

European Securities and Markets Authority  
103 rue de Grenelle  
75007 Paris, France  
(Submitted online at [www.esma.europa.eu](http://www.esma.europa.eu))

15 June 2015

Dear Sirs,

**ESMA Consultation Paper - Draft guidelines on complex debt instruments and structured deposits**

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

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

ICMA is responding in relation to its primary market constituency that lead-manages syndicated debt securities issues throughout Europe. This constituency deliberates principally through ICMA's Primary Market Practices Committee<sup>1</sup>, which gathers the heads and senior members of the syndicate desks of 48 ICMA member banks, and ICMA's Legal and Documentation Committee<sup>2</sup>, which gathers the heads and senior members of the legal transaction management teams of 21 ICMA member banks, in each case active in lead-managing syndicated debt securities issues in Europe.

I set out ICMA's response in the Annex to this letter and would be pleased to discuss it with you at your convenience. (ICMA is distinctly responding from the retail structured product angle through the Joint Associations Committee on retail Structured Products.)

Yours sincerely,

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

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<sup>1</sup><http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Primary-Market-Practices-Sub-committee/>.

<sup>2</sup><http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Legal-and-Documentation-Sub-committee/>.

## ANNEX

Some products are conceptually simple (for example that a bond is like a deposit account but transferable), though may individually require intermediation in the retail context (e.g. as not all borrowers are the same).

Similarly certain specific bond features may be generically comprehensible to retail investors, though may individually require intermediation in terms of investment implications – basic calls (“they can repay early”), basic puts (“I can ask for early repayment”), subordination (“others get repaid ahead of me if things go wrong”), undated nature of perpetual bonds (“no fixed repayment deadline”), inflation-linking (“my investment will keep pace with inflation”), denomination in another currency (“I will then have to exchange the money I get into my own currency”), etc.

Labelling such features as automatically “complex” could risk implying them to be 'toxic' rather than merely disabling the possibility of transacting under MiFID’s ‘execution-only’ regime (either by checking individual understanding under MiFID’s 'appropriateness' regime or ensuring suitability under MiFID’s advisory or discretionary management regimes).

Furthermore classifying products as either “complex” or “non-complex” in respect of MiFID’s ‘execution-only’ regime should not taken as a universal definition of ‘complexity’ for any other purposes – including MiFID’s ‘target market’ regime. Specifically, such “complex” / “non-complex” classification should not be taken across and adopted as a ‘bright-line’ test in relation to ESMA’s view (in the Final Report

on ESMA’s Technical Advice to the Commission on MiFID II and MiFIR) that for simpler / more mainstream investments it is likely that the target market will be identified with less detail (for example in many cases the mass retail market without further refinement), whilst for more complicated / less mainstream investments the target market should be identified with more detail. This is because, rather than any bright line differentiation, there will instead likely be a continuum between the simplest / most mainstream investments and the most complicated / least mainstream investments.

Lastly, Article 30 of MiFID II exempts eligible counterparties from the above restriction on MiFID’s ‘execution-only’ regime. This remains crucial to the efficient of operation of the institutional cross-border bond markets.