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(Submitted by e-mail to [cp11\\_28@fsa.gov.uk](mailto:cp11_28@fsa.gov.uk) and online using the form on the FSA's website at [www.fsa.gov.uk/Pages/Library/Policy/CP/2011/cp11\\_28\\_response.shtml](http://www.fsa.gov.uk/Pages/Library/Policy/CP/2011/cp11_28_response.shtml))

13 March 2012

Dear Sirs,

**Financial Services Authority and HM Treasury joint Consultation Paper CP11/28  
UK implementation of Amending Directive 2010/73/EU  
Simplifying the EU Prospectus and Transparency Directives**

The International Capital Market Association (ICMA) is responding to the above.

ICMA is a self regulatory organisation and an influential voice for the global capital market. It represents a broad range of capital market interests including global investment banks and smaller regional banks, as well as asset managers, exchanges, central banks, law firms and other professional advisers. ICMA's market conventions and standards have been the pillars of the international debt market for over 40 years. See: [www.icmagroup.org](http://www.icmagroup.org).

ICMA is responding in relation to its primary market constituency that lead-manages syndicated debt securities issues throughout Europe. This constituency deliberates principally through ICMA's Primary Market Practices Sub-committee<sup>1</sup>, which gathers the heads and senior members of the syndicate desks of 27 ICMA member banks, and ICMA's Legal and Documentation Sub-committee<sup>2</sup>, which gathers the heads and senior members of the legal transaction management teams of 19 ICMA member banks, in each case active in lead-managing syndicated debt securities issues in Europe. ICMA has also sought feedback from its structured product constituency.

We set out our response in the annexe to this letter and would be pleased to discuss it with you at your convenience.

Yours faithfully,

A handwritten signature in black ink, appearing to read "R. Ewing", with a large, sweeping flourish at the end.

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<sup>1</sup> <http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Primary-Market-Practices-Sub-committee.aspx>.

<sup>2</sup> <http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Legal-and-Documentation-Sub-committee.aspx>.

<b>Annex Response</b>
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### Qualified investor opt-out

The amended PD provides, in 2.1(e) that “qualified investors” means:

- *“persons or entities that are described in points (1) to (4) of Section I of Annex II to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments [i.e. investors who are professionals across the board], and*
- *persons or entities who are, on request, treated as professional clients in accordance with Annex II to Directive 2004/39/EC, or recognised as eligible counterparties in accordance with Article 24 of Directive 2004/39/EC unless they have requested that they be treated as non-professional clients.”*

The UK consultation proposal is that “Qualified investor” means:

- “(a) a person or entity described in points (1) to (4) of Section I of Annex II to the markets in financial instruments directive, other than a person or entity that has requested to be treated as a non-professional client in accordance with that directive;*
- (b) a person or entity who is, at their request, treated as a professional client in accordance with Section II of Annex II to that directive;*
- (c) a person or entity who is recognised as an eligible counterparty in accordance with Article 24 of that directive;*
- (d) a person or entity whom an investment firm is authorised to continue to treat as a professional client in accordance with Article 71(6) of that directive.”*

The consultation proposal will align the PD definition of “qualified investor” with the definition of “professional investor” under MiFID. This is a logical and (for the market) a welcome change. However, the consultation proposal seems to go too far, in that the exception should only apply to the second category (bullet breakdown / underlining above added for emphasis). The UK consultation proposal would effectively incorporate into the PD the MiFID provisions that allow professional investors to opt out of professional status. The “opt in/out” concept under MiFID works well in the context of advice and sales. However, it does not work in the context of public offers under the PD.

Under MiFID, the opt out/in right can be exercised by the customer either on a general basis, or in relation to specific products generally, or on a case by case basis (that is, in relation to a specific offer of bonds, but not others). In addition, MiFID allows customers to make different elections in respect of the same products or services when dealing with different intermediaries.

This flexibility of approach does not work when applied to the question of whether or not a public offer is being made under the prospectus directive. For example, if there are ten banks acting as arrangers or managers of the new issue, a particular investor may have relationships with all of them (indeed, most institutional investors in eurobonds do). The investor could have opted out of professional status with some of those managers, but not others. When the issuer’s offer is made, therefore, it will be unclear whether it is within the qualified investor exemption from the public offer prospectus requirement or not.

It will be even more confusing if an investor that has not opted out of professional status at the outset of the transaction subsequently decides to do so. It will have received the initial communication of information that is sufficient to enable it to decide to invest; but will no longer be able to receive the further communications in the offer. There seems little point in a protective regime that only protects against an event (the initial communication of information) that has already occurred.

Furthermore, investors who are included in the list in MiFID Annex II will typically *want* to receive the offer (that is, in terms of the PD, the communication containing sufficient information to enable them to decide to invest). After all, they can only decide on what level of protection they want from their intermediary under MiFID if they can consider what is being offered. It is therefore unhelpful to such investors to be prevented from receiving the initial offer.

Lastly, there is one of the underlying concepts to the PD and set out in its Recital 16 - namely that the level of expertise of the investor should be taken into account in determining whether or not a prospectus is required. The institutions listed in MiFID Annex II are all capable of taking their own decisions when receiving offers of securities. Once the offer is communicated, they can either negotiate for themselves, or (if they so wish) avail themselves of greater protection under MiFID by opting out of professional status. It makes no sense to take the risk that they will simply never receive the initial offer, because they have different MiFID status with different members of the syndicate of managers or because the managers do not want to take the risk that, during the course of the offer, they will opt out. It would obviously create considerable uncertainty in the primary securities markets if an offer were made without a prospectus, on the basis that all professional investors had opted in and then, half way through the offer, some of them opted out. The issuer would be left with the option either of excluding those investors from the offer or of producing a prospectus. No one would benefit from either course.