International
Capital
Market
Association

ICMA

Financial Regulation Strategy
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

(by e-mail to financial.reform@hmtreasury.gsi.gov.uk)

18 October 2010

Dear Sirs,

HMT consultation cm7874: "A new approach to financial regulation: judgement, focus and stability"

The International Capital Market Association ("ICMA") is responding to HM Treasury's above consultation.

ICMA 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,

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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 is responding to questions 17 and 18 only.

17. The Government would welcome views on whether the UKLA should be merged with the FRC, as a first step towards creating a companies regulator under BIS.

ICMA has several concerns regarding the above proposal and considers that the better merger counterparty for the UKLA is the CPMA.

Firstly, the proposed new companies regulator will essentially be a regulator of UK PLCs (that is, issuers with premium equity listings). This seems to us to be a very unsuitable regulatory focus for a department that is to include the UKLA, given that fewer than 10% of securities issues admitted to the UK's Official List are UK premium equity, with the remainder consisting largely of bonds and other securities, many issued by non-UK entities (including entities which are not companies, but sovereigns, supra-nationals and agencies). Such issues would fall largely, or even entirely, outside the scope of the new companies regulator within BIS. Instead of being a natural fit with the companies regulator, the UKLA would be a drain on its resources and would distract it from its main focus (UK premium listed equities) as it would have to devote very considerable resource in managing a significant volume of work that has nothing to do with its core purpose. The fact that the UKLA was part of a UK companies regulator would also be very off-putting to issuers that currently use the UK regulated markets but are not UK premium equity issuers. The position of the UK as an international market would therefore be damaged.

Secondly, the FSA's integrated responsibility for both primary market disclosure through prospectuses and conduct regulation in the markets generally allows it to perform its responsibilities more effectively than would be the case if the responsibilities were split in the manner suggested in the Consultation Document. The process of issuing new securities in the market involves a number of areas of regulation, that are necessarily linked together. Approval of prospectuses forms a part of this process, but depends on other aspects. So, for example, many new issues will involve production not just of prospectuses, but also of other disclosure documents such as advertisements or other marketing materials that are regulated by the advertisement regime under the Prospectus Directive and by the financial promotion regime under the Financial Services and Markets Act 2000. These regimes form part of market regulation (and therefore belong with the CPMA) and currently are subject to rules set out in the FSA's Handbook (for example, the regime for approval of financial promotion by authorised persons under COB 4). At government level, they are within the jurisdiction of the Treasury, not BIS, and should remain so, because they affect markets generally and not just UK premium equity issuers.

Equally, the most important matters that are required to be disclosed in a prospectus are those that are likely to affect the market price of the securities. This is a question which a regulator that is in daily contact with the market, such as the FSA or, in the future, the CPMA, is best placed to judge. There is, for example, a strong link between the judgements made by those regulating the disclosure regime for inside information under the market abuse regime (which will be within the CPMA) and the judgements made on the key disclosure elements in a prospectus. In both cases, the question has to do with the pricing effect of the information in the market. In the market abuse context, the market regulator regularly monitors disclosure of price sensitive information (that is, information that would, if made public, have a significant effect on the market price of securities) and often gets involved in discussion as to what needs to be disclosed or even whether disclosure is required. Experience derived from this role within the market regulator is invaluable in the context of the review of prospectus disclosure, the really important information in a prospectus being that which is necessary to make an informed investment decision (including under the recent amendments to the prospectus directive, essential information to enable investors to understand the risks of the securities being offered to them). Market regulators, who, through their close operational contact with the market, understand how markets react to disclosure (and therefore what needs to be disclosed), are much better at making these judgements than those whose primary focus is corporate governance and who have little or no regular interaction with the market. It may be argued that two entities charged with different aspects of primary market regulation can work effectively together through proper collaboration. But experience shows that a single body provides better regulation and cooperation than split responsibilities.

Thirdly, the UKLA's role involves the review of detailed information that can be beneficial from a broader supervisory perspective. This benefit will likely be lost if the UKLA role is separated from supervision. The UKLA's detailed, working level, knowledge of forthcoming new issuance is particularly relevant to the monitoring of market abuse (notably insider trading in existing related securities), which will be the responsibility of the CPMA. Equally, matters discussed in the listing or admission process (such as difficult issues relating to disclosure in a prospectus or those surrounding eligibility criteria) are very important to those monitoring, for example, timely disclosure of inside information under the market abuse regime. As the market abuse directive requires member states to nominate a single authority to ensure compliance with its provisions, and as market abuse is inextricably linked with the market regulation role that will be assigned to the CPMA, it makes good regulatory sense to leave the prospectus approval and listing process with the CPMA, rather than hiving it off into a corporate governance department with no responsibilities for protecting the market against market abuse. Again, it is unlikely that the split could be healed by effective cooperation between the different entities charged with responsibility because the dynamic sharing of granular knowledge at working level across organisational boundaries will never be as efficient, particularly when the main focus of the two entities is so very different.

Fourthly, most of the material legislation used in daily practice by the UKLA is based on EU Directives and Regulations that are elaborated in conjunction with Committee of European Securities Regulators (CESR), on which UK representation will be the responsibility of the CPMA (which also handles many other aspects of EU regulation). With the UKLA arguably being the most expert European regulator in terms of new issuance (at least in terms of debt securities), its merger into the companies regulator within BIS would deprive the CPMA and so CESR (and ultimately EU policy makers and legislators in Brussels) of part of their influence in developing financial regulation in this area. Furthermore, this may incidentally lessen the CPMA's, and so the UK's, ability to play a leading role in CESR (including in its transformation into ESMA) and in EU financial regulatory developments more generally. The problem will not be solved purely through the CPMA acting as liaison between CESR/ESMA and the new companies regulator in relation to matters that fall within the latter's jurisdiction. In practice, other regulators round the CESR/ESMA table will listen to those who have direct responsibilities for the matter under discussion. Those who have to take further instructions on nuances that emerge during debate or who cannot agree a proposal, because they have no direct authority to do so, will be ignored. As the responsibilities would also be split at government level between the Treasury and BIS, the UK's voice in Council would also be weaker than at present, where one Ministry speaks with direct authority for both the listing and admission aspects of regulation and market conduct.

Finally, it is difficult to see what problem this proposal is trying to solve. The crisis has not revealed any major defects in regulation of listing and admission of securities. The UK should not be disturbing regulation that works well and replacing it with something that is likely to work less well in the future, for reasons given above, particularly at a time when so many other important (and in many cases necessary) changes are being proposed and assimilated by the markets.

18. The Government would also welcome views on whether there are other aspects of financial market regulation which could be made more effective by being moved into the proposed new companies regulator.

ICMA is not aware of any other aspects of financial market regulation which could be made more effective by being moved into the proposed new companies regulator.