International
Capital
Market
Association

ICMA

February 2, 2011

European Commission
Directorate General Internal Market and Services
Financial Institutions
B-1049 Brussels

By email: Markt-consultations-mifid@ec.europa.eu

ICMA Commission's Interest Representative Register Number: 0223480577-59

Re: ICMA response to Public Consultation – Review of the Markets in Financial Instruments Directive (MiFID)

Dear Sirs,

1. ICMA is a pan-European self regulatory organisation and an influential voice for the global capital market. It has a membership of 400 firms and represents a broad range of capital market interests including global investment banks and smaller regional banks, as well as asset managers, exchanges and other venues, 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.

2. We thank you for providing us with an opportunity to comment on the proposals set out in the public consultation on the Review of MiFID ("paper"). We are limiting our response to:

   - Question 1;
   - Questions 2 – 3 and 8;
   - Questions 37 – 41 and 59;
   - Questions 119 – 123; and
   - Questions 86 and 124.

3. Our response has been informed by the considerable input received from our Members across Europe who represent a very wide and diverse range of market users, including Members active in the primary markets, secondary markets, buy-side, sell-side, repo and short-term debt markets.

Executive Summary

4. *General comments* - the MiFID review should build on the improvements achieved to date rather than seeking to completely re-engineer the Directive. The review should

not attempt to make MiFID future-proof. The Commission should take the time to adequately consider the full implications of the proposals set out in the paper rather than trying to rush the consultation process, which could result in costly mistakes arising from unintended consequences.

5. *Admission to trading* – the definition should be broad enough to include, for example, corporate bonds which, while admitted to trading, are nevertheless predominantly traded OTC.

6. *Scope of OTF* – we strongly urge that money market instruments should not be brought more fully within the scope of MiFID. To do so would represent a vast expansion of the current MiFID position which could result in tremendous costs with little obvious benefit. Some firms may pull out of these markets entirely or business could relocate to other jurisdictions around the world.

7. *Forms of trading to be included within the OTF definition* – we advocate that the definition should accommodate bilateral trading, either electronically or via voice with electronic confirmation. We disagree with the proposal that all OTFs should convert into a MTF after reaching a specified volume threshold. We urge the Commission to allow market participants the freedom to choose whether to execute trades on a trading venue (RM, MTF, and OTF) or OTC. We question the idea that trading on a trading venue is less risky.

8. *Non-equity markets – scope of transparency* – the idea that bonds with a prospectus or which are admitted to trading are the more liquid/frequently traded market segment is not sustainable. As an alternative, we suggest limiting the scope of the framework to investment grade bonds and/or bond issues over a certain size.

9. *Non-equity markets pre-trade transparency* – we agree with CESR's recommendation that a mandatory pre-trade transparency regime is unlikely to deliver benefits and that mandatory pre-trade transparency requirements should not be introduced in the OTC space. We also do not agree with the proposal that RMs, MTFs and OTFs should provide for real-time and continuous updating of available and actionable trading interest. This would significantly interfere with the way the market currently works. The proposal that pre-trade quotes of investment firms should reflect current market value, be available to the public and be binding below a specific trade size is also highly problematic and would serve only to increase trading costs and damage liquidity.

10. *Non-equity markets post-trade transparency* – we advocate that the framework should be based on high/low/median prices published at end of day. There should also be generous delays to accommodate the unique nature of the bond market (as opposed to imposing the same delays as exist in the equities market). We urge that the framework should be developed based on data to be collected by ESMA, who can then properly calibrate a liquidity filter. Once this has been done, we would strongly recommend a phased implementation. The consequences of proceeding on the proposed basis and applying the regime to all bonds from the start and only rolling back the regime if it appears to be causing damage does not seem prudent. There is a serious risk that ill considered measures could drive the market to other jurisdictions, such as those in Asia.

11. *Title transfer collateral arrangements* - we do not support a prohibition of title transfer collateral arrangements involving retail clients such a general restriction, but accept that there should be measures in place to ensure that such activity is

adequately managed and that retail clients are fully aware of the risks.

12. *Direct sales and underwriting* – These questions have been addressed from the perspective of the institutional Eurobond markets (where borrowers seek funding from professional investors). Whilst, of itself, an offer of financial instruments is appropriately not an investment 'service' (and so is subject to regulation outside MiFID), it may well involve distinct MiFID services. Conceptually, these (i) are rendered to one type of client only (for example reception and transmission of orders is rendered to an investor client and not to an issuer client) but (ii) may be provided by a single entity directly or by distinct entities; MiFID obligations are to be complied with in either case (and in the earlier case firms will have acted *inter alia* on the relevant organisational and conflict of interest considerations, likely including separate management of distinct internal functions). Underwriting and placing are MiFID services rendered to issuers only. Full issuer discretion in this respect (unfettered by inflexible detailed rules) is essential to promoting a stable funding environment needed for European economic recovery. Intermediaries have developed (not least further to existing regulation) sophisticated procedures to manage underwriting and placing through constantly changing market dynamics – ICMA would be happy to discuss these in further detail (and substantial background has been set out in ICMA's IPMA Handbook Explanatory Note XIII, including on the various specific issues raised by the Commission). Whilst it is unclear what implementing legislation the Commission envisages may be needed, ICMA would be happy to assist in the technical development of any detailed legislative provisions the Commission indicates to be necessary.

General comments

13. We agree with your assessment that MiFID has made some improvements in the financial services landscape across Europe. These have tended to benefit all market participants and the economy as a whole, as they relate to increasing competition and lower trading costs. We also agree that there is a need to review the Directive. We agree that the financial crisis has created a need to carry out structural reforms that are aimed at establishing a safer, sounder, more transparency and more responsible financial system. However, the MiFID review should seek to build on the improvements achieved to date rather than trying to re-engineer the Directive in a way that dilutes or negates the effect of what has been achieved so far.

14. One of the rationales for the MiFID Review is: "a number of unforeseen developments that could affect the smooth and efficient functioning of EU equity markets need to be addressed." This implies a desire to future-proof the directive, which is a theme that pervades the paper. We would strongly warn against trying to make MiFID future-proof if doing so results in the Directive becoming unworkable in practice or imposing such significant regulatory burdens that the barriers to entry become prohibitive for all but the largest firms/participants. This would be counter-productive to the gains that have already been made in improving competition in financial services across Europe. Two fundamental drivers for any regulatory intervention should be (1) that the costs of the regulatory proposal should not outweigh the benefits being sought; and (2) that the regulatory

proposal should be proportionate to the market failure or problem for which action is being considered. We would strongly urge the Commission to keep these in mind.[1]

15. Many of the proposals set out in the paper are not accompanied by any explanation as to the underlying regulatory objective. This has made responding to the paper very difficult since it is hard to provide feedback on proposals when one is unclear as to what the underlying objective or market failure is that the proposal is seeking to address. We also note the comments of Ms. Sharon Bowles, MEP, at the 20 September public hearing on the MiFID review where she appealed for a carefully measured approach that was based on clearly articulated objectives which addressed clear market and regulatory failures and which set out who would benefit from greater transparency and how the information would be used.

16. Given the complexity of some of the proposals set out in the paper it is vital that the details that will underpin these proposals are properly considered. It is important that the Commission take the time to adequately consider the full implications of these proposals rather than rushing the consultation process which raises the possibility of costly mistakes arising from unintended consequences.

17. Given the significant number of regulatory initiatives currently under consideration, it is imperative that there be close co-ordination and co-operation between all regulatory bodies and also within those same bodies. We are also concerned that little or no attention is being given to assessing the ***cumulative*** regulatory impact of all these regulations that will come into effect at roughly the same time. The cumulative costs to the whole of the financial services industry are potentially significant and could be ill-timed given the current economic climate.

Question 1 – Definition of admission to trading

18. It is not clear what purpose this definition would serve and no explanation is provided in the paper. Is the intention to eliminate the distinction between admission to trading on a regulated market (RM) and admission to trading on an MTF? This would clearly have consequences for other European Directives such as the Transparency Directive, Market Abuse Directive and others. To impose the same level of regulation on issuers admitted to MTFs as apply to issuers admitted to RMs would be prohibitively costly for such issuers and would force many from the market. We urge the Commission to re-think this proposal.

19. The definition is drafted in terms of allowing a financial instrument to be **traded** on the systems of a RM, MTF or OTF. This conflates the concepts of “admission to trading” and “traded on”, which could be problematic. In the case of corporate bonds, where a significant proportion of all bonds are admitted to RMs, would they fall outside the definition, because they are not usually traded on such markets and instead trade OTC? This lack of clarity needs to be addressed to make clear that even though such instruments predominantly trade OTC, the fact that they have been admitted to trading on a RM, MTF or OTF means that they would be caught within the definition.

[1] We emphasise the Commission’s commitment, set out in its White Paper on Financial Services 2005 – 2010, to “deploy the most open, transparent, evidence-based policy-making based on a dual commitment to open consultation and impact assessments”. (p. 4)

20. MiFID currently pre-supposes an application by the issuer to be admitted to trading on a RM or MTF. The paper is silent on (a) whether an issuer could be admitted to an OTF unilaterally, i.e. without the issuer submitting an application to be so admitted; and (b) whether an issuer could be admitted to an OTF without having to satisfy transparent rules and criteria. We urge you to ensure that an issuer be admitted to a RM, MTF or OTF only upon receipt of a duly authorised application for admission. We also urge that an issuer should be admitted to an OTF only after satisfying transparent rules and criteria to be so admitted. However, the rules applicable to issuers admitted to trading on an OTF should be proportionate in the light of the function they perform, in which context the requirements applicable to OTFs should be less onerous that those which apply to RMs and MTF.

Questions 2 and 3 – Scope of OTF

21. The paper defines an OTF as a facility or system that brings together buying and selling interests or orders relating to financial instruments. It is important to note that currently much of MiFID applies to the trading of transferable securities, which excludes money market instruments. We think that money market instruments such as Commercial Paper and Repo should continue not to be brought fully within the scope of MiFID. To do otherwise would represent a vast expansion of the current MiFID position especially as the paper is silent as to what additional aspects of MiFID would apply to such markets. It would be wrong to bring into the full scope of MiFID money market instruments for a number of reasons.

    a) The money markets are wholesale markets for low-risk, highly liquid, short-term debt instruments. The money markets differ from other financial markets in that they are typically wholesale inter-bank markets where large transactions take place. The euro area money market plays a crucial role in transmitting the monetary policy decisions of the ECB. Accordingly, the money markets are important in enabling large sums of money to be shifted between banks to ensure the availability and efficient use of liquidity where it is needed and as a means of transmission for monetary policy purposes. To bring money market instruments within the full scope of MiFID would end the distinction between money market instruments and transferable securities that is present in other EU Directives. It could also unnecessarily interfere with the sound functioning of these vital markets.

    b) The absolute volume of transactions that take place in the money markets is very high. The latest ICMA European Repo Survey[2] indicated that the total value of repo contracts outstanding on the books of the 57 institutions who participated in the survey was EUR 6,979 billion. The survey also shows that approximately 17 – 20 % of the repo market is made up of repo trades that have a maturity of 1 day while approximately 15 – 19% of the market is made up of trades that have a maturity of between 2 days and 1 week. For the Euro Commercial Paper market, outstandings (at year end 2010) amounted to $494 billion. The weighted average tenor of outstanding trades was 61 days (with 54% under one month and 21% between 1 – 3 months). The average trade size is approximately $70million. It is important to note that these figures assess the outstanding value of contracts at a certain date. Accordingly, turnover (i.e. transaction flow) will be a multiple of the outstandings. For example, for overnight transactions the ICMA Repo Survey shows the outstanding value of one day's worth of contracts.

[2] See: https://www.icmagroup.org/ICMAGroup/files/c9/c94fc032-3dd1-4be6-b0bd-45e7bb6291fd.pdf

Turnover (i.e. transaction flow over a period) will be a multiple of market size measured in terms of outstanding value at the end of the period, as many transactions executed between surveys of outstanding value will mature during the interval. For example, in the case of one-day transactions, the semi-annual ICMA Survey will include the outstanding value of only one day's contracts. However, if the daily volume of one-day transactions is fairly constant, the turnover since the previous survey could be at least 125 times larger (depending on the number of business days). If transaction reporting requirements were to apply to these markets, the volume of transaction reporting would expand exponentially beyond current levels. It is unlikely that regulators would have the resources to scrutinise properly such a volume of transaction reports. Similarly, regulators and firms would not have the resources to be able to assess properly the pre- and post-trade transaction reports should such requirements apply to these markets. Tremendous costs would be involved, much of which would presumably end up being passed on.

c) If the OTF proposals were to apply to firms that bring together buying and selling interests or orders relating to money market instruments (by way of voice and/or hybrid voice/electronic execution), we suspect that some firms would pull out of these markets entirely as the profitability of this business is already marginal and the added costs of becoming an OTF could make the business uneconomic. Alternatively, given the international nature of money markets, business could relocate to other jurisdictions around the world, Asia in particular.[3] This would adversely affect the EU's global competitiveness. Also of concern is the proposal that an OTF would convert to a MTF after reaching an asset-specific threshold. Given the size of the money markets it is conceivable that, from the outset, there would be cases where the asset-specific threshold is already exceeded such that a facility would be classified automatically as a MTF. This would serve as a serious barrier to entry. This would, in turn, also impact on the competitiveness of the marketplace (a smaller number of firms in operation). A less competitive marketplace would negatively impact on users of the market.

22. ***Forms of trading to be included within the definition of OTF*** - We repeat our earlier comment about the difficulties of trying to future-proof the regulation and how trying to do so is likely to dramatically increase the cost of regulation. Given the lack of detail in the paper regarding (1) the definition of an OTF; (2) the objectives the OTF proposal is seeking to achieve; and (3) the consequent implications, it is difficult to provide a detailed assessment of the concept. A large proportion of trading in wholesale fixed income markets is conducted OTC. Firms employ a range of technical systems to execute orders, some of which have the characteristics of an organised facility, while others simply use electronic or voice systems to make the process of OTC dealing more efficient. The introduction of an OTF category to fixed income markets needs to be approached carefully to take account of the particular characteristics of the market, and to avoid disrupting the range of arrangements that have evolved in the market to serve investors' needs. There needs to be flexibility to enable trading on an OTF where appropriate, but also for trades to be conducted OTC. The definition of OTFs in this market also needs to be carefully considered in conjunction with the associated obligations, in particular those relating to pre- and post-

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[3] In this regard, the following articles may be of interest. While the regulations that are at the heart of these articles are not MiFID specific, they nevertheless show the extent to which the relocation of business to Asia is being actively considered by firms in Europe.
http://www.cnbc.com/id/40273604/European_Bank_Revolt_Over_Regulation_Grows
http://www.guardian.co.uk/business/2010/nov/05/hsbc-concern-eu-bonus-rules

trade transparency (on which see our separate comments on section 3 of the Consultation Paper), admission to trading, and transaction reporting. It is important not to undermine the potential benefits of OTFs by imposing inappropriate requirements on them that would work against investors' interests. We would urge caution if the intention is to develop a single set of harmonised requirements for all RMs, MTFs and OTFs, since it is vital that the proposed framework should recognise the fundamental differences between such venues in a way that takes account of the different needs of a wide variety of market participants. This said, there is no single execution model that fits 100% of the market 100% of the time. We advocate that the factors that will need to be taken into account are –

- the impact of capital charges on choice of trading venue;
- the need to ensure that pre- and post-trade transparency requirements attaching to OTF trading do not disrupt liquidity provision;
- the need to maintain flexibility in product development - trading is typically particularly ad hoc in nature when a product is being developed;
- the need for continued availability of capacity in the market to execute trades bilaterally, either electronically or via voice with electronic confirmation;
- the need for firms to be able to adjust dynamically to different market circumstances;
- the need to accommodate uncertainty as to when products become 'clearing eligible', changing market circumstances, and variations in liquidity, availability of prices, frequency of trading;
- the advantages of trade and transaction reporting through authorised venues; and
- the need to accommodate 24-hour trading in fixed income markets and to ensure that the European regime, including the OTF requirements, remains competitive in a global context.

23. If the OTF category accommodated bilateral trading, then we would be very supportive of the requirement. The trading model could adjust dynamically to different levels of market circumstances, as opposed to changing the OTF execution requirement to adjust for market conditions. An OTF model where trades could also be made bilaterally, either fully electronically or via a hybrid voice model, would ensure that an OTF could cope with lower levels of liquidity, either temporarily or permanently. We would see a great benefit in the fact that all trade transparency and transaction reporting requirements would be delivered by the authorised trading venues. This would greatly facilitate the implementation of the transparency and transaction reporting requirements in an efficient and speedy manner.

24. ***Conversion of an OTF into a MTF*** – We are concerned by the proposal that all OTFs must convert into a MTF after reaching a specified volume threshold. This could serve to create perverse incentives – businesses strive to be successful and should not be penalised for their success. The use of a simple volume threshold could be arbitrary if no account is taken of the liquidity and nature of individual markets.

Question 8

25. The paper states: "The Commission services consider that ... the MiFID could continue to be neutral as to where a trade is executed."[4] Significantly, the Commission services do not consider that the MiFID ***should*** be neutral on this point. We strongly urge the Commission

[4] Page 29.

to allow market participants the freedom to choose whether to execute trades on a trading venue, such as a RM, MTF or OTF, or OTC. Mandatory or "incentivised" use of trading venues in situations where products are not suited to such will negatively affect market participants and markets in general – the effects could include a reduction in competition, a lack of innovation to meet end-user needs, liquidity drying up during periods of market stress, market makers taking less risk and acting more on an order basis, a reduction in efficiency and increase in costs as end users have to execute a larger number of smaller trades to avoid adverse price movements. Furthermore, it is difficult to see how mandated use of trading venues would reduce risk. This idea implies that trading on trading venues is less risky. However, the difficult conditions that have occurred in equity markets when the main trading venue has unexpectedly shut down (e.g. LSE outage of 26 November, 2009 and NYSE Euronext outage of 13 October, 2010) clearly illustrate the operational risks that arise when trading is mandated onto a very small number of trading venues. For this reason we urge that this proposal be re-considered.

Section 3 – Pre- and post-trade transparency

26. The paper draws a link between the absence of pre- and post-trade price transparency and a significantly lower number of transactions resulting in reduced liquidity. It also implies that liquidity will increase if there is greater transparency. However, it is important to stress that the link between the publication of price information and liquidity is valid for only some markets. This link exists for equity markets where there are many buyers and sellers and the markets are order-driven. This link does not work for dealer markets or for those markets where there are very few buyers and sellers. In these markets, no matter how much pre-and post-trade transparency exists, liquidity will not be increased. This is particularly the case in cash bond markets where the vast majority of investors buy bonds and hold them to maturity – this significantly reduces the need for an actively traded secondary market. Thus, no matter how much transparency exists in the market, liquidity in the market will not increase as a result. Instead, the increased transparency would serve merely to inhibit dealers from committing capital (and thus providing liquidity) and the result would be a ***reduction*** of liquidity in the market. This is because, when dealers' purchases from customers are disclosed to the market in real-time, the dealers lose the ability to bargain effectively when trying to sell those positions they have taken on. Dealers then face potentially large losses if market prices move against their positions. A reduction in liquidity cannot be what the Commission is seeking to achieve. We note that in Europe there are a few jurisdictions with active retail participation, such as Italy. For these jurisdictions it is appropriate that pre- and post-trade information relevant to retail customers should be readily accessible. In this context it is important to take account of existing arrangements that provide transparent information to retail clients about prices and if necessary make targeted rules about their ability to access this information. However, it would be wrong to systematically impose retail solutions on the wholesale segments of the market.

Questions 37 – 41 and 59

Section 3.4 – Non-equity markets

27. The paper notes that: "Existing price and market data reporting tools for non-equities are not always considered sufficient." We would like to remind the Commission that pre-and post-trade transparency already exists for corporate and sovereign bond markets. There is already a considerable amount of pre-trade transparency in the form of dealer pricing runs

(provided by organisations such as Bloomberg, Markit, ThomsonReuters, CMA/QuoteVision/DataVision etc.) electronic execution platforms (provided by organisations such as Bloomberg, TradeWeb, BondVision, MarketAxess and TLX), aggregate/composite pricing services (provided by organisations such as Markit, CMA and Bloomberg). In the post-trade space, there are a number of providers of post-trade data, such as Xtrakter, www.bondmarketprices.com (specifically aimed at retail investors) and SIX Telekurs, to name a few. On any given day, the bondmarketprices.com website will display trade prices for about 2000 sovereign, sub-sovereign, corporate and financial bonds[5] while Xtrakter's price service will display trade prices for approximately 12,000 issues.[6] As far as we are aware, there are no significant failings in these resources or investors' ability to access them. If such failings are shown to exist, MiFID should address them but this should be the limit of the legislative reforms. We also note the speech given by José Manuel González-Páramo, Member of the Executive Board of the European Central Bbank at the Commission's public hearing on non-equities markets transparency in 2007: "Indeed, the pre-trade transparency in some liquid cash and derivative market segments is so high, at least under normal market conditions, that it makes the real-time post-trade transparency obsolete for price discovery purposes." We therefore question the need for regulatory intervention in this area and would strongly urge that the provision of pre-trade transparency should remain market-driven.

28. The paper suggests that improvements could "aim to help the market deal with inherent information asymmetries, support fair and orderly pricing, and improve overall market efficiency and resilience." This implies that inherent information asymmetries exist in non-equities markets. It is important to emphasise that paragraph 34 of CESR's 10 July 2009 Report mentions the perceived existence of an asymmetry of information between retail investors compared to wholesale ones. However, this is difficult to sustain given the existence of the post-trade price services mentioned above. If trade information is already available and is not being utilised, it is difficult to see how imposing a mandatory post-trade transparency framework would serve to improve the situation - it would only increase the cost of business for little or no benefit and the potential for significant harm.

29. It is proposed that the pre- and post-trade transparency requirements apply to all bonds with a prospectus or which are admitted to trading either on a regulated market or MTF. The paper suggests that these instruments are the more liquid/frequently traded market segments per asset class. However, the idea that a prospectus or admission to trading is a measure of the more liquid/frequently traded market segment is erroneous. It is our understanding that almost all traded bonds have a prospectus and therefore existence of a prospectus cannot be a meaningful measure of liquidity. It is notable that sovereign bonds are considerably more liquid than corporate bonds, and yet few are accompanied by a prospectus at issuance.[7] Equally, emerging market bonds are typically accompanied by a prospectus at issue but will often be very illiquid. Ultimately, the types of bonds that will be more liquid will be plain vanilla issues where the issuer is a large and well-known company with a very good credit rating. The smaller the issuer and/or the higher the credit risk, the less liquid the bonds are likely to be. Structured bonds are often admitted to trading due to investor demand for a product that is so admitted. However, these types of bonds are not

[5] For example, on 12 January, 2010, the bondmarketprices.com website displayed prices for 582 sovereigns, 334 sub-sovereigns, 265 corporates, and 650 financial bonds.
[6] Note that the Xtrakter service also includes data for Bills and GDRs as well as the wholesale trades that are excluded from the bondmarketprices.com site due to that site being geared strictly for retail investors.
[7] EU Member states are exempt from issuing a prospectus under the Prospectus Directive.

very liquid, if they trade at all. Xtrakter data for 2009 shows that for the structured market (asset backed) 75% of the issues traded less than once a week and nearly 94% traded less than 300 times during the year. Ultimately, the existence of a prospectus or admission to trading will cover the vast majority of all issued bonds and cannot and should not be used as a proxy for determining liquidity. The Xtrakter data annexed to this response may be of assistance in assessing the liquidity of various segments of the bond market. Instead, we would propose as an alternative limiting the scope of the framework to investment grade bonds and/or bond issues over a certain size.[8] This limitation would also be more appropriate for retail investors, who ideally should be looking to invest in the more liquid segments of the market. We also note that not all CESR members agree that a prospectus/admission to trading is how the scope should be defined. Notably, CESR's 10 July 2009 Report noted that the Swedish Finaninspektionen, the UK FSA, the Irish Financial Regulator and the German BaFin did not agree with the proposed scope. Given that the vast bulk of the corporate bond markets are in the jurisdictions governed by these regulators, we would urge that their views be considered carefully. We would urge the Commission to reconsider this approach.

3.4.1 - Pre-trade transparency

30. The paper suggests that MiFID be amended to require pre-trade transparency for all trades in specific non-equity products, whether executed on regulated markets, MTFs, OTFs or OTC. First, we strongly urge you to follow the CESR recommendation that any pre-trade transparency regime should apply only to RMs and MTFs. CESR found that "the majority of consultation respondents stated that there was no lack of pre-trade transparency … and … that a mandatory pre-trade transparency regime would … be unlikely to deliver benefits."[9] We strongly support this position which is supported by buy-side users of the markets.[10] Moreover, it should be emphasised that "CESR does not, at this stage, propose to introduce mandatory pre-trade transparency requirements to the OTC space."[11] We firmly support this view. Our members from both the buy- and sell-sides have made it clear that access to, and the amount of, pre-trade information is not an issue for them.

31. Second, the paper proposes that all RMs, MTFs and OTFs offering trading in bonds with a prospectus or which are admitted to trading either on a regulated market or MTF should publish their pre-trade information in a continuous manner. As noted in our response to Questions 2 and 3 above, the definition of an OTF needs to be very carefully considered in conjunction with the attached obligations, to ensure that the current flexibility to meet investors' needs in fixed income markets is not disrupted. In illiquid bond markets in particular, requirements to publish pre-trade information in a continuous manner would be likely to discourage participation in the market, and make it more difficult for investors to trade. Similarly, a requirement for an OTF to publish pre-trade information in a continuous manner is likely to disrupt the pricing of one or more bonds which form part of a package of trades – e.g. where one party has an interest rate swap linked to the pricing of a bond, the actual price of the bond cannot be made public until the trade takes place. Alternatively, there can be complex trades that take place which are negotiated bilaterally with a voice

[8] Notably, when TRACE was introduced in the US in July 2002 it only applied to investment grade issues with an initial issuance size above $1 billion.

[9] Technical Advice, paragraph 18, p.9

[10] See: EFAMA's response to CESR's Consultation Paper on Technical Advice to the Commission on Non-equities Transparency - http://www.esma.europa.eu/popup_responses.php?id=5694

[11] Technical Advice, paragraph 24, p.10

broker or there are various market participants looking to combine various trades together where the "final" price is a "package price". Accordingly, publication of pre-trade information should be at the discretion of the venue, and regulation should focus on ensuring that the disclosure of such information is fair and non-discriminatory.

32. Third, we do not agree with the proposal that pre-trade requirements for RMs, MTFs and OTFs should provide for a real-time and continuous updating of available and actionable trading interest. This would seriously interfere with the way the market currently works, whereby investors submit Requests for Quotes (RfQs). This is a system that has worked well for many years and as far as we are aware there are no calls from market users for this system to be replaced – a position that is supported by CESR in its Technical Advice. The Commission should not proceed with such a disruptive proposal without explaining its objectives, what market failure it seeks to address, and how it will mitigate harmful impacts on market users. Moreover, while this proposal is workable in an equity context, it is unrealistic for fixed income securities. This is because there are a vast number of fixed income securities (approximately 300,000 securities in issue) in comparison to the number of equity securities in issue across Europe.[12] To expect a RM, MTF or OTF (or the market makers that support such venues) to provide real-time and continuous updating of available and actionable trading interest would require significant human and financial resources. This would also be contrary to the liquidity profile for most corporate bonds - secondary market liquidity will peak in the short period of time immediately after issuance and then it will disappear.

33. Fourth, the paper proposes that the pre-trade quotes of investment firms executing trades OTC should "reflect current market value". The paper notes that the requirement would specify that quoted prices could not significantly deviate from pre-trade information available for comparable or identical instruments on RMs, MTFs or OTFs. The paper is silent as to what this requirement is trying to achieve, who it would benefit or what market failure this proposal would be trying to address. It merely states that it aims to replicate the Systematic Internaliser requirements for equities. A requirement such as this would be very difficult to implement and monitor in relation to corporate bonds because they can be so illiquid. How would a "comparable instrument" be defined? Could a Vodafone bond issue be considered comparable to a Siemens bond issue? Moreover, as noted above, as well as credit ratings and benchmark yields bond pricing also takes into account a variety of factors including the size of the trade (i.e. the larger the trade the better the price) and counterparty risk (i.e. the better the credit rating of the counterparty the better the price), and so a requirement that quotes reflect current market value would be very difficult and perhaps impossible for firms to implement. We also fear that a requirement as significant as this would greatly increase the barriers to entry and that the regulatory burdens would be prohibitive for all but the largest firms.

34. The paper also proposes that an investment firm executing trades OTC be required to make its quote (both price and volume) available to the public. The Commission should not proceed with such a broad-ranging, market-disruptive proposal. Instead, it should accept CESR's judgement that there is no fundamental problem with non-equity OTC pre-trade transparency, and focus instead on specific known market failures, such as (a) ensuring that when quotes are disclosed to the market, their status (firm or indicative) is clearly stated and if firm, that they can be relied upon; (b) tailored measures, or proper enforcement, to

[12] Notably, the ESMA database of shares admitted to trading on EU Regulated Markets lists only 6436 instruments as of 24 January, 2011.

tackle any abuses that may have emerged in national retail bond markets. We would also advocate that MiFID should seek the abolition of nationally based rules that have often been used to protect domestic markets.

35. The paper also proposes that an investment firm executing trades OTC be required to make binding quotes below a specific trade size. The paper is silent as to what such a requirement is trying to achieve, who it is intended to benefit and what market failure such a requirement would be trying to address. We would urge the Commission to re-think this proposal as we fear that, in addition to a mandatory post-trade transparency framework, it could serve to further damage liquidity in the market. This is because there are many elements that make up a pre-trade price. To require a firm to provide a binding price below a specific trade size would seriously interfere with the way bonds are priced in wholesale markets[13] and would be contrary to the current regulatory requirements that firms take appropriate measures to address their counterparty risk. Additionally, we fear that such a requirement would discourage the provision of liquidity by dealers. We note that the paper proposes that it would be implementing measures that would specify the size-threshold per asset-class. However, we wonder about the feasibility of size-thresholds during times of market turbulence. If this proposal were to be taken forward, then it would be essential to allow a measure of flexibility to accommodate such situations.

36. The paper suggests that the size-threshold below which an investment firm would have to make binding quotes could "represent a commonly accepted value of trades in each asset-class beneath which the risk associated with the trade can easily be laid off in the market and is likely to be undertaken by or on behalf of retail investors." Because of the illiquid nature of many corporate bonds we feel that setting such a threshold would be very problematic. As mentioned above, the vast majority of corporate bonds are extremely illiquid in that they trade very infrequently. Because such instruments are so illiquid trades cannot easily be laid off in the market. Moreover, while a few jurisdictions in Europe have well-developed retail bond markets, the majority of secondary market bond trading is largely wholesale. A requirement such as this would be inappropriate for such wholesale markets. Moreover, the risk of embedding size-thresholds in regulation is that as a market evolves the average sizes of trades may change or the nature of the market itself may significantly change which could make the regulatory thresholds inappropriate. Accordingly, we would urge that thresholds should not be embedded in regulatory measures.

3.4.2 – Post-trade transparency

37. The difficulty of balancing transparency with liquidity provision is the reason why it is so important that the post-trade transparency regime be calibrated appropriately. The paper suggests that the post-trade transparency regime should be transaction-based rather than based on aggregate data. In May 2010, ICMA carried out a survey of members (both buy-side and sell-side)[14] which asked for views on when price data should be published. The majority (57%) of respondents indicated that price data should be published at the end of the day. This was particularly pronounced for buy-side respondents (64%) who felt that end of day pricing was ideal. Relatively few respondents suggested that price data should be published close to real-time or real-time. The survey also revealed a strong preference

[13] See our comments above relating to the fact that complex trades will often be linked to other types of transaction.
[14] A copy of the survey is attached but can also be found at:
https://www.icmagroup.org/ICMAGroup/files/1f/1fa026d7-c864-4f55-8f5c-13d1231ed87b.pdf

amongst all market participants for high/low/median[15] end of day prices rather than actual trade prices or aggregate trade prices. We would strongly urge the Commission to consider who would benefit from real-time or close-to real-time transaction-based price data, when our survey indicates very little support on either the buy-side or the sell-side for such a proposal. Indeed, our members have indicated that real-time or close-to real-time price transparency will result in dealers taking on smaller inventories and spread widening. So market efficiency would reduce and costs to users would rise.

38. We fully support the proposal that the post-trade transparency regime should be calibrated to the class of financial instrument and to the type of instrument. We also support the proposal that the post-trade transparency regime should be predicated on a system of thresholds and delays based on transaction size. When considering the thresholds to be adopted, the Commission should ensure that the regime that is drawn up for bonds is not more onerous that that for equities or even on a par with equities. Instead, the regime should allow for more generous time delays to accommodate the unique nature of the bond market. In this context it is notable that CESR's Technical Advice for equities advocates that the largest of equity trades should have a publication delay till prior to the opening of trading on the next trading day if the trade occurs after 15:00. CESR did not recommend a similar delay for bond trades occurring late in the day. We would ask that the Commission consider the considerable impact to the bond market if a similar delay is not taken forward for this asset class.

39. It should be emphasised that CESR has clearly stated that "the calibration of thresholds and time delays for the proposed regime should ideally be based on the liquidity of the asset in question." (Technical Advice, p. 3) We feel strongly that there must be a liquidity filter that makes up a key element of the calibration of thresholds in order to preserve liquidity. Notably, data from Xtrakter, based on TRAX reporting for the year 2009 shows how illiquid much of the corporate bond market is. For example, 363,772 corporate bonds (approximately 11%) traded less than once a day in 2009. Moreover, 5,077 corporate bond issues (which amounted to 51.8% of the market) traded less than 50 times in the year.[16] More work must be done to develop a liquidity filter to refine the scope of the obligation. Even if it cannot be used to limit scope, such a liquidity filter must be used as the basis for considering longer reporting delays than those advised by CESR. CESR has noted that it lacks sufficient data to assess the various proposals of how to calibrate thresholds according to liquidity. However, given that firms currently have to transaction report their trades to regulators (pursuant to Article 25.3 of MiFID), this claim seems curious. Nevertheless, if there is a lack of data, the most prudent course of action would be to task ESMA with responsibility for collecting trade reporting data for a period of time and then using the data to develop a liquidity filter. Once a liquidity filter has been developed, we would further advocate a phased implementation, starting with only the most liquid of bonds i.e. those bonds that have a turnover that is not less than the turnover of shares that fall within CESR's definition of a "liquid share".[17] Once it had been determined that such a framework had not damaged the market in these bonds, the framework could potentially be expanded

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[15] Median could possibly be linked to average volume.

[16] See Annex1.

[17] According to CESR, a liquid share must have the following characteristics:

(a) the share must be traded daily;
(b) the free float is not less than €500m
(c) the average daily turnover for the share is not less than €2m;
(d) the share must have been traded for at least 6 weeks.

gradually over time, if deemed necessary. However, the consequences of proceeding on an uninformed basis and applying the regime to all bonds from the start and then rolling back the regime if it appears to be causing damage does not seem prudent. Once damage has been caused to the market, the effects could be irreversible. There is a serious risk that ill considered measures could drive the market to other jurisdictions around the world, Asia in particular.

40. Finally, we would strongly urge caution in attempting to create a consolidated tape for bonds. We note that the paper briefly touches upon the need to support consolidation of trade data. However, a consolidated tape for bonds would not be appropriate: for all but the most liquid bonds, the information would be misleading, and the cost of maintaining static data prohibitive.

41. We also note that the paper suggests that the post-trade transparency regime apply to all structured products with a prospectus or which are admitted to trading on an RM or MTF. However, in relation to Asset Backed Commercial Paper (ABCP), we would draw your attention to the CESR Report of 10 July, 2009 which set out that "CESR came to the conclusion that additional post-trade transparency is not one of the pressing topics for participants in these markets. ... Therefore CESR does not currently see a need for a post-trade transparency regime for ABCPs". We agree with CESR's advice – ABCPs should be excluded.

42. It should also be noted that a published trade price implies to retail customers that a bond is available to buy at that price. In this regard, it should be noted that prices given to retail clients will not necessarily fully reflect the prices in the wholesale market (because of the larger size of wholesale trades, commission in the price will be lower (though large in absolute terms). Moreover, a published trade price is no reflection of how liquid/illiquid the bond will be. Publication of wholesale prices could therefore be misleading for retail investors. It is important to note that TRACE was originally conceived of as a scheme for retail investors.

Liquidity

43. Finally, it is worth considering the definition of liquidity. An IMF Working Paper "Measuring Liquidity in Financial Markets" argues that the microeconomic concept of liquidity is multifaceted and that liquid markets exhibit five characteristics – tightness, immediacy, depth, breadth and resiliency.[18] We urge the Commission to consider very carefully how their proposals will impact on each of the characteristics that make up a liquid market and the element of immediacy in particular. An article by Jerry Tempelman, published in the Journal of Portfolio Management,[19] argues that the introduction of TRACE in the US has had a number of negative effects and that excessive price transparency impedes quantity discovery – i.e. buyers and sellers finding each other and trading when, because of the size of their orders, they are at the same time seeking to hide their presence in the marketplace.

[18] http://www.imf.org/external/pubs/ft/wp/2002/wp02232.pdf

[19] http://www.jerrytempelman.com/Jerry's%20website/Publications/06.%20Financial%20economics/04.%20TRACE%20and%20corporate%20bond%20liquidity.pdf

Questions 119 - 123

44. The paper suggests that there should be a prohibition of title transfer collateral arrangements involving retail clients. We do not support such a general restriction, but accept that there should be measures in place to ensure that such activity is adequately managed and that retail clients are fully aware of the risks. It follows that we do not support there being an option to extend such a prohibition to non-retail clients; and most certainly not to eligible counterparties (in case the reference in question 120 to "non-retail clients" is to be read to cover them in addition to professional clients). Retail clients should receive timely, clear, fair and not misleading documentation explaining the products and risks. Non-retail clients should be able to agree the terms under which they would engage in such business, including such information as they require.

Questions 86 and 124

45. The responses to questions 86 and 124 of paper are made on behalf of ICMA's primary market constituency that lead-manages syndicated bond issues throughout Europe. This constituency deliberates principally through ICMA's Primary Market Practices Sub-committee[20], which gathers the heads and senior members of the syndicate desks of 21 ICMA member banks, and ICMA's Legal and Documentation Sub-committee[21], 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.

46. The responses to these questions are therefore being addressed exclusively in the context of the European cross-border syndicated wholesale/institutional debt funding ('eurobond') issuance markets. The responses do not therefore address the equity markets[22] or the retail bond markets, which are subject to different working dynamics. Furthermore, the responses do not address certain questions in paper that may have an impact on the eurobond issuance markets but not exclusively– ICMA is aware that such questions are being addressed by other industry bodies on a wider level (notably regarding client and complex/non-complex product categorisation[23]).

Question 86 - Direct sales by investment firms and credit institutions

47. **Direct sales by issuers of their securities and execution of orders -** MiFID (including and its related legislation) governs the conduct of business obligations relating to the provision of financial services in the various financial instrument markets. Its provisions are activity-based and so rightly apply to those entities conducting such activities – in practice entities that are members of the financial services industry. Some non-financial entities may conceivably wish to undertake such activities – but in this respect they will establish dedicated units (or related entities) that will act and be subject to regulation as any regular member of the financial services industry.

48. An offer of financial instruments is not, of itself, an investment 'service' activity and so rightly falls to be regulated, not by MiFID, but by other regulatory tools such as the

[20] http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Primary-Market-Practices-Sub-committee.aspx.
[21] http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Legal-and-Documentation-Sub-committee.aspx.
[22] ICMA is aware of at least one industry body that is looking at paper from the perspective of the perspective of the equity issuance markets.
[23] ICMA has seen and agrees with the response of the British Bankers Association in this respect.

Prospectus, Transparency and Market Abuse Directives. This is and should be so (perhaps with just a few exceptions) regardless of whether the issuer is a state, a pharmaceutical company, a bank or some other kind of entity.

49. That said, a non-gratuitous offer of financial instruments necessarily involves the sale of such financial instruments and in turn, for example, the reception and transmission of orders or their execution. Whilst this may be obvious where distinct entities are involved in addition to investors (namely the issuer and independent intermediaries), these concepts are equally operative (although the practical consequences may be more limited[24]) where only one entity (the issuer) is dealing with the investors (as the single entity can be considered to be performing distinct economic functions). In this respect, any outward facing activities should be subject to regulation no differently than if such activities were conducted by an independent entity. Incidentally, the regulation of conflicts of interests may well sharpen the distinction between various functions, perhaps for example through some degree of separate management.

50. The 29 July 2010 responses[25] of CESR (as it then was) to the Commission's request for additional information cite a possibly typical example of a bank distributing its own shares via its branch network. Less typical, but conceptually similar would be a railway company seeking to distribute its bonds at its station ticket offices (assuming MiFID's organisational and other requirements were satisfied).

51. The Commission notes that the MiFID definition of 'Execution of orders on behalf of clients' ("acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients") may need to be amended to explicitly include the direct sale of their own securities by banks and investment firms. ICMA has not been involved in any discussions concerning any particular problems in this area and would be happy to assist the Commission in relation to any specific drafting proposals it may wish to make. For the conceptual reasons stated above, the MiFID regulation of direct sales is not limited just to banks and investment firms.

52. **Firms acting on behalf of issuers also acting on behalf of investors** - The Commission notes that: (i) some practical issues have also emerged with respect to investment firms and credit institutions distributing products to investors on the basis of an agreement with the issuer in the provision of the services of placing and underwriting; (ii) in particular, it seems necessary to clarify in practice the situation of investment firms that can be acting on behalf of an issuer and, as part of the same transaction, on behalf of the investor as well; (iii) it considers that MiFID conduct of business rules clearly apply to the provision of services to investors, irrespective of the circumstance that a firm is acting, at the same time, on behalf of the issuer and of the investor; but (iv) in order to ensure a convergent application of these principles in concrete situations, implementing measures should be adopted in this area.

53. A MiFID activity amounting to a service is by its very nature only provided to one MiFID client (or potentially group of clients if acting together) – for example, the reception and transmission of client A's order is a service rendered by intermediary X solely to client A. It is not a service rendered by intermediary X to client B or, in a new issue context, to the issuer of the securities concerned. Similarly, underwriting and placing are services rendered

[24] For example, there will be no alternative execution venues in relation to best execution.
[25] CESR/10-860.

by intermediary X solely to the issuer of the securities concerned. These services can however both be rendered by intermediary X, and necessarily so for issuers to be able to control who the initial investors in their securities will be (see further the response to consultation question 124 below). In this respect, MiFID conduct of business rules indeed apply to the provision of services to investors, regardless of whether a firm is providing separate services, at the same time, to both the issuer and investors.

54. It is unclear what implementing measures the Commission conceives may be necessary to ensure a convergent application of these principles in concrete situations and ICMA would be happy to assist the Commission further in this respect. ICMA notes that (i) firms rendering services to both issuers and investors are generally organised into distinct functions separately dealing with issuers (origination and syndication) and investors (sales) and (ii) MiFID imposes certain obligations (including organisational) on firms in relation to potential conflicts of interest.

Question 124 – Underwriting and placing

55. The Commission identifies salient aspects emerging from the provision of underwriting and placing services provided by lead-managers of issues, which are regulated under MiFID and subject, inter alia, to its organisational, conflict of interest and record-keeping requirements. Various aspects of the Eurobond new issuance process are subject to regulation under other regulatory regimes in addition to MiFID (notably the Prospectus Directive in relation to disclosure and the Market Abuse Directive in relation to inside information and stabilisation). CESR's 29 July 2010 responses include (at pages 11-12) a description of the Eurobond new issuance process; and further background on the complex dynamics underlying it is also set out in Explanatory Note XIII[26] published by ICMA in its IPMA Handbook. Underwriting and placing are complex services – lead-managers work to ensure transactions are executed as smoothly and as efficiently as possible, whilst meeting the issuer's size, maturity, pricing and distribution objectives and taking into account possible secondary market performance and a professional investor base willing to participate in this and subsequent transactions. Those factors need to be considered in constantly changing market dynamics, often involving subjective judgments. Prescriptive and detailed rules are unsuitable to overcome these challenges, whilst high-level regulatory principles would allow firms to develop procedures to suit changing market environments. Effective regulation in this area is as important as ever, given the refinancing and new funding exercises (by sovereigns and banks especially) due for many months to come and fundamental to the European economic recovery. Market confidence in the success of new issues is critical in this respect – any rules that would adversely affect the likelihood of successful funding for sovereigns and for public and private entities are commensurately inappropriate. It is worth noting the very substantial volumes of funding that have been successfully achieved in 2009 and 2010, during a highly uncertain and volatile period.

56. If the Commission decides to implement further requirements in the MiFID implementing Directive, several considerations should be borne in mind.

    a) *Requiring organisational arrangements and procedures* – This may be an option to be explored further, as neither of the other two are supportive of the stable offering/borrowing environment that is needed now as much as ever to assist the wider

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[26] Currently publicly available at http://www.icmagroup.org/ICMAGroup/files/ff/ffc15ce6-d6b0-49b3-b2ab-e7ef2b70c44b.pdf (6 pages).

European economy. A substantial body of arrangements and procedures (and related know-how) has been developed in the markets with substantial time and resources committed to date, not least further to existing regulatory requirements, and ICMA would be happy to assist the Commission further in this respect. The initial formation of the syndicate is however an issuer prerogative that is outside the (potential) lead-managers' control.

b) *Specific rules* – As noted in the introductory paragraphs, the inflexibility of specific prescriptive rules would mean that transactions, which are subject to wildly varying market dynamics, would have to proceed in fixed and, so likely, sub-optimal conditions – impacting primary issuance success rates and related market funding confidence and supply.

c) *Specific conflicts of interest requirements* – It is unclear what this might mean in practice. In the Commission's example of the investment research context, the outcome tends to have been institutional separation within the investment firms concerned. An actual separation of lead-managers into merchant banks and stockbrokers would be inconsistent with today's syndicated issuance markets. However, and as mentioned in the response to Question 86 above, lead-managers are organised into distinct functions separately dealing with issuers (origination and syndication) and investors (sales). ICMA is willing to discuss this aspect further with the Commission in order to clarify its understanding.

57. The Commission raised certain specific practices in the context of new issues as having attracted its attention – these are discussed below.

58. *Pre-sounding* – These discussions between lead-managers and some potential investors (those likely to be most material in constituting any orderbook), prior to any public announcements, are intended to help ascertain likely investor pricing appetite rather than demand generally. The discussions may indeed lead, in some cases, to certain investors holding potentially inside information – they are accordingly subject to restrictions under the Market Abuse Directive. Lead-manager internal policies and procedures will provide inter alia for such investors to be 'wallcrossed': they will be put on notice, before they are asked if they are willing to be presounded, that they will be receiving potentially inside information and may be consequently subject to restrictions; record keeping obligations as to which persons have been made insiders will also apply. The prevalence of wallcrossing is subject to investor willingness and seems to have diminished since the height of market volatility and uncertainty over the past two years. ICMA has also published[27] its Recommendation 1.30 'Pre-sounding of Transactions' to help lead-managers collectively coordinate their individual policies and processes when working together for an issuer in the context of specific transactions. In some cases pre-sounding may be conducted on the basis of public information only – in such cases the investors concerned will not be holding inside information and therefore no restriction is applicable.

59. *Inflating of orders* – This can occur not just in the case of oversubscription, but also where an investor overestimates demand that it was unable to confirm internally prior to placing its order or where it anticipates particularly strong demand by other investors and so expects to liquidate part of its allocation in initial secondary trading to crystallise the initial

[27] See ICMA's April 2009 Regulatory Policy Newsletter (at page 14): http://www.icmagroup.org/ICMAGroup/files/5c/5c4c5a4b-a077-4179-9a7b-3d8cada29117.pdf.

issuance premium ('flipping'). Leaving aside the ex-post treatment of inflation by investors under the Market Abuse Directive, lead-managers work hard to mitigate the consequences of such inflation – see Explanatory Note XIII for further detail.

60. *Over-marketing of issues* – Marketing of new issues is conducted by lead-managers' sales functions, which are distinct from their origination and syndication functions and separated by Chinese walls (see response to Question 86 above). At the height of market volatility and uncertainty over the past two years, syndication functions at times responded to requests from professional investors (in trying to manage their allocation expectations) for disclosure of demand (and so the degree of oversubscription), and this in turn may have resulted in sales staff emphasising to their investor clients the need for decisions as to whether to invest or not and so to investors feeling pressurised. Ultimately however, professional investors should base their investment decisions on the fundamentals relating to the issuer and the actual terms of the issue (as disclosed in prospectuses published pursuant to the Prospectus Directive) and not on the basis of demand by other investors. Syndicate functions now generally limit disclosure, prior to closing of orderbooks, to just whether transactions are subscribed or not (without stating the scale of any oversubscription).

61. *Shadow bookbuilding* – "testing the interest of investors before the announcement of an issue" amounts to pre-sounding as discussed above. The outcome of the pre-sounding process, if positive and sufficiently accurate, may mean that lead-managers will have a strong expectation as to the likely configuration of the orderbook once opened. However such orders will still need to be formally placed by the pre-sounded investors concerned once the book is opened. In certain market conditions, with substantially more investor demand than supply, submission of investor orders can potentially exceed the proposed new issue size many times over in a very short timeframe, with orders for billions of euros or dollars submitted in just a few minutes in some extreme cases – this raises arguments for a swift closing of the orderbook. However, many lead-managers are considering keeping orderbooks open where possible for a minimum period of one hour from the formal announcement of the transaction – see further Explanatory Note XIII. Distinctly, and as mentioned above, the incidence of pre-sounding seems to have subsided.

62. *Over-pricing* – Pricing is a complex process, in which lead-managers seek to identify the point where pricing is agreeable (i) to the issuer on its view of its business model and targeted cost of funding and (ii) to investors, both in the immediate and in terms of securing the issuer's ability to return to the market at a later time. The latter element may result in issuers offering a slight issuance premium to participating investors. When markets (and the balance of supply and demand) change direction, there may be some intrinsic delay in pricing following suit, though market participants may still reflect on the margin differences involved. It is difficult to understand however how pricing can have been reported to have simultaneously favoured issuers and investors. Fundamentally, parties unhappy with proposed pricing are able to withdraw from the transaction and should do so. Over-pricing would result in unsold positions, which would weigh down on lead-managers' books and attract unwelcome capital charges.

63. *Allotment* – Investors will be disappointed where they do not receive their desired allocation. However this is quite likely where, as has long been the case, demand exceeds supply. Such disappointment became nearly endemic at the height of the crisis, as investors fled from other asset classes into the bond markets, with supply failing to keep pace due to issuer caution at limited prospects for the commercial use of funds raised and ongoing

volatility despite the general increase in demand. Lead-managers apply allocation procedures designed to help promote a balanced spread of appropriate investors with view to reasonable secondary liquidity and a good ongoing relationship between the investor and its bondholders. See further information in Explanatory Note XIII.

64. If you would like to discuss the issues raised in this submission, please contact John Serocold (John.Serocold@icmagroup.org) in the first instance.

Yours faithfully

John Serocold
Senior Advisor

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Annex 1

Trade analysis based on TRAX reporting for the year 2009

	Total No of Trades	Average No of Trades *(1)*	Total EUR Value *(2)*	Average EUR Ticket Size *(3)*
Sovereign *(4)*				
1 - 49 ***(5)***	10,226	15	135,745.5	13,274,547
50 - 99	12,918	71	120,795.8	9,350,970
100 - 299	49,761	188	218,317.4	4,387,319
300 - 999	218,472	597	1,259,532.2	5,765,188
1000+	2,567,508	4,520	54,834,894.6	21,357,244
Strips	27,763	63	279,947.2	10,083,465
Supranational				
1 - 49 ***(5)***	5,258	14	16,903.8	3,214,864
50 - 99	6,618	72	13,435.0	2,030,069
100 - 299	28,356	176	44,627.6	1,573,832
300 - 999	59,171	558	103,689.5	1,752,370
1000+	150,937	2,396	312,751.3	2,072,065
Corporate				
1 - 49 ***(5)***	55,644	11	192,156.8	3,453,324
50 - 99	59,401	71	86,817.8	1,461,555
100 - 299	248,727	184	312,618.5	1,256,874
300 - 999	894,201	570	987,067.1	1,103,854
1000+	1,959,105	2,011	2,945,850.7	1,503,672
Municipal				
1 - 49 ***(5)***	3,236	12	29,445.0	9,099,206
50 - 99	5,253	75	19,038.0	3,624,216
100 - 299	18,371	173	32,370.4	1,762,040
300 - 999	22,410	487	42,110.2	1,879,081
1000+	5,226	1,307	10,902.6	2,086,216
Structured				
1 - 49 ***(5)***	25,979	9	368,424.7	14,181,633
50 - 99	19,920	72	68,299.9	3,428,708
100 - 299	68,921	173	202,334.0	2,935,738
300 - 999	101,115	519	204,341.6	2,020,883
1000+	80,590	1,612	84,814.4	1,052,418
Indexed				
1 - 49 ***(5)***	16,042	8	27,472.8	1,712,557
50 - 99	6,207	69	6,665.3	1,073,839

100 - 299	12,725	165	5,368.3	421,872
300 - 999	12,460	479	5,986.3	480,444
1000+	4,738	1,579	123.7	26,118

General Notes:

Matched IDB brokered trades count as two transactions. We are aware that 'internal trades' are submitted to TRAX which would be included above and that these may reflect large transaction sizes substantially in excess of the average ticket size.

Other Notes:

1) Represents the average number of trades for each security in the sector;
2) Represents the total nominal value of all the trades in the sector expressed in euro millions;
3) Represents the average trade size for the sector expressed in euro;
4) Sovereign includes Government Agency and other statutory body issues but excludes the Strips which are shown separately;
5) The 1 - 49 trade count sectors include many trades that reflect primary activity with the whole issuance being sold to one or relatively few investors, hence the high average ticket size. In respect to the Sovereign sector, 65% of the issues relate to Government Agency and other statutory bodies.

Trade analysis based on TRAX reporting for the year 2009

	Trade Count 1 - 49 *1*			Trade Count 50 - 99			Trade Count 100 - 299			Trade Count 300 - 999			Trade Count 1000			Total
	Issues	**%**	**Avg Sz *2***	**Issues**	**%**	**Avg Sz *2***	**Issues**	**%**	**Avg Sz *2***	**Issues**	**%**	**Avg Sz *2***	**Issues**	**%**	**Avg Sz *2***	**Issues**
Sovereign ***3***	661	32.4	1,134	181	8.9	1,117	265	13.0	1,164	366	17.9	2,052	568	27.8	10,578	2,041
Strips	273	62.2		88	20.0		65	14.8		13	3.0					439
Supranational	381	47.4	155	92	11.5	235	161	20.0	525	106	13.2	899	63	7.8	3,054	803
Corporate	5,077	51.8	210	832	8.5	406	1,355	13.8	526	1,568	16.0	683	974	9.9	1,053	9,806
Municipal	274	54.8	459	70	14.0	808	106	21.2	860	46	9.2	1,046	4	0.8	1,985	500
Structured	2,884	75.8	320	276	7.3	765	398	10.5	1,105	195	5.1	1,259	50	1.3	1,203	3,803
Indexed	1,976	91.0	45	90	4.1	254	77	3.5	165	26	1.2	316	3	0.1	75	2,172

General Notes:

Matched IDB brokered trades count as two transactions. We are aware that 'internal trades' are submitted to TRAX which would be included above and that these may reflect large transaction sizes substantially in excess of the average ticket size.

Other Notes:

1) The 1 - 49 trade count sectors include many trades that reflect primary activity with the whole issuance being sold to one or relatively few investors, hence the high average ticket size;

2) The average issue size is expressed in euro millions;

3) Sovereign includes Government Agency and other statutory body issues but excludes the Strips shown separately. 65% of the Sovereign 1 – 49 sector (429 issues) relates to such Agency and other statutory body securities.