International
Capital
Market
Association Ltd

ICMA

29 June 2007

European Commission
DG Internal Market and Services

Dear Sir/Madam

Call for evidence regarding private placement regimes in the EU

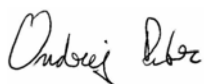
The International Capital Market Association (**ICMA**) is pleased to respond to the Commission's call for evidence regarding private placement regimes in the EU (the **Call for Evidence**).

ICMA is the self-regulatory organisation and trade association representing investment banks and securities firms issuing and trading in the international capital markets worldwide. ICMA's members are located in some 50 countries across the globe, including all the world's main financial centres, and currently number over 400 firms.

Our response is based on extensive consultations with our member firms and their legal counsel.

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

Yours faithfully,



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ANNEX

Summary

The key conclusions of our response may be summarised as follows:

- **Any new private placement regime available to collective investment undertakings should not apply to securities issued by entities from outside the collective investment sector. These are already subject to a comprehensive private placement regime harmonised across the EU. There is no market or regulatory failure requiring an intervention.**

- **When the new private placement regime for collective investment undertakings is proposed, care should be taken to define its scope and to ensure level playing field between securities issued by entities from this sector and those from outside of it.**

Focus of response

We recognise the importance of an efficient pan-European private placement regime and welcome the opportunity to comment on the Call for Evidence.

We understand that the primary purpose of the Call for Evidence is to address difficulties facing certain collective investment undertakings attempting to offer their securities (**fund securities**) across the EU. We are aware of these difficulties but do not comment on them in this response as we believe that the collective investment industry and its representatives are better placed to do so.

On several occasions, however, the Call for Evidence suggests that the contemplated private placement regime might extend to securities issued by other entities (**non-fund securities**). Our response focuses on the implications of the Call for Evidence for private placements of non-fund securities.

For this reason, it does not take the form of answers to the questions asked in the Call for Evidence but attempts to explain those implications to support the argument that a new private placement regime for non-fund securities is not required. We would be happy to expand on the specific points made in the Call for Evidence, in particular if a decision is at any point taken to include non-fund securities within the scope of any new regime.

Private placement of non-fund securities

The nature, features and risk/reward profile of non-fund securities vary enormously and are subject to constant change and development as issuers and their advisers strive to meet investor preferences. Private placements of these securities constitute a substantial segment of the primary securities markets and their importance continues to grow.

These securities are in practice considered "privately placed" when they are offered to investors outside the scope of the Prospectus Directive, i.e., without having been admitted to trading on a regulated market and subject to one or more of the other exemptions provided under the Prospectus Directive (e.g. offer to "qualified investors", offer to less than 100 non-qualified investors per Member State, high denomination or high minimum consideration). Such offers are in practice always made to sophisticated investors, i.e., institutions or high net worth individuals, and never to retail investors.

A significant number of such private placements are not designed by the issuer or its advisors, but by investors themselves on the so called "reverse enquiry" basis. This is a process where a potential investor approaches an issuer (or an investment firm which then approaches an appropriate issuer) with a request that securities with certain specifications are issued. In these cases, the investor buys securities tailor-made to its specifications.

Private placement regime for non-fund securities

The regulatory framework for private placements of non-fund securities is significantly different from that which is in place for fund securities. The considerations which have led to the Call for Evidence do not exist in this area and market practices also differ across the two areas.

There is (or shortly will be) a harmonised EU regime covering both disclosure and conduct of business elements of their private placement. The regime is in principle "maximum harmonisation", i.e., there is no scope for additional Member State requirements which could inhibit cross-border offers and adversely affect the single market.

There is no market or regulatory failure (both in terms of cross-border market integration and investor protection) which would require that this regime be revised.

As a general observation, it would be helpful following the recent wave of new EU securities regulation if market participants and competent authorities were allowed to absorb them and if their impact on market practices could be observed before any further regulatory initiatives are launched.

Disclosure element

The disclosure element of private placement of non-fund securities is harmonised by the Prospectus Directive. The Prospectus Directive specifies the conditions under which the general obligation to publish a prospectus approved by a competent authority does not apply to an offer of securities. If these conditions are satisfied, Member States may not impose any disclosure, approval or other requirements in relation to the offer. Thanks to the existence of these express exemptions, the fact that the understanding of an "offer to the public" still differs among the Member States does not have significant practical relevance.

Absence of a legal requirement for a pre-approved prospectus does not mean that investors are provided with no disclosure but that the nature and extent of the disclosure is tailored to the circumstances of the offer, nature of the securities and requirements of the investors targeted. There is no evidence of investors being provided with insufficient information.

If the privately placed securities are admitted to trading on a regulated market, they are subject to the requirement to publish a prospectus approved by a competent authority. The other disclosure obligations under the Prospectus Directive and other relevant EU legislation, in particular the Transparency and Market Abuse Directives, apply as well in such a scenario. This is a sound policy which we support.

This regime is open to all issuers, whether they are based in the EU or in a third country.

The implementation of the Prospectus Directive has caused – and is still causing – a number of difficulties to the issuers and the investment firms involved in arranging and distributing new issues. We have attempted to summarise them in our response to the

recent CESR`s call for evidence on the supervisory functioning of the Prospectus Directive and Regulation[1] which you might find of interest. The private placement disclosure regime under the Prospectus Directive is, however, widely praised as one of its successes. This regime works well and there is no market or regulatory failure which would require its revision. The various difficulties which have arisen in the area (e.g. inconsistent implementation or interpretation of "qualified investor" among the Member States) should properly be (and indeed is being) addressed by the Commission, CESR and the ESME group as a part of their Level 3 and Level 4 work in relation to the Prospectus Directive.

Conduct of business element

The "client-facing" conduct of business obligations of investment firms distributing the securities are harmonised by MiFID, which is due to start to apply across the EEA by 1 November 2007.

Private placement considerations are in-built into this regime by distinguishing between several kinds of clients (clients, professional clients and eligible counterparties) and disapplying (in case of eligible counterparties) or modifying (in case of professional clients) some, but not all, conduct of business obligations. We believe that MiFID has carefully struck proper balance between the (justified) investor protection considerations and the fact that sophisticated investors are better able to protect their interests than retail ones.

MiFID has not yet been implemented in all Member States and the full impact of its rules cannot therefore be observed. The ability of Member States to impose additional requirements which could have a detrimental effect on private placements will, however, be severely limited. Over time, implementation of MiFID is also expected to lead to removal of a number of other obstacles to efficient private placements which may currently be in place in the Member States, such as restrictions on the types of investors a product may be offered to or various filing or approval requirements. It will be the responsibility of the Commission and CESR to ensure that these objectives are actually achieved.

Generally speaking, however, pre-MiFID, non-harmonised conduct of business rules have not given rise to any substantial difficulties when conducting private placements and we do not expect the MiFID rules to have a different impact.

In any case, the MiFID rules should be allowed to bed down for several years before any decision to revise them could be taken.

Alignment of disclosure and conduct of business elements

The exemptions available for private placements under the Prospectus Directive and those under MiFID are not identical. While some degree of alignment suggested below might be helpful, full alignment does not appear feasible or necessary. The two kinds of exemptions have different objectives and apply in different circumstances.

The only area where the two kinds of exemptions overlap concerns the investor categories. It would in principle be helpful if the definition of investors subject to the exemptions from the prospectus regime and those subject to a simplified conduct of business regime was the same. This is a difficult topic, currently considered in detail by the ESME group in course of its review of the Prospectus Directive. The aligned category

[1] http://www.icmagroup.org/market_practice/Advocacy/eu_prospectus_directive/eu_prospectus_directive.Par.0033.ParDownLoadFile.tmp/ICMA%20Response%20to%20CESR%20Call%20for%20Evidence%20on%20the%20Functioning%20of%20the%20Prospectus%20Directive.pdf

could not be based on the concept of an eligible counterparty because it would severely restrict the exemptions from the prospectus regime. A number of investors in the private placement market are unlikely to be an eligible counterparty. The choice would appear to be between a professional client and a qualified investor. It would certainly not be helpful to devise a fourth category specifically for this purpose. This, however, is a topic which needs to be considered in the context of the overall review of the Prospectus Directive and does not require a separate legislative initiative.

Relationship between private placement regimes for fund and non-fund securities

We do not comment on the various aspects of the contemplated private placement regime for fund securities but would like to highlight two important considerations which should be kept in mind when it is actually proposed.

First, care should be taken when defining its scope. This is to ensure that non-fund securities do not inadvertently fall into its scope. We believe that the current carve-out from the Prospectus Directive of "*units issued by collective investment undertakings other than the closed-end type*" is sufficiently clear and well-established and could form the basis of any new regime.

Secondly, broadly the same private placement regime should in principle apply to both fund and non-fund securities to ensure level playing field among them. This is particularly important as a product with certain risk/reward profile can often be sold as both a fund and non-fund security. As long as there is a separate regulation of collective investment undertakings in the EU, there are bound to be regulatory differences, but these should not be unnecessarily exacerbated by introducing a new layer of regulation. We therefore believe that any new private placement regime for fund securities should not place the collective investment industry at an unfair advantage vis-à-vis other issuers.