to encourage a change in mindset from those issuers may be necessary. We consider that these types of UK corporate issuers are more accustomed to meeting financing needs through loans or equity; they are not used to thinking about approaching the bond markets. The loan markets are competitive, and loans are much easier for them to access as they speak bilaterally with relationship banks as opposed to having to borrow from many unknown bondholders. ICMA would be happy to engage further with the FCA in this respect, including considering measures to encourage such issuers, based on similar efforts undertaken by ICMA in recent years.

ANNEXE A: REQUESTED CHANGES TO FINANCIAL STATEMENT REQUIREMENTS

The below are both from the ICMA response (11.02.2022) to the EC's targeted consultation on the Listing Act:

1. "**Pro forma financial information**: Whilst pro forma financial information is often not necessary in the context of bond prospectuses, the requirements in Annex 20 are considered to be prescriptive and onerous, in particular the requirements for an independent accountants' report (which investors may not necessarily require) and for the information to be published only in respect of the last completed financial period/most recent interim financial period. These requirements are perceived as a disincentive to issuing bonds within the scope of the PR if pro forma financial information is considered to be necessary. MTF rules are considered to be more flexible and proportionate."

2. "**Legal and arbitration proceedings**: The Level 2 annexes require disclosure of information on legal and arbitration proceedings which may have, or have had in the recent past, significant effects on the issuer and/or group's financial position or profitability. Detailed disclosure on such proceedings is challenging to prepare because the status of such proceedings regularly changes. More general disclosure relating to such proceedings is typically already included in risk factor sections and/or financial statements, and so this specific disclosure requirement seems unnecessary. Also, bond investors are interested in the issuer's solvency (i.e. its ability to honour the terms of the bond), rather than the issuer's profitability (which is relevant in the context of an investment in equity securities)."

The below is from the ICMA feedback (21.12.18) on the draft EC delegated regulation and annexes supplementing the new PR:

3. "**Items 7.1 and 11.5.1 of Annex 6, items 7.1 and 11.4.1 of Annex 7 and items 6.1 and 10.4 of Annex 8 (Trend information and significant change in the issuer's financial position):**
We note that ESMA considers the terms "financial performance" and "financial position" to be well known to the market (see paragraph 267 of the ESMA Final Report). However, we query whether there is a need for two separate disclosure requirements. It may be clearer if these disclosure requirements were to be combined into one disclosure requirement."

By way of illustration on the above point, the below is taken from the current Annex 6 of the UK PR delegated regulation (emphasis added):

SECTION 7	TREND INFORMATION
Item 7.1	A description of: (a) any material adverse change in the prospects of the issuer since the date of its last published audited financial statements; (b) any significant change in the **financial performance** of the group since the end of the last financial period for which financial information has been published to the date of the registration document. If neither of the above are applicable then the issuer shall include an appropriate statement to the effect that no such changes exist.

Item 11.5	Significant change in the issuer's financial position
Item 11.5.1	A description of any significant change in the **financial position** of the group which has occurred since the end of the last financial period for which either audited financial information or interim financial information have been published, or provide an appropriate negative statement.

ANNEXE B: HISTORICAL ESTIMATES

The proposed definition of forward-looking statements contemplates including estimates. But there is a concern that this limits the proposed protection to only ***forward-looking estimates*** rather than any other estimates.

Many financial and non-financial historic or retrospective metrics or data points can be estimates (i.e. where management judgement, assumptions and/or scenarios are used to calculate a number as distinct from pure mathematical calculation). IFRS disclosure requires the most significant of these used in presenting the financial statements to be disclosed in the notes to the financial statements, which provides cautionary disclosure about the management judgements and assumptions used.

Sustainability estimates:

The very nature of sustainability issues is that they are complex, systemic issues which are difficult to measure at any level with absolute certainty. As such, estimates are expected, and these can be both ***retrospective and forward looking***.

ISSB S-1 standard recognises this in the below extract, and requires firms to highlight when, and the nature of, any estimates or uncertainties included in disclosures. The use of historical estimates is - and will become - increasingly prevalent in the case of sustainability-related disclosures – see acknowledgement in IFRS S1 standard B50 regarding “Metrics” and separately the extract below.

Examples of estimates include:

1. Absent a monitor that measures actual outputs or quality of a particular thing, many sustainability metrics are based on estimates or estimation rather than measurement of actual changes or things.
2. A good example is a utility invoice which can be based on actual meter readings, or estimated based on past usage. Purchased electricity is the key component of scope 2 emissions.
3. Another example: without a tailpipe monitor attached to a vehicle, the CO2 emissions of that vehicle are attributed to it from the emissions attributed to the factory model tested. Actual emissions vary with age, fuel and how, when and where the car is driven. Emissions disclosure for multiple cars, or even the automobile sector as a whole, are necessarily estimates.
4. Aggregated GHG emissions are an aggregated estimate of the component GHG gas emissions in CO2E tonnes.
5. The quality of air, water and soil that can be actually measured though aggregated disclosures are likely to involve extrapolation and estimation.

Importance of historical or baseline estimations:

Most importantly, to set targets to reduce or improve environmental and social impacts, entities must set *historical or retrospective baselines* against which to measure and report progress against the targets. These historical or retrospective baselines will necessarily be estimations for many things that have not been - or cannot be - actually measured or are not monitored already. So, it would seem incongruous that the target might avail itself of the PFLS protection but the *historical or retrospective baselines,* estimated using the same methodology, would not.

Importance of consistency with existing customary and good disclosure practice:
It is also critical that the FCA's proposed definition and eligibility requirements be consistent with - and do not cut across or preclude - existing financial and non-financial disclosure practice that provides users of general purpose reports with appropriate cautionary disclosure about estimates and how they may differ from historical facts. This applies to any "*reasonable and supportable information*" (as defined in IFRS/ISSB terms) - historical or forward-looking and importantly whether or not required by mandatory disclosure standards and regulations.

Achieving ISSB & FCA Policy Objectives:

Extending the proposed PFLS protection to *all estimates,* accompanied by appropriate cautionary disclosure, would seem to be entirely conducive to achieving the FCA's policy objectives of the proposed PFLS protection, particularly as the FCA intends (as it has indicated) that the UK be an early adopter of ISSB disclosure standards.

We also note that the ISSB S-1 standard permits entities not to disclose certain information otherwise required by the standard if "*the level of measurement uncertainty involved in estimating those effects is so high that the resulting quantitative information would not be useful*."

An unduly restrictive FCA PFLS definition, or overly prescriptive PFLS eligibility requirements, are likely to drive entities to utilise this exemption and rely on qualitative disclosure more than they would otherwise do, whereas clarifying that *historical estimates* may also be eligible for the same protection as forward-looking estimates is more likely to encourage the disclosure that the FCA and ISSB is seeking to encourage (or at least not discourage).

FCA Guidance:

If the FCA considers that it does not have statutory authority to extend the PFLS regime to estimates that are not forward-looking then, at a minimum, we request FCA guidance that makes it clear that the PFLS regime is a *presumptive* regime, in that information within it is presumed to be protected, but that:

(i) the definition is not an exclusive definition of what information may be protected from liability and

(ii) it neither precludes nor prevents the use of appropriate cautionary disclosure to rebut the requisite standard of liability for any information, whether or not it is forward-looking.

The FCA is also requested to provide guidance that it will extend or provide protection to, or at least will not consider enforcement action with respect to, information or amounts required to be disclosed by ISSB standards (S1 or S2) which cannot be measured directly and where measurement uncertainty or even a high level of measurement uncertainty exists, provided that the FCA consider that the ISSB disclosure requirements reading the disclosure of the estimates are accurately described and explained in accordance with ISSB requirements (e.g. see IFRS S1 79-81 below) (or the relevant UK implementing legislation). That guidance would however, necessarily be limited to sustainability-related disclosures and does not obviate the overriding imperative that the FCA PFLS regime and related FCA implementing guidance be consistent with, and not be unduly prescriptive so as to be inconsistent with, customary market best financial and non-financial disclosure practice, which is based on the US PSLRA forward-looking statements regime).

Extracts from ISSB S-1 below:

50 If a metric has been developed by an entity, the entity shall disclose information about: (a) how the metric is defined, including whether it is derived by adjusting a metric taken from a source other than IFRS Sustainability Disclosure Standards and, if so, which source and how the metric disclosed by the entity differs from the metric specified in that source; (b) whether the metric is an absolute measure, a measure expressed in relation to another metric or a qualitative measure (such as a red, amber, green—or RAG—status); (c) whether the metric is validated by a third party and, if so, which party; and (d) the method used to calculate the metric and the inputs to the calculation, including the limitations of the method used and the significant assumptions made.
77 **An entity shall disclose information to enable users of general purpose financial reports to understand the most significant uncertainties affecting the amounts reported in its sustainability-related financial disclosures.**
78 **An entity shall:**
(a) identify the amounts that it has disclosed that are subject to a high level of measurement uncertainty; and
(b) in relation to each amount identified in paragraph 78(a), disclose information about:
(i) the sources of measurement uncertainty—for example, the dependence of the amount on the outcome of a future event, on a measurement technique or on the availability and quality of data from the entity's value chain; and
(ii) the assumptions, approximations and judgements the entity has made in measuring the amount.

79 When amounts reported in sustainability-related financial disclosures cannot be measured directly and can only be estimated, measurement uncertainty arises. In some cases, an estimate involves assumptions about possible future events with uncertain outcomes. The use of reasonable estimates is an essential part of preparing sustainability-related financial disclosures and does not undermine the usefulness of the information if the estimates are accurately described and explained. Even a high level of measurement uncertainty would not necessarily prevent such an estimate from providing useful information.
80 The requirement in paragraph 77 for an entity to disclose information about the uncertainties affecting the amounts reported in sustainability-related financial disclosures relates to the estimates that require the entity's most difficult, subjective or complex judgements. As the number of variables and assumptions increases, those judgements become more subjective and complex, and the uncertainty affecting the amounts reported in the sustainability-related financial disclosures increases accordingly.
81 The type and extent of the information an entity might need to disclose vary according to the nature of the amount reported in the sustainability-related financial disclosures—the sources of and the factors contributing to the uncertainty and other circumstances. Examples of the type of information an entity might need to disclose are:
(a) the nature of the assumption or other source of measurement **uncertainty;**
(b) the sensitivity of the disclosed amount to the methods, assumptions and estimates underlying its calculation, including the reasons for the sensitivity;
(c) the expected resolution of an uncertainty and the range of reasonably possible outcomes for the disclosed amount; and
(d) an explanation of changes made to past assumptions concerning the disclosed amount, if the uncertainty remains unresolved.

ANNEXE C: RETAIL OFFERINGS OF NON-EQUITY SECURITIES

1. **Introduction / Potential UK prospectus regime alleviations** – ICMA notes UK official interest in alleviating aspects of the UK prospectus regime going forward to facilitate the ability for bond issuers to allow (should they wish to) potential retail investors to participate in their bond issues, in terms of low denominations and even direct access (beyond indirect access through discretionary portfolio managers or bonds funds).

2. **Historic drivers disincentivising direct retail bond supply** – ICMA recalls that the effective disappearance of direct retail participation in bond markets (with the odd national exception) follows from a range of factors.

   (A) **Regulatory factors (resulting *inter alia* in high denominations):** (i) relatively burdensome retail prospectus disclosure requirements (notably the many, detailed retail summary requirements introduced in the 2010 review of the EU prospectus regime) with limited exemptions for subsequent re-sales[2]; (ii) conceptual/liability concerns with preparing PRIIPs KIDs combined with uncertainty regarding PRIIPs product scope[3]; (iii) some preference to use the ICMA1 institutional-only approach (recently supplemented) to MiFID product governance over the ICMA2 retail-inclusive approach (recently supplemented) and bearing in mind that the regime is conceptually flawed regarding commoditised funding products such as bonds that should be excluded from its scope; and

   (B) **Non-regulatory factors:** (i) logistical supply factors (timing and resourcing complexities in enabling direct retail participation in primary issuance offers, relative to institutional-only offerings); (ii) reputational supply factors (heightened visibility around retail involvement and limited societal substantive acceptance of debt as also involving potential risk), (iii) economic demand factors (low prevailing interest rates for over a decade preceding the post-Covid period having dampened retail demand for investment grade credit) and (iv) supply inertia (as issuers have got comfortable with institutional-only investors satisfying their funding needs and have limited resource for discretionary consideration of alternatives that inessential in the absence of a funding gap).[4]

   With the FCA considering itself as now having "other, better tools" outside the prospectus regime to regulate challenges arising around various non-mainstream/bond securities (P4#28-31), as well

[2] The high minimum denomination (currently €100,000) has been seen as the surest exemption (and helped preserve at least institutional issuance in Europe), following some ambivalence with (low denomination) reliance on the professional investor exemption – given the PR's 'public offer' definition inclusion of "placing of securities through financial intermediaries" (retained in Regulation 7(4) of the 11 July near-final version of the Public Offers and Admissions to Trading Regulations 2023 - POATR). (And even then, one European regulator at least looked to hold primary market participants responsible for retail investor access to a trading platform's independent fractionalisation of high denomination bonds.) Even 'on-venue' trading (still only around half of European corporate bond trading per pp.30-31 of ICMA 2022H2 European data report) involved support from a 2005 bilateral confirmation by the European Commission (substantively replicated in Regulation 7(5) of the near-final POATR).

[3] See further ICMA September 2018 response to FCA call for evidence. ICMA is separately engaging on HMT and FCA efforts to replace the UK PRIIPs regime see further ICMA 3 March response to HMT and 7 March response to FCA.

[4] Other factors that might be relevant to the success of UK retail investor bond market participation include (i) visible access to the government bond curve (if only as a benchmark baseline alternative) and (ii) the willing participation of any providers of retail-sized trading liquidity.

as its new ability to be nimble in adopting further prospectus or other regulations as needed, a willingness to currently alleviate the prospectus regime in various ways seems logical.[5]

3. **UK prospectus regime alleviations for retail welcome, to extent not more burdensome than legacy wholesale regime** – Alleviating aspects of the UK prospectus regime to facilitate the ability for bond issuers to allow potential retail investor participation, should they wish to do so, is welcome in principle. In this respect, the proposed single standard for bond disclosure with the existing wholesale disclosure annexes as a starting point (P4#25) is specifically welcome. However, the single standard should not be more onerous than the existing wholesale standard, to avoid (i) disrupting the institutional/wholesale bonds markets that have been reliably providing trillions in financing to the global economy over the years and (ii) undermining the competitiveness of the UK as a listing venue in these markets. Whilst the effectiveness of a UK prospectus regime retail alleviation remains subject to other enduring disincentives (including regulations outside the UK that influence international bond dynamics – notably in the EU), it nonetheless remains important to start somewhere in terms of addressing individual disincentives.

4. **Official approach to potential retail contexts** – ICMA understands FCA preference is for retail participation on a 'mixed' basis also including institutional investors rather than for dedicated retail bond issues. This would be to enable retail investors to benefit from the institutional process in terms of price discovery / price tension (P4#34). Aside the general proposal in #3 above for a single disclosure standard, ICMA notes FCA's musing of potential additional incentives to certain issuances (P4#33-38) but further understands that there may also be concerns about certain other issuances being directly available to general retail investors by virtue of being listed on a regulated market. This effectively means three possible contexts might arise in terms of potential retail investor participation:

   (a) a **'general' context** that would benefit from the generally-applicable single disclosure standard – which would likely be the most significant retail alleviation of the new regime;

   (b) an **'incentivised' context** for seasoned issuers on a UK regulated market that would benefit from some additional alleviation as envisaged in P4#33-38 – but it is unclear what specific additional disclosure alleviations might be plausible: allowing for example the admission prospectus to only include 'securities note' information and not 'registration document' information (other than relating to the context of the new issue in question), might not be materially additive as an incentive and may well be subject to concerns similar to those arising regarding the European Commission's proposed widening of prospectus exemptions for certain fungible issuances[6]; and

   (c) a **'restricted' context** where, to the extent FCA has any potential concerns about general retail availability of certain other issuances, it could require a £50,000 minimum denomination or, if it wished, allow the issuer to alternatively choose a lower denomination subject to further disclosure (an alternative, but more complex, approach might be for the FCA to require admission to a distinct 'institutional-only' regulated market segment.

   FCA could seek to promote ex-ante certainty in terms of any 'incentivised' or 'restricted' context by maintaining public 'whitelists' and/or 'blacklists' (see further #7 below regarding the 'incentivised' context).

[5] In this respect, the exempting of mainstream bonds from the UK Consumer Duty is welcome – see further pp.36-37 of the 2023Q2 edition of the ICMA Quarterly Report. It may also be worth revisiting the scope of the FCA's 2020 marketing restrictions on 'speculative illiquid securities' to replicate the Consumer Duty exemption – see further p. 42 of the 2021Q1 edition of the ICMA Quarterly Report.

[6] See further #1 at p.2 of ICMA March 2023 comments on the EU Listing Act proposals and also at #28-29 in the main body of this response.

5. **Potential transactional approaches to retail inclusion (given conservative bond market dynamics)** – Mainstream bond market practices have tended to evolve in relatively conservative, incremental ways. It therefore seems likely that any initial uptake by bond issuers (and their advisers) on an improved ability to involve retail investors will remain (at least initially) as close to existing practices as possible. A potential basic incremental approach ("Model A") might, based on the single disclosure standard, involve a lowering of denominations to ease retail investor participation through subsequent secondary market trading (with independent retail brokers potentially participating in primary market issuance with a view to on-selling following admission and generally contributing liquidity to retail trading). A further incremental approach ("Model B") might involve some direct retail participation in a primary market offering.

6. **Relevant prospectus regime characteristics** – Some of the proposed UK prospectus regime characteristics seem more relevant than others in retail-inclusive contexts.[7]

   (A) **Public offer exception for securities admitted or subject to admission application** – The public offer exception for post-admission retail offers/sales may indeed simplify Model A later-stage retail involvement following admission to a regulated market (MTFs are not seen as relevant to a retail DCM context). Though the new regime also exempts offers conditional on admission, it seems unlikely that bond market issuers would seek to involve retail investors in a Model B primary offer based on a just an admission application. Rather they would likely seek early approval of an admission prospectus (or base prospectus) prior to initiating any related retail offering conditional on regulated market admission.

   (B) **Single (wholesale) disclosure standard (with no mandatory summary)** (P4#22-32) – Providing for a single disclosure standard based on the current wholesale annexes would indeed constitute a materially useful alleviation. Any retail investors are highly unlikely to read a prospectus (unlike any retail advisor or discretionary portfolio manager) and the issuer burden of the current retail disclosure standard has been a material disincentive to retail supply, disproportionate to the limited investor benefit involved. In terms of a summary (P1#48-54), the PR's articulation of mandatory requirements has been particularly disincentivising.[8] Rather (and notably bearing in mind the FCA's 'mixed' institutional/retail market preference in #4 above) investor information can be more effectively provided for by leaving FCA-regulated entities wishing to facilitate retail investor sales (whether acting in concert with the issuer or independently) to deliver information to investors in the form of regulated financial promotions / advertisements (that are already required to be consistent with the prospectus as well as being fair, clear and not misleading).

   (C) **Withdrawal rights / admission context and clear trigger** (P1#64, P4#19, P6#49-61) – Withdrawal rights conceptually operate in relation to primary market 'offer' regulation rather than 'admission' regulation. This is the approach in the current EU and UK prospectus regimes. Whilst this is fundamental to market effectiveness in an institutional-only context[9] (as noted at #14-18 in the main body of this response), ICMA understands that UK authorities may nonetheless wish to regulate retail withdrawals notwithstanding the primary market offers are to be exempt from the public offer prohibition (as being conditional on admission). In the

[7] ICMA comments in the institutional-only context apply equally in the retail context to the extent not stated otherwise.

[8] And 'key' information (that originated in the weakly-designed PRIIPs context) has always been a nebulous, if not arbitrary, subset of the generally-understood concept of 'material' information (that is being carried over into the "necessary" information test in Regulation 23 of the near-final POATR).

[9] Where one or more public offer exceptions in Part 1 of Schedule 1 of the near-final POATR, other than the conditional-on-admission exception under paragraph 6(a), would apply (such as under paragraphs 1-5).

'Model B' conditional-on-admission offer scenario[10], a prospectus supplement between launching the conditional offer and the admission could act as a trigger for withdrawal rights.[11] (It is difficult to envisage the mechanical operation of withdrawal rights in a conditional-on-admission scenario in the absence of prior prospectus approval.)

7. **'Incentivised' context / proposed whitelist and blacklist items** – Some of the items noted by the FCA (P4#33-38) may be of limited relevance and it is also unclear how the incentivisation would apply in the context of a programme base prospectus covering many different types of securities.

   (A) **Sterling-only** (P4#36) – It is unclear that there may be any specific reason for limiting scope to Sterling-denominated bonds only (bearing in mind also that issuance programme base-prospectuses are pretty much universally multi-currency).

   (B) **Trustee-only** (P4#36) – It is unclear how this is relevant, since: (i) trust structures can be less effective in terms of supporting investor action (trustees generally require prior indemnification from investors before exercising their discretion to act) over the alternative 'fiscal agency' structures (involving just an administrative role regarding investor notifications and voting procedures), which are consequently in wider use; and (ii) though ICMA understands there might be some FCA desire to have an involved entity 'within reach', acting as a trustee is not a regulated activity.

   (C) **Standardised terms & conditions** (P4#37) – ICMA agrees that adopting standardised terms & conditions is highly unlikely in a mainstream context, since the overwhelming volume of issuance is by established issuers who are not expected to be willing to commit the significant resources that would be needed to consider a move from their own legacy terms & conditions.

   (D) **Modifications** (P4#37) – ICMA understands there may be some FCA concern with an issuer granting itself, in an instrument's terms & conditions, unfettered discretion to modify such terms & conditions. This is unheard of for a mainstream bond issuer, though ICMA notes FCA may have seen this in other contexts.

   (E) **Early repayment** (P4#37) – It is unclear what significant concerns may arise regarding early repayment provisions to the extent they are paired with a make-whole provision (such a make-whole provision anyway losing its significance in the case of redemptions close to a bond's scheduled maturity that simply facilitate issuer access to refinancing windows). ICMA notes that the PRIIPs regime (see #2(A)(ii)) may have indeed resulted in some issuers stripping out make-whole provisions to the extent not otherwise stripping out early repayment provisions altogether or limiting bond availability to institutional/professional investors. Going forward however, the UK PRIIPs regime is due to be replaced and the European Commission has also proposed to formally exclude make-whole provisions from the scope of the EU PRIIPs regime.

   (F) **Events of default** (P4#37) – ICMA understands there may be some FCA concern with an issuer that does not include any events of default whatsoever in its bond terms. This is unheard of for a mainstream bond issuer, though ICMA again notes FCA may have seen this in other contexts.

   (G) **Not senior FIG** (P4#38) – Whilst ICMA understands FCA may wish financial institution issuers to be outside the scope of the additional disclosure alleviations given investor risks stemming

[10] Where none of the public offer exceptions in Part 1 of Schedule 1 of the near-final POATR, other than the conditional-on-admission exception under paragraph 6(a), would apply.

[11] The only exception would be in the case of offers, conditional on admission under a base prospectus and spanning the publication of future financials automatically incorporated by reference – in which case FCA could require issuers, to the extent such financials are material under Regulation 23 of the near-final POATR, to publish a notice triggering the withdrawal rights. It would however be unlikely that issuers would launch relatively short bond offer periods (even involving retail investors, a couple of weeks at most) knowing then of the pending publication of such financials (even if not considering them material under Regulation 23).

from applicable prudential rules (notably bail-in), it is worth recalling that senior preferred bonds are not subject to such risks.