International
Capital
Market
Association

ICMA

European Commission
DG Internal Market and Services Unit F2
B-1049 Brussels
Belgium

(by e-mail to markt-f2-transparency@ec.europa.eu)

23 August 2010

Dear Sirs,

Consultation on the modernisation of Directive 2004/109/EC ("TOD") on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

The International Capital Market Association, Register of Interest Representatives identification number 0223480577-59, ("ICMA") is pleased to respond to the European Commission's consultation on the review of TOD.

The International Capital Market Association is a unique 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.

ICMA is responding in relation to its primary market constituency that lead-manages syndicated bond issues throughout Europe. This constituency deliberates principally through ICMA's Primary Market Practices Sub-committee[1], which gathers the heads and senior members of the syndicate desks of 21 ICMA member banks, and ICMA's Legal and Documentation Sub-committee[2], 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 bond issues in Europe.

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

Yours faithfully,

R. E.

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[1] http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Primary-Market-Practices-Sub-committee.aspx.
[2] http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Legal-and-Documentation-Sub-committee.aspx.

Annex

ICMA expresses no specific response to **questions 1 to 23**. ICMA wishes to raise three points for the Commission's consideration in response to **question 24** ("*Do you have any other comments regarding the Transparency Directive?*").

1. TOD Article 8.1(b): Increase of the €50,000 threshold

The current review (2009/0132/COD) of the Prospectus Directive (Directive 2003/71/EC, the "PD") seems likely to amend TOD Article 8 as below (according to the Council General Secretariat's 28 June report to CoRePer[3]):

1. Articles 4, 5 and 6 shall not apply to the following issuers:

(a) a State, a regional or local authority of a State, a public international body of which at least one Member State is a member, the ECB, and Member States' national central banks whether or not they issue shares or other securities; and

(b) an issuer exclusively of debt securities admitted to trading on a regulated market, the denomination per unit of which is at least EUR ~~50000~~ <u>100 000</u> or, in the case of debt securities denominated in a currency other than Euro, the value of such denomination per unit is, at the date of the issue, equivalent to at least EUR ~~50000~~ <u>100 000</u>.

[...]

<u>4. By way of derogation from paragraph (1)(b), Articles 4, 5 and 6 shall not apply to issuers of exclusively debt securities the denomination per unit of which is at least EUR 50 000 or, in the case of debt securities denominated in a currency other than euro, the value of such denomination per unit is, at the date of the issue, equivalent to at least EUR 50 000, which have already been admitted to trading on a regulated market in the European Union before [*date of entry into force of the amending Directive (anticipated to be in 2010Q4)*], for as long as such debt securities are outstanding.</u>

The PD review has contemplated a transitional period (including regarding the increase from €50,000 to €100,000) in providing for transposition by Member States within eighteen months following the amending Directive's entry into force (anticipated to be around 2012Q2/3). The changes to the PD will not therefore affect new issuance at all until mid-2012 (assuming national transposition timetables allowing for domestic legislation), leaving market participants sufficient time to prepare for the changes.

However, the application of the TOD changes is not synchronised with the changes to the PD: €50,000-denominated bonds issued after end-2010 entry into force, but before likely transposition in mid-2012, will benefit <u>until maturity</u> from the relevant PD exemptions but <u>only temporarily</u> (until mid-2012 transposition) from the parallel and equally important TOD exemptions (particularly for non-EU issuers facing a potential obligation to restate their financials into IFRS). For such issuers, the PD review amendments to the TOD will, in terms of issuance decisions, in fact take effect pretty much immediately (20 days) following publication of the amending Directive in the Official Journal.

Fungible issuance however may already, and so effectively retrospectively, be affected. For example, a non-EU corporate that does not wish to restate its financials into IFRS but wants the ability to 'tap' before mid-2012 bonds it issued, say, today (i.e. to issue further bonds that will be identical with the initial bonds except as to the issue date and price and so be fungible with them) will have to denominate the initial bonds in amounts of €100,000 rather than €50,000 in order to be able to benefit from the relevant TOD exemptions (including as to restatement into IFRS).

In order to address the discrepancy arising in relation to fungible issues, we would suggest the above new Paragraph 4 be amended by as follows:

4. By way of derogation from paragraph (1)(b), Articles 4, 5 and 6 shall not apply<u>, for as long as the debt securities concerned are outstanding,</u> to issuers of exclusively debt securities<u>:</u>

<u>(a)</u> the denomination per unit of which is at least EUR 50 000 or, in the case of debt securities denominated in a currency other than euro, the value of such denomination per unit is, at the date of the issue, equivalent to at least EUR 50 000<u>; and</u>

<u>(b)</u> which have ~~already~~ been <u>first</u> admitted to trading on a regulated market in the European Union before [*date of entry into force of the amending Directive*] <u>or for which the original prospectus was approved before that date within the meaning of Directive 2003/71/EC, provided in each case that no further issues of such debt securities</u>

[3] http://register.consilium.europa.eu/pdf/en/10/st10/st10974.en10.pdf.

are made on or after [*first anniversary of the date of entry into force of the amending Directive*]~~, for as long as such debt securities are outstanding~~.

2. Article 8.1: Issuers guaranteed by non-EEA states or non-EEA public sector entities

Specified periodic financial reporting requirements of TOD clearly do not apply to states and their authorities (TOD Art 8.1(a)) as well as (at the option of the home Member State) issuers of debt securities guaranteed by a Member State (TOD Article 8.3). The TOD does not, however, deal with scenarios where issuers issue debt securities on behalf of a non-EEA state and/or are guaranteed by a non-EEA public entity. A number of such entities have their debt securities admitted to EEA regulated markets. A case in point is certain issuers guaranteed by the Canadian government, provincial governments or municipalities that are not required by Canadian law to produce semi-annual reports (nor in most cases to address all the items required by the TOD in their management reports) and would be affected by the application of the TOD regime.

Such issuers benefit from a simplified prospectus regime (namely pursuant to Annex XVII of the PD's implementing Regulation EC/809/2004 for Public International Bodies and for debt securities guaranteed by a member state of the OECD[4]). This special treatment is based on the recognition of the fact that the credit rating and credit-worthiness of such issuers in general is entirely dependent on the state or other relevant public sector entity in question. To ensure consistency of reporting requirements, this simplified treatment should in principle be carried over to the TOD regime and therefore issuers guaranteed by OECD member states or their regional or local authorities should be exempt from TOD's specific periodic financial reporting.

3. TOD implementing Directive Article 12.3 – dissemination in full unedited text

Article 12.3 of the TOD implementing Directive (Directive 2007-14-EC) provides that regulated information shall be communicated to the media in "unedited full text", but that the requirement is deemed fulfilled, with respect to periodic financial reporting, if the announcement communicated to the media indicates on which website, in addition to the AOM, the relevant documents are available.

Official announcements and financials particularly, invariably seem to be initially produced in PDF form (and sometimes also HTML). Producing a 'full unedited text' involves another form of document in addition to PDF/HTML, which requires lengthy conversion and proofreading processes and generally seems to result in a less user friendly format (to the extent that the PDF/HTML is still included to ensure investor access to a more readable document).

There appears to be a lack of consistency in the approach of national regulators as some interpret "full unedited text" as permitting PDF links whilst others do not. In today's markets PDF is universally accessible (to both investors and the distributing media), so restrictions on its use would seem redundant. Permitting issuers to disseminate "regulated information" in PDF format would greatly reduce unnecessary administrative burdens on issuers. Article 12.3 should therefore be considered for deletion or at least for further interpretation by CESR/ESMA.

[4] ICMA proposed extending Annex XVII of the PD implementing Regulation to issuers guaranteed by regional and local authorities of OECD member states in its 10 March 2009 (accidentally dated "2008") response to the Commission's consultation on the review of the Prospectus Directive (http://www.icmagroup.org/ICMAGroup/files/54/54d09f97-1137-402b-8cc4-c554e6229908.pdf).