



Daniel Measor
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS
United Kingdom

(Submitted by email to cp17-37@fca.org.uk)

5 February 2018

Dear Mr Measor,

FCA Consultation Paper on Industry Codes of Conduct

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

ICMA is a membership association, committed to serving the needs of its wide range of members representing both the buy side and sell side of the industry. Its membership includes issuers, intermediaries, investors and capital market infrastructure providers. ICMA currently has more than 530 members located in over 60 countries worldwide. See: www.icmagroup.org.

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

Yours faithfully,

A handwritten signature in black ink that reads "C. Bellamy".

Charlotte Bellamy

Director - Primary Markets

Charlotte.Bellamy@icmagroup.org

+44 20 7213 0340

ANNEX 1

Introduction

1. ICMA welcomes the opportunity to engage with the FCA on the proposals set out in the Consultation Paper. ICMA's market conventions and standards have been the pillars of the international debt market for 50 years, and so the FCA's proposals to recognise certain industry codes of conduct are of particular interest to ICMA and its members.
2. The proposed definition for industry codes that may be recognised seems quite broad¹ and it is not clear whether guidelines or guidance on market practice would be captured. The ICMA documents that could possibly be classed as 'industry codes of conduct' are:
 - a. [ICMA Primary Market Handbook](#);
 - b. [ICMA's rules and recommendations for the secondary market](#);
 - c. [ICMA ERCC Guide to Best Practice in the European Repo Market](#);
 - d. [ICMA Private Wealth Management Charter of Quality](#);
 - e. [ICMA European Corporate Debt Private Placement \(ECPP\) Market Guide](#)
 - f. [Green Bond Principles \(GBP\)](#);
 - g. [Social Bond Principles \(SBP\)](#); and
 - h. [Sustainability Bond Guidelines \(SBG\)](#).
3. We refer to the above collectively as the "ICMA Codes" in this response. A short summary of the ICMA Codes is set out in Annex 2.²

The application of the FCA's proposal to recognise certain industry codes to ICMA Codes

4. The FCA states in paragraph 3.14 of the Consultation Paper that it does not intend to give industry codes and standards covering "regulated markets and activities" formal status. The FCA also helpfully notes in paragraph 3.15 that it "wishes to make a clear distinction for the purposes of this consultation between industry or market codes that cover unregulated markets on the one hand, and industry-written guidance covering regulated markets on the other." We also understand that the general intention behind the proposals is to recognise industry codes relating to areas of the market that are unregulated, for example spot FX, certain money market activities and physical commodity trading (as referenced in paragraph 3.7).
5. We agree with the FCA's suggestion that it would be unhelpful to give industry codes covering regulated markets and activities any formal status (paragraph 3.14). If there is a need for further regulatory guidance in those areas, then the better approach is for such guidance to be provided by the relevant regulatory body (eg the FCA or ESMA), rather than applying a regime in which the FCA recognises standards prepared by third parties. This will ensure that the

¹ The proposed definition for "FCA-recognised industry code" is "A market code prepared by a *private person* that prescribes or prohibits forms of conduct or behaviour in relation to activities in financial markets, recognised by the FCA under its industry code recognition process and procedures and listed on the FCA website."

² Certain FCA staff have been provided with ICMA login details giving access to those documents listed above that are available on a subscription basis only. Please contact Charlotte Bellamy (Charlotte.Bellamy@icmagroup.org) for further information.

conduct expected of firms in the regulated market space is clear.

6. Broadly, the ICMA Codes relates to bond issuance³, private placement⁴, bond underwriting⁵, bond trading⁶, repo⁷ and cross-border private banking⁸. **We therefore view the ICMA Codes as relating to regulated markets activities**, in that there are a number of UK and European legislative provisions and regimes that apply to various aspects of bond issuance, private placement, underwriting and trading, repo and cross-border private banking.
7. We believe this to be the correct interpretation, even though there may be specific provisions within the ICMA Codes that relate to activities that are not specifically regulated but are incidental or ancillary to an overall regulated activity. An example of this might be provisions in the ICMA Primary Market Handbook relating to sharing draft documentation for a new bond issue among syndicate members. Sharing draft documentation might not be specifically regulated, but it relates to the general activity of underwriting a new bond issue, which is subject to a number of regulatory regimes (e.g. MiFID II, MAR, Prospectus Directive).
8. In addition, the recommendations in the ICMA Codes could be viewed as giving granular detail to the FCA's General Principles in PRIN 2 (such as conducting business with integrity (PRIN 2.1) and skill, care and diligence (PRIN 2.2) or taking reasonable care to organize and control affairs responsibly and effectively, with adequate risk management systems (PRIN 2.3)) in the context of the cross-border bond market. So even where a provision within an ICMA Code relates to an activity that is not a regulated activity *per se*, we would still view the ICMA Codes as giving guidance on regulatory rules. And to re-iterate, the general purview of all ICMA Codes is the cross-border bond market, to which a number of regulatory regimes apply.
9. Separately, it is envisaged in paragraph 5.13 of the Consultation Paper that any recognised code would need to have been subject to public scrutiny and be made publicly available and free for all parties who wish to use it. These requirements are sensible, because firms will need to be able to scrutinise and access industry codes that are recognised by the FCA if they are to comply with them.
10. Certain items of ICMA Codes are publicly available, and others are only available to ICMA members and subscribers (see further Annex 2). While ICMA Codes are periodically reviewed and updated (sometimes more than once per year) following engagement with relevant stakeholders, ICMA generally does not open consultations on updates to ICMA Codes to members of the public.
11. **As such, we do not expect the FCA's proposals to relate to ICMA Codes.**
12. Notwithstanding the above, we set out below some general remarks and considerations that the FCA might wish to consider in taking its proposals forward.

General remarks

13. The FCA's aim of clarifying its expectations of authorised firms and their staff in relation to unregulated markets is welcome. However, there are questions around the scope and practical impact of the proposals to recognise certain industry codes, which we discuss further below.

³ In the case of the GBP, SBP and SBG.

⁴ In the case of the ECPP Market Guide.

⁵ In the case of the ICMA Primary Market Handbook.

⁶ In the case of the ICMA rules and recommendations for the secondary market.

⁷ In the case of the ICMA ERCC Guide to Best Practice in the European Repo Market.

⁸ In the case of the ICMA Private Wealth Management Charter of Quality.

14. The FCA proposal to recognise certain industry codes would seem to be a relatively significant change to the overall UK regulatory framework for authorised firms, so it is important that firms and their advisors are able to engage properly with these proposals. It is therefore perhaps unfortunate that the timing of the proposal has coincided with the implementation of MiFIDII/R, arguably one of the most wide-ranging and complex pieces of legislation to affect the financial services industry in recent years. The FCA may wish to take this into consideration in terms of further engagement with industry in progressing the proposals.

Specific queries and concerns with the proposal to recognise industry codes

15. While the FCA is seeking to clarify its expectations of authorised firms and their staff where they carry on unregulated financial market activities, it is possible that the proposal to recognise certain industry codes of conduct could be seen as over-complicating the existing regulatory framework, by adding a new layer of quasi-regulatory industry codes. Although the FCA notes that compliance with recognised codes will remain voluntary, FCA recognised codes may be perceived as having quasi-regulatory status (because the FCA will treat compliance with recognised codes as tending to indicate compliance with FCA COCON 2.1.5 and, in some cases, other parts of the FCA Handbook).
16. This perceived quasi-regulatory status could potentially undermine the benefits of industry codes, if authors of codes feel constrained in how they approach drafting or updating codes (as to which, see further paragraph 22.c below) in light of the possibility that the code could be subject to recognition and therefore gain such perceived 'quasi-regulatory' status.
17. The justification for these proposals appears to be a desire to encourage firms to follow industry codes and provide assurance to firms that they are meeting their regulatory requirements. However, it seems that firms may still be expected to comply with relevant codes that are not recognised by the FCA (notwithstanding their otherwise voluntary nature). Indeed, the FCA states at paragraph 4.15 that its ability to take enforcement action is not affected if a code is not recognised and the FCA may use an unrecognised code to inform its view of proper standards if it were to take enforcement action. On the other hand, it also seems that compliance with a recognised code will not necessarily equate to compliance with FCA rules that require firms or individuals to observe 'proper standards of market conduct', but rather merely "tend to indicate compliance" with the FCA "usually" not taking enforcement action against firms for behavior that is so compliant. This position would seem to suggest that the status of a code as recognised or unrecognised will have little (if any) bearing on how it is considered by the FCA in the course of any enforcement action. This might be viewed as undermining the stated justification for the proposals. It might also be confusing for market participants.
18. We agree with the indication in paragraph 3.30 of the Consultation Paper any FCA enforcement action would be based on potential rule breaches (including the FCA's Individual Conduct rules), rather than breach of a voluntary industry code. An express confirmation on this point would be useful.
19. The FCA notes at paragraph 3.24 of the Consultation Paper that not all industry codes will define the proper standard of market conduct and firms and individuals need to use judgment to assess the merits and relevance of particular codes. It seems that this would continue to be the case after the FCA's recognition regime is in place. However, the existence of the FCA recognition regime could mean that firms are encouraged to look only to those codes that are recognised by the FCA and not other codes that may still be relevant to their activities, which does not appear to be the FCA's intention.
20. It is not clear whether FCA recognition would be relevant for codes that have application to

cross-border activities or firms that are based both in and outside the UK, or whether the FCA proposals relate only to codes and activities that have a UK-only territorial scope. Where an industry code applies to firms' activities on a global basis (which is often the case given the nature of many large firms' businesses), it is not clear whether recognition by a regulator in one jurisdiction would be viewed as appropriate in other jurisdictions. For example, might FCA recognition unhelpfully constrain the development or update of codes in relation to issues pertinent in Asia?

21. The concerns highlighted by the FCA in the section "Risks and challenges of this approach" (paragraphs 4.10 – 4.13 of the Consultation Paper) are valid. While the FCA notes in paragraph 4.13 that the proposals have been designed to address or avoid these risks, it is not entirely clear whether that will be achieved in practice.
22. In addition to the risks and challenges noted by the FCA, we would also highlight the following points:
 - a. **Regulated market vs. unregulated market scope:** The scope of the FCA's recognition proposals to codes covering unregulated markets may not be clear in practice. The FCA states in paragraph 3.15 of the Consultation Paper that it wishes to make a clear distinction between industry codes that cover unregulated markets on the one hand, and industry-written guidance covering regulated markets on the other. The Consultation Paper also makes it clear that the recognition proposals relate only to industry codes for unregulated markets, whereas industry codes covering regulated markets and activities will not be given any formal status (paragraph 3.14). However, the FCA also notes (paragraph 3.3) that there has been a blurring in practice between the boundaries between the regulated and unregulated activities of regulated firms. In the light of this, we wonder if there is the potential for confusion as to whether a particular industry code would fall within the scope of the FCA's recognition regime. This compounds the general concern set out in paragraph 15 above that these proposals might over-complicate the regulatory framework.
 - b. **Unrecognised codes:** The FCA may wish to consider giving more information to firms in relation to codes that fall within the scope of the regime but are not recognised. For example, the FCA may wish to clarify that compliance with an unrecognised code does not necessarily indicate non-compliance with an FCA rule. The FCA may also wish to consider notifying the market of any decision it makes not to recognise an industry code, including any associated rationale that may be relevant for firms.
 - c. **Code updates:** The final FEMR report cited in paragraph 3.7 of the Consultation Paper notes the importance of codes being kept up-to-date. However, it is not clear how the FCA envisages recognised codes being updated once the code has been recognised. The FCA notes at paragraph 5.10 of the Consultation Paper that it would only recognise a particular version of a code and any later iterations would need to be considered separately. It seems likely that a requirement to seek further FCA approval in respect of any update to a recognised industry code would at best delay such update and at worst result in the code not being updated at all. Such a result would seem to run contrary to the apparent goal of ensuring industry codes are kept up-to-date and do not simply 'sit on a shelf'. In this regard, it is worth noting that some industry codes are updated on a reactive, consensual basis. In other words, firms will bring a market issue to the relevant code author and the code author will seek to address the issue via discussion and, if a consensus can be reached, an update to the relevant industry code. It is likely to be important that the flexibility to update codes on a consensual basis is maintained if industry codes are to remain relevant and helpful for users.
 - d. **Code consultations and interpretive questions:** While the FCA notes that compliance with recognised codes will remain voluntary and recognised codes will not have the same status

as regulation, it is possible that, in practice, recognised codes may be perceived as having a “quasi-regulatory” nature (as noted in paragraph 15 above). However, it appears that such codes will not be subject to a formal FCA consultation process, but rather the author’s consultation process. Similarly, it seems that the FCA will not answer ‘interpretive questions’ on the codes, but leave this to code authors. There are limited details as to the FCA’s oversight or involvement in any such consultation process or answering of interpretive questions by code authors, which may need to be considered further.

Concluding remarks

23. While we do not anticipate the FCA’s proposals to recognise certain industry codes to be relevant to ICMA Codes, ICMA considers that there are some important questions relating to the impact and scope of the proposals. The FCA may wish to consider these questions via further engagement with industry in due course.

ANNEX 2

ICMA Primary Market Handbook

- a. The [ICMA Primary Market Handbook](#) is available to ICMA members and Handbook subscribers. Since its launch in 1985 (as the “IPMA Handbook”), the Handbook has grown from a few short pages to a comprehensive document, continuously responding to market developments when guidance or harmonisation is required. Oversight of the Handbook rests with the [ICMA Executive Committee](#), acting on the advice of the [ICMA Primary Market Practices Committee](#) and/or the [ICMA Legal and Documentation Committee](#).
- b. The Handbook comprises ICMA Recommendations, guidance and standard language and documentation, generally relating to offers of syndicated international bonds in the primary market, to programmes under which such offers may be made and to euro-commercial paper programmes and trades made under them. The full scope of the Handbook is set out in its [Chapter 1 - Scope](#) (publicly available), with further background information set out in [Appendix B1 - Reader’s Guide](#) (publicly available). An overview of the content of the Handbook can be obtained from its [Table of Contents](#) (publicly available).

ICMA rules and recommendations for the secondary market

- c. [ICMA’s rules and recommendations for the secondary market](#) is available to ICMA members and subscribers. Amendments to the ICMA Rule Book are separately and individually notified to ICMA members and subscribers and are incorporated into the ICMA Rule Book from time to time.
- d. ICMA’s rules and recommendations for the secondary market apply to transactions in international securities – an international security is defined as a security intended to be traded on an international, cross-border basis (i.e. between parties in different countries) and capable of settlement through an international central securities depository or equivalent.
- e. All transactions between members of ICMA involving international securities (as defined within the rules) are subject to ICMA’s rules and recommendations, unless specifically agreed otherwise by the parties at the time of concluding a transaction. Unless otherwise stated, the rules and recommendations do not apply to the syndication and allotment process or to repurchase and to other transactions entered into under the GMRA or similar master agreements.
- f. Oversight of the ICMA Rule Book rests with the [ICMA Executive Committee](#), acting on the advice of the [ICMA Secondary Market Practices Committee](#).

ICMA ERCC Guide to Best Practice in the European Repo Market

- g. The [ICMA ERCC Guide to Best Practice in the European Repo Market](#) is publicly available. It sets out standards for the orderly trading and settlement of repos. Its purpose is to help foster a smooth and orderly market in repo in Europe by recommending practices which market experience suggests can help avoid uncertainties or disagreements about transactions, and consequent delays or disruption to repo trading and settlement. The Guide also codifies market conventions, where this has been thought to be helpful, usually in response to queries from market participants. The Guide is different in nature from, but complementary to, the high-level UK Money Markets Code adopted in April 2017.
- h. The practices set out in the Guide are general recommendations only. Parties to repos are free to agree other terms, where they see fit. It is not necessarily a problem if recommended best

practice is not followed, provided parties recognise the risks to which they may expose themselves as a result. The Guide has been written to assist staff in member firms of the [ICMA European Repo and Collateral Council \(ICMA ERCC\)](#) but other firms may find the Guide helpful. It presupposes some knowledge and experience of how the repo market operates.

- i. Oversight of the Guide rests with the [ICMA Executive Committee](#), acting on the advice of the ICMA ERCC. It is the intention of the ICMA ERCC to continually monitor developments in the European Repo Market. Accordingly, the Guide will continue to remain under review and will be amended as warranted by any evolution in the agreed understanding of best practice.

ICMA Private Wealth Management Charter of Quality

- j. The [ICMA Private Wealth Management Charter of Quality](#) is publicly available. It brings together in a single document the guiding principles of best practice adopted by the cross-border private banking industry. The Charter is designed to be consistent with relevant regulation at both the EU and national level, and to complement principles such as the Wolfsberg Principles on anti-money laundering and the global recommendations of the Financial Action Task Force. This is the first initiative of its kind where the private wealth management industry has joined together voluntarily to commit to common standards of quality, compliance and good market practice as set out in the Charter.
- k. Oversight of the ICMA Private Wealth Management Charter of Quality rests with the [ICMA Executive Committee](#), acting on the advice of the [ICMA Asset Managers and Investors Council \(AMIC\)](#).

ICMA European Corporate Debt Private Placement (ECPP) Market Guide

- l. The [European Corporate Debt Private Placement \(ECPP\) Market Guide](#) is publicly available. With the aim of supporting the development of the ECPP market by providing a framework of best practices for ECPP transactions, it builds on existing practices in the bond and bank loan markets, as well as practices in other international private placement markets. First published in 2015 and updated in 2016, the ECPP Market Guide defines best practices and the role of parties, while providing standard summary terms for discussion between borrowers and investors that is both documentation and jurisdiction neutral. The ECPP Market Guide also covers aspects of the German Schuldscheindarlehen market as part of the wider ECPP universe, and includes an appendix on general principles of, and best practice applicable to, ECPP deal amendments and waivers. The ECPP Market Guide also promotes and directs readers to the standardised and complementary transaction documentation produced by the Loan Market Association and the Euro PP Working Group.
- m. Oversight of the ECPP Market Guide rests with the [ICMA Executive Committee](#), acting on the advice of the [ECPP Joint Committee](#). The ECPP Market Guide will be amended as warranted by any evolution in the agreed understanding of best practice.

Green, Social and Sustainability Bond Principles

- n. The [Green Bond Principles \(GBP\)](#) are publicly available. They are updated as of June 2017 and are voluntary process guidelines that recommend transparency and disclosure and promote integrity in the development of the Green Bond market by clarifying the approach for issuance of a Green Bond. The GBP are intended for broad use by the market: they provide issuers guidance on the key components involved in launching a credible Green Bond; they aid investors by ensuring availability of information necessary to evaluate the environmental impact of their Green Bond investments; and they assist underwriters by moving the market towards standard disclosures which will facilitate transactions.

- o. The [Social Bond Principles \(SBP\)](#) released in June 2017 are based on the GBP and provide voluntary process guidelines for Social Bonds. The [Sustainability Bond Guidelines \(SBG\)](#) released in June 2017 are for bonds that finance both green and social projects, and provide guidance on how both the GBP and SBP may apply in such cases.
- p. Oversight of the GBP, SBP and SBG rests with the Green Bond Principles Steering Committee. The governance framework is available on the [ICMA Green, Social and Sustainability Bonds Governance Framework webpage](#).