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Markets Policy  
The Financial Services Authority

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## JOINT ICMA/BBA RESPONSE TO DISCUSSION PAPER 08/1: A REVIEW OF THE STRUCTURE OF THE LISTING REGIME

Dear Ms Odutola

The International Capital Market Association (**ICMA**) and the British Bankers' Association (**BBA**) are pleased to respond to the FSA Discussion Paper 08/1: A review of the Structure of the Listing Regime (the **Discussion Paper**).

ICMA is the self-regulatory organisation and trade association representing constituents and practitioners in the international capital markets worldwide. ICMA's members are located in 49 countries across the globe, including all the world's main financial centres, and currently number some 400 firms in total.

BBA is the leading association for the UK banking and financial services sector, speaking for 228 banking members from 60 countries on the full range of UK or international banking issues and engaging with 35 associated professional firms. Collectively providing the full range of services, its member banks make up the world's largest international banking centre, operating some 150 million accounts and contributing £50 billion annually to the UK economy.

We attach our response as an **Annex** to this letter and would be pleased to discuss it with you at your convenience.

Yours sincerely,

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## ANNEX

### General comments

We welcome the debate about the UK listing regime and commend the FSA for its thorough analysis in the Discussion Paper.

**To summarise our response, we believe that no changes to the substance of the regime are needed or indeed desirable. Specifically, we are concerned about the adverse impact that Option 1 might have on the market participants and the competitiveness of the UK market generally. At the same time, we would not object to clearer labelling of the listing segments.**

There are several general points which we would like to highlight before answering the questions asked in the Discussion Paper and making certain other specific comments. These relate to the nature of the perceived market failure requiring changes to the UK listing regime, the different treatment of domestic and overseas issuers and the competitiveness of the UK market generally.

#### Nature of the failure requiring changes to the UK listing regime

We believe that any structural changes to the UK listing regime should be made only in response to a clearly identified market failure and in a way which is proportionate to that failure. The Discussion Paper gives “confusion” and “misunderstanding” among investors about the nature of a product and its listing status as the starting point of the discussion, but does not elaborate on what this means and who is responsible for such “confusion” or “misunderstanding”.

It is unquestionable that in everyday parlance or in the financial press, “listing” is used as shorthand for admission to a market of any kind irrespective of the precise regulatory terminology for the market or the admission. Similarly, “equity” is sometimes used as a generic jargon expression for various products sharing similar economic features such as shares, GDRs or even convertible or otherwise equity-linked debt.

Irrespective of such casual use of language in everyday parlance, professional market participants are expected to know and use proper terminology when it matters. This means that:

- Issuers, banks which arrange issues of new securities and their respective legal advisers are expected to accurately describe the securities, the market and the nature of admission in the prospectus or other relevant issue documentation.
- Firms interfacing with investors (including, but not only, those interfacing with retail investors) are expected to accurately present the product and its features to those investors.
- Institutional investors are expected (and, if they are regulated, required) to know the various kinds of products, trading platforms and listing or admission options, familiarise themselves with the documentation, understand the descriptions used and ask questions where they do not.

In other words, while there may be scope for “confusion” or “misunderstanding” in everyday parlance, there should be no scope for it on actual transactions if the market participants discharge their duties in accordance with these expectations and, indeed, their regulatory obligations.

We do not believe (and the Discussion Paper does not suggest) that there are failures in the way products are described in the documentation or presented to investors. We would be interested to hear any assertions and see any evidence to the contrary as it would be an imperative for us and our members to investigate such shortcomings immediately.

At the moment, however, it seems that if there is any “confusion” or “misunderstanding” among market participants it arises solely out of:

- The “everyday parlance.” To the extent this is perceived as a regulatory problem, it could only be addressed by a sustained educational campaign by the FSA and market participants both in the UK and abroad in which our associations would be happy to participate. It would certainly not change solely as a result of changes to the structure of the listing regime or the official labels of its segments. Despite any such educational campaign, however, we would question the likelihood of market professionals both on the sell-side and buy-side, and even more so people outside the industry such as financial journalists, stopping, on a global scale, using the expressions “listing” or “equity” loosely only because they no longer accorded with European or UK regulatory terminology.
- The “primary” and “secondary” listing labels. These expressions no longer have the meanings which they suggest in plain English. To the extent this is perceived as a regulatory problem, it can easily be remedied by introducing more helpful labels such as those suggested below.

#### Domestic v. overseas issuers

We would like to emphasise the fact, highlighted already in the Discussion Paper, that no listing regime, however restructured and enhanced, can ensure that identical standards will apply to domestic and overseas issuers. By definition, an overseas issuer will be a creation of foreign law operating in a foreign country, subject to (among other things) foreign legal, corporate governance, accounting, audit and enforcement regimes. Despite the imposition of certain listing standards applying to both kinds of issuers equally and despite continuing convergence and recognition of these regimes (namely in the EU but to some degree also globally), there will always remain important “structural” differences.

We believe that these differences are a price worth paying for maintaining the international stature of the UK market. In the absence of a major market failure (which would, in our view, need to involve more than “confusion” or “misunderstanding” in everyday parlance), the proper way of addressing them is not to attempt to harmonise them away. Such an approach would succeed only in driving such issuers away from the UK market. Going back to our previous comment, the proper way to address them is to ensure that the differences are disclosed to investors or otherwise ascertainable by them – and to allow them to draw their own conclusions.

### Competitiveness of the UK market

In line with the FSA's statutory duty to have regard to the competitiveness of the UK market, the Discussion Paper rightly recognises both the importance of this factor in the discussion about any changes to the UK listing regime and one of the reasons behind it: the existence of a number of avenues to raise capital, both in terms of product, market and status or standards of the market – and the resulting flexibility and choice for both issuers and investors.

As we illustrate below, reducing this choice would inevitably reduce the competitiveness of the UK markets. We believe that any steps in that direction should be taken only in response to a major market failure as discussed above.

### Endorsement of other submissions

We have seen the draft of the joint response to the Discussion Paper by the London Investment Banking Association (LIBA) and the Securities Industry and Financial Markets Association (SIFMA) and we are in general agreement with their conclusions.

### **Answers to questions asked in the Discussion Paper**

#### **Q1: Do you consider that the UK super-equivalent Listing standards should be retained?**

Yes, we believe that the UK super-equivalent listing standards should be retained for the primary (equity) listing segment (however it might be renamed), at least as long as there is investor demand for them.

Our views have not changed since the discussion preceding the implementation of the Prospectus Directive. In principle, the existence of super-equivalent listing standards (and, more importantly, the ability to impose new ones) in the primary (equity) listing segment is useful in that it safeguards high standards of investor protection and the reputation and “brand” of this section of the UK market and contributes to its competitiveness.

#### **Q2: Do you consider that the super-equivalent Listing standards should continue to be set by the FSA or should they be determined by the market (exchanges, trade associations, or other independent body)?**

We believe that the super-equivalent listing standards in the primary (equity) listing segment should continue to be set by the FSA.

The value of the super-equivalent listing regime lies in the fact that the standards are set and enforced, in a consistent manner, by a reputable regulator independent from market participants, including trading platforms.

**Q3:** Should [the FSA] allow equity securities to be admitted to the Official List if they are only to be admitted to trading on a MTF operated by an RIE or an investment firm and not on a Regulated Market of an RIE? If so, on what basis?

We do not have an agreed position on this question.

In principle, regulated markets and MTFs should be treated equally to the extent possible given the differences between them so that they can compete with one another as envisaged by MiFID. The listing label would seem to be an important element of this “level playing field.” At the same time, our members have different views on whether this theoretically desirable option would deliver any immediate practical benefits for issuers and investors. We also acknowledge that the applicable regulatory frameworks would have to be analysed in more detail before any final decision could be taken.

We would, however, be concerned if a possible conclusion that only equity securities admitted to a regulated market could be listed was carried over to the debt securities markets. This would adversely impact the PSM market as discussed below.

**Q4:** Which of [Option 1 or Option 2] do you consider to be optimal?

We believe that Option 2 is the optimal solution and would strongly oppose adopting Option 1.

On the assumption that the “confusion” or “misunderstanding” requires a regulatory response, both options could in theory help to clarify the differences between the two listing regimes. We are not convinced, however, that either of them could address the perceived problem of casual use of language in “everyday parlance”, particularly as this includes referring to “listing” as shorthand for admission to a non-listed market such as AIM - which would obviously not be affected by either of the Options.

More importantly, there is a considerable difference between the respective side effects of Option 1 (involving loss of listed status for GDRs and secondary listed shares) and Option 2 (involving re-labelling of the listed segments).

Option 1 might (in no particular order) have an adverse impact on:

- The competitiveness of the UK market as issuers keen to retain or obtain a listed status would most likely list or re-list in other jurisdictions, whether in the EU (where listed status is available based on directive-minimum standards) or elsewhere.
- The issuers who would have to review their capital raising plans, standard documentation of future issues as well as documentation of outstanding issues and go through the process of re-listing outstanding issues in other jurisdictions. All of this would involve considerable efforts and costs.
- Investors who are restricted (by their internal mandates or by laws and regulations) from investing in non-listed securities or disadvantaged when they do so. Such investors would have to review their investment restrictions and review and adjust their holdings. This might potentially lead to sales or transfers of securities resulting in the investors incurring losses (due

to selling pressure or other factors) in the process. Unless fully offset by actions taken by the issuer to mitigate the impact of de-listing in London (namely by a re-listing in another jurisdiction), investors with inflexible mandates might suffer - while investor protection would not seem to be advanced in any way.

- The tax position of the issuers and investors, as recognised in the Discussion Paper.
- Other market segments such as debt listed on the PSM, a topic discussed below.

The probability, scale and costs of these side effects are difficult to specify. The very possibility of them occurring and the resulting risk and uncertainty, however, are good arguments against Option 1 and in favour of Option 2. The differences between the two listing regimes could be clarified just as easily by Option 2 without incurring any of these potentially harmful side effects.

In other words, adopting Option 1 would be a disproportionate response to any perceived (but unproven) problem and would carry the risk of a significant adverse impact on market participants and the UK market generally.

**Q5: What are your views about opening up Secondary Listing for UK incorporated companies?**

This is another question on which we do not have an agreed position.

On the one hand, having a wide range of capital raising avenues and, to the extent possible, a level playing field among them is in principle beneficial to issuers, investors and the UK market generally as discussed above. Some of our members believe, for example, that some UK companies considering an IPO might find the ability to start with a secondary listed status helpful. Introduction of a clear three-tiered regime for equities (primary listing, secondary listing and AIM admission) with, ideally, progressively lighter standards available to both UK and overseas equity issuers could also help reduce the “confusion” or “misunderstanding” among investors.

On the other hand, some other of our members are not convinced that UK companies would make use of this option. They also point out that such companies would presently face various obstacles such as unavailability of the FTSE indexation or scepticism of the UK investor community. Finally, introduction of what is effectively a new listing segment (“directive-minimum” equity listing of UK companies) could have the opposite effect to that outlined above, increasing the complexity of the UK listing regime and the resulting scope for “confusion” or “misunderstanding” among investors.

**Q6: What are your views on how [the principle of “comply or explain” against the UK Combined Code and pre-emption rights] should apply to overseas Primary Listed companies?**

We do not believe that any changes to the corporate governance requirements imposed on overseas primary listed companies are necessary.

As explained above, overseas companies will by definition always be subject to some elements of their domestic regimes and will therefore be disclosing on a different basis to UK companies. Forcing them to adopt UK standards could never be completely successful and would most likely prove detrimental to the competitiveness of the UK market as excessive requirements might drive the companies to other markets, a point well-illustrated by the US in recent years.

It seems to us that the non-articulated concern here is “lower standards”, rather than “confusion” or “misunderstandings”. Understanding the differences and evaluating them is the proper response to such a concern, an exercise which is the shared responsibility of all market participants but particularly investors.

We believe that the current requirements allow overseas issuers to provide adequate disclosure of their compliance with their own regimes and the extent to which such regimes are different from the UK Combined Code. In our experience, prospectuses and other offer documents have not been criticised for any lack of clarity in this regard. There are also the parallel rules requiring adherence to certain corporate governance standards for inclusion into the FTSE index.

Specifically in relation to UK Takeover Code requirements, we note that some non-EEA issuers (to whom the Takeover Directive does not apply) seeking a primary listing have been known to include key provisions from the UK Takeover Code in their articles of association in order to address investor concerns.

Finally, imposing domestic standards on overseas issuers might in some cases (and especially within the EU) cut across the principles of recognition of standards among jurisdictions. By way of example provided in the Discussion Paper, the latest amendments to the EU company law directives require an EU company admitted to an EU regulated market to comply or explain against its domestic corporate governance code. Imposing a requirement to comply or explain against the UK Combined Code instead might be technically allowed under the directives but it would seem to be inconsistent with their spirit and with a clear agreement reached by the Member States on this question.

**Q7: Should [the FSA] require the appointment of a sponsor for a transaction involving the issuance of GDR? If not, are there any other responses to the significant growth in GDRs that are necessary?**

No, we do not believe that any regulatory change targeting GDRs specifically is necessary.

The Discussion Paper (or, indeed, any information available to us at present) does not indicate the existence of any market failure in the GDR market which would require the imposition of a sponsor regime or other additional requirements. “Significant growth” of the market itself does not equate to such failure. We do not understand the request mentioned in the Discussion Paper for an “alignment with primary listing standards” – the main objective reflected in the Discussion Paper seems to be how to distinguish the various listing segments more clearly, not the opposite. We fully agree with the comment in the Discussion Paper that, given the professional nature of the market, imposition of additional requirements (and the resulting increase in the financial and timetabling costs of a GDR issue) could drive the market to other European countries.

More generally, we would be very interested to hear what exactly the concerns are regarding GDRs as a product. In the vast majority of cases, they are a “wrapper” which enables investors to make an emerging market equity investment (i) free from some of the risks associated with investing directly into the relevant share (such as foreign exchange or settlement risk) and (ii) with the added protection of a UK listing and disclosure regime based on the various EU securities directives which (although lighter-touch) is usually of a considerably higher standard than the one which an investor would have to rely on when investing directly into the relevant share. At the same

time, it still remains a “foreign equity” the features and risks of which an investor must seek to understand. On this basis, we consider GDRs a very valuable investment option and do not understand why they should be singled out as requiring special regulatory attention.

**Q8: Do you have views on the labelling options?**

We believe that while re-labelling the two “tiers” of the listing regime could be helpful, we would suggest that other, more neutral labels are used.

We agree that the existing “primary” and “secondary” listing labels no longer reflect the substance of the two regimes and the differences between them. The proposed “Tier 1” and “Tier 2” listing labels do not, however, seem to be suitable alternatives.

This is because the labels should meet four separate requirements:

- They should ideally reflect the substance of the difference between the two regimes, i.e., that one (largely) copies out the pan-European standards while the other includes additional UK ones.
- The label used for the pan-European standard regime should not suggest that the standards are insufficient or otherwise appear unduly pejorative so as not to drive issuers to other jurisdictions. Issuers, particularly non-European ones, are very sensitive about the label their securities will have, particularly when choosing the best listing venue. “Tier 2” fails this test as would other labels for the pan-European standard regime involving expressions such as “minimum”.
- They should be non-technical and easily understandable. By way of an example, legalistic labels such as “directive minimum” and “super-equivalent” should be avoided.
- They should not use terminology associated with other labels used in the market. “Tier 1/Tier 2” fail this test as these expressions are associated with various classes of regulatory capital and the securities issued to raise these classes of capital.

While we recognise there could be many other labels meeting these requirements, the labels which found most support in our discussions were “premium” as a replacement for “primary” and “standard” or “regular” as a replacement for “secondary”.

We would like to emphasise, however, that it is the substance of the listing standards and the product which the market participants should focus on, understand and base their decisions on, rather than solely the label (however it might be renamed).

**Other specific comments: Impact of any changes on debt listings**

The Discussion Paper focuses on emerging market equity (in the wider sense of the term) listings and does not consequently discuss other products, namely debt. This does not mean, however, that debt (including securitised derivatives) listings would be unaffected. By way of example:



- The label eventually chosen to replace secondary listing would apply to debt listings as well. In fact, it would be even more relevant in the case of debt listings because debt issuers (unlike share issuers) would not have the option to move up to the primary listing segment.
- Taking away the listed status of debt securities admitted to an MTF or taking it away from GDRs under Option 1 would affect the PSM market. Although it is primarily for the London Stock Exchange to comment on such an impact in an informed manner, we would be concerned if the viability of the PSM was threatened as a result. We believe it is an important alternative for some debt issuers. It is used by a small but significant proportion of debt issuers, many of whom have moved to or have chosen the PSM to access a viable alternative venue following the implementation of the various EU securities directives, particularly the Prospectus and Transparency Directives. The number of these issuers may further increase in the future if issuers from further emerging market countries start accessing the UK market.

It is for this reason that the debt capital markets community has a greater interest in the Discussion Paper and the outcome of the discussion than the focus of the Discussion Paper might suggest. We would therefore welcome greater clarity on the impact of any changes to the listing regime on debt issues, whether admitted to a regulated market or the PSM, even if it is only to clarify that they will not be affected.