

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

(by e-mail to [financial.reform@hmtreasury.gsi.gov.uk](mailto:financial.reform@hmtreasury.gsi.gov.uk))

14 April 2011

Dear Sirs,

**HMT consultation cm8012: "A new approach to financial regulation: building a stronger system"**

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](http://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<sup>1</sup>, which gathers the heads and senior members of the syndicate desks of 23 ICMA member banks, and ICMA's Legal and Documentation Sub-committee<sup>2</sup>, which gathers the heads and senior members of the legal transaction management teams of 19 ICMA member banks, in each case active in lead-managing syndicated 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,



**Ruari Ewing**  
Advisor - Primary Markets  
[ruari.ewing@icmagroup.org](mailto:ruari.ewing@icmagroup.org)  
+44 20 7213 0316

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

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

## Annex

ICMA is focusing here on the role of the UK Listing Authority (**UKLA**) within the future Financial Conduct Authority (**FCA**) and is responding to questions 11 and 16 (second bullet) only.

**11. What are your views on the (i) strategic and operational objectives and (ii) the regulatory principles proposed for the FCA?**

**16. The Government would welcome specific comments on:**

- [...]; and
- the proposals in relation to listing and primary market regulation.

The proposed statutory objectives for the FCA seem generally suitable. However there is potential for contradiction between them: the strategic objective “protecting [...] the UK financial system” (and the operational objective of “protection for consumers”) could be interpreted to require financial risk to be reduced to a minimum, which will consequently reduce “choice in the market for financial services” and so adversely impact that operational objective – some statutory acknowledgment that the FCA should sensibly balance the objectives in different contexts seems necessary. We believe that the UKLA should not be forced, in an attempt to achieve this balance, into refusing admission of riskier securities to the UK’s markets. Rather, it should continue to seek to attract to the UK’s markets as wide a range of issuers and products as possible, thus maintaining the UK’s position as one of the world’s leading international financial centres. The knowledge of markets and products gained through this process will provide an extremely valuable source of information for the market conduct and prudential supervision elements of the new regulatory structure; and, of course, consumers will still be protected through appropriate conduct of business rules.

There is a further danger in the UKLA becoming more restrictive in its approach due to its being subject to the same obligation and regulatory approach as the rest of the FCA. This is the risk that UK-based investors, in their search for higher yields, will increasingly buy riskier securities listed outside the UK, in jurisdictions where there is no similar approach to product regulation (see further below) and a more basic approach to the disclosure required in the listing context – effectively leaving UK-based investors (as well as others) with potentially less (or reduced quality) information on which to base their investment decisions. In this respect, keeping some focus (notably in the form of an operational objective) on the competitiveness of the UK’s financial markets would be beneficial from a systemic financial stability perspective.

There is also a risk of confusing markets regulation with retail protection regulation – two very distinct responsibilities. In particular, it seems misleading to use the term ‘consumer’ (directly equated in most peoples’ mind with retail investors) “defined broadly to include persons who use, have used or may use “services” or have relevant rights or interests in relation to those services, and persons who have invested in, or may invest in, securities (for example, those listed on the Official List)”. The term “market user” would seem more appropriate.

More generally, ICMA is aware of increased Financial Services Authority (**FSA**) interest in product regulation (most notably in the context of its Discussion Paper DP11/1 on product intervention<sup>3</sup>). The regulator should always be wary about the risk of being seen (most likely with hindsight) to endorse certain products. No product will be appropriate to all users in all circumstances and this should be, and is, rightly regulated for retail investors / consumers as part of the selling process under the conduct of business regime (with more sophisticated investors being allowed to judge risks and returns for themselves). However, we fear that the power to intervene in relation to particular products early in their development cycle, combined with the declared intention of the FCA to adopt a more intrusive approach, may be seen by many as equivalent to product endorsement, non-intervention being taken as approval. This problem will become particularly acute when there is a market failure, with significant numbers of investors losing money on a particular type of product.

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<sup>3</sup> See [http://www.fsa.gov.uk/pubs/discussion/dp11\\_01.pdf](http://www.fsa.gov.uk/pubs/discussion/dp11_01.pdf).

On a related vein, the consultation picks up on wholesale activities flowing through to retail financial services as part of a transaction chain. Here again, explaining to retail investors / consumers the risks associated with products should be, and is, rightly regulated for retail investors / consumers as part of the selling process under the conduct of business regimes. The only distinction from a listing perspective, should follow that between the EU Prospectus Directive's retail (sub-€50,000 denominations) and wholesale (€50,000 and above denominations) regimes.

A great asset of the UKLA currently is its ability to draw upon the granular knowledge of its prudential supervisor colleagues, many of which (particularly those responsible for the more relevant issuers) will become part of the distinct Prudential Regulation Authority (**PRA**). The Consultation envisages cooperation between the FCA and PRA, but this is non-specific except at the senior and formal levels. The UKLA should not be seen to be approving prospectuses on the basis of information that it may no longer have access to. However, it will still be important that, when a regulated institution such as a bank raises additional capital, the prospectus continues to be reviewed by the issuer's prudential regulators. One potential approach might be for draft prospectuses to be reviewed in terms of factual completeness by the relevant PRA supervisory staff – this would need to be carefully coordinated to ensure that overall review timetables (such as those specified in the EU Prospectus Directive) are not adversely impacted.

Whilst the underlying nuances discussed above may seem clear to current HM Treasury and FSA staff currently working on the development of the UK's new approach to financial regulation (and so not in need of clarification), this will not necessarily be the case for other or future (and possibly more junior) FCA staff actually involved in the day to day discharge of the FCA's statutory responsibilities – hence the need to include specific provisions in the relevant legislation.