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*(Submission by e-mail to [primarymarketbulletin@fca.org.uk](mailto:primarymarketbulletin@fca.org.uk))*

19 November 2013

Dear Sirs,

**Consultation on the UKLA's Primary Market Bulletin No. 7 (PMB7) – October 2013**

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 Sub-committee<sup>1</sup>, which gathers the heads and senior members of the syndicate desks of 31 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 debt securities issues in Europe.

We set out our response in the Annex to this letter and would be pleased to discuss it with you at your convenience.

Yours faithfully,

A handwritten signature in black ink, appearing to read "R. Ewing", with a large, sweeping 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/>.

<b>Annex Response</b>
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**General remarks**

1. The publication of “blackline” versions of revised technical notes by the UKLA is welcomed. Subject to compatibility with UKLA internal procedures, it would be helpful if future Primary Market Bulletins, being specialist publications, could be inclusive documents, comprising the current bulletin concept together with any underlying consultation papers, draft technical notes and blacklines.
2. We welcome the UKLA’s openness in sharing its responses to the comments provided by the market on technical notes 605.2, 629.2 and 631.1 which is very helpful.
3. In respect of the review period, PMB7 states on page 2 that the document review period for retail non-equity securities is intended to change so that comments on the first draft and subsequent drafts of these documents are returned in five days and three days respectively rather than the current four days and two days. The rationale for increasing the document review period for retail non-equity prospectuses from the current four days and two days, to five days and three days, is not clear. Whilst it is appreciated that there may be a short period of time when readers are adjusting to reviewing retail non-equity prospectuses in the new style, it is very much hoped that any such increase in turnaround times, if warranted, is kept to a short interim period.
4. Furthermore in respect of the review period, it is important to ensure that issuers have certainty regarding timing, review rounds and comment handling in the approval process.

**New technical note to explain the prospectus disclosure requirements for retail investors in non-equity securities – UKLA/TN/632.1**

5. We endorse the aim of the UKLA in ensuring that prospectuses aimed at true retail investors are drafted using language that is appropriate for such investors and that complex technical language and complex legal concepts should therefore be explained clearly.
6. The proposals set out in the new technical note are said to apply only “when preparing a retail prospectus [...] to a retail audience”. The proposed guidance however links ‘retail’ prospectuses to prospectuses for securities with a ‘low’ denomination, i.e. of less than €100,000. The link to low denominations is inappropriate as low denominated offerings targeted exclusively at institutional investors would have to comply with the proposed guidance, so:
  - (a) such investors would be faced with volumes of inappropriate disclosure (given their knowledge and sophistication) that would pointlessly complicate their understanding of the issue; and
  - (b) issuers would be confronted with the additional and pointless burden of preparing such disclosure.

(Incidentally (i) the UKLA is not required, in relation to its own retail consumer policies, to imitate the Prospectus Regulation in making a distinction between low denominations and denominations exceeding €100,000) and (ii) there seems to be no obvious relevance for the reference to Recital 3 of the Amending Directive in footnote 2 of the technical note.) Application of the proposed guidance should instead follow the FCA’s PMB7 objective that “a different approach is appropriate for a prospectus targeted at wholesale investors due to their knowledge and sophistication”. The guidance in the technical note should therefore apply to a prospectus relating to an offer of securities which is not exempt under Article 3.2 of the Prospectus Directive. References to “retail denominated prospectus” would thus be consequentially amended to “retail prospectus”.
7. The flexibility of the guidance in the technical note (for example, in relation to the statement that FAQs are helpful but not essential) is welcome. Such theoretical flexibility must however carry over into the practical application of the technical note by UKLA readers during the prospectus approval process, given the potential risk that those drafting prospectuses (and those responsible for reviewing them at the UKLA) might pursue the aim of clarity and simplicity of language at the

expense of accuracy and legal precision (which could undermine the objective of consumer protection). For example, the statement that a retail prospectus should not place excessive reliance on defined terms and technical language should not be applied so as to prohibit the use of defined terms and technical language where the prospectus is easily analysable and comprehensible by a retail investor. A statement noting that defined terms and technical language are sometimes necessary in order to ensure the disclosure is true, accurate and not misleading would be helpful in this respect.

8. It would be very helpful if the statement "Where such language is used it should be clearly explained in each section of the prospectus where this language is used" in section (a) of the proposed technical note could also be clarified. Hopefully this proposal does not imply that a complex legal concept that might need to be mentioned in various places in a prospectus needs to be explained in each section where it is used, as this could make a prospectus very unwieldy. Such concepts should only need to be explained once and with the explanations cross-referenced elsewhere. The prospectus could also become more lengthy and confusing if the use of defined terms is excessively restricted.
9. Section (c) of the technical note provides some helpful clarification on the use of worked examples. It would also be helpful if this could be further clarified to underline that the intention behind the use of worked examples, as was indicated during a meeting between the UKLA and several law firms on 23 July 2013, is to explain the features of the securities rather than to give an indication of the possible performance of such securities.
10. Section (e) of the proposed technical note discusses the presentation of features, risks, protections and rights associated with bonds. While generally such information should be presented in an easily analysable and comprehensible format, it is unclear how the guidance reference to 'risk' disclosure relates to the underlying legislative regime for the disclosure of risk factors and more specifically the UKLA's own technical note 621.2 on risk factors. For example, it is not clear from the proposed technical note if the UKLA is (a) expecting a different section with disclosure on risks that is distinct from the risk factors section (which would be confusing), or (b) re-affirming that the section describing the key features of the bonds and any underlying – as currently required under the Prospectus Regulation (item 4 of each of annex V, XII and XIII) – is presented in an easily analysable and comprehensible format through either clear narrative or use of diagram.
11. Section (e) of the proposed technical note further proposes to require clear explanation of how the protections and rights that have been built into the bond might work in a default scenario, either through a clear narrative or illustrative diagram. It might be arguable there is some investor benefit in describing in the prospectus in narrative or illustrative terms the possible repayment process in a default scenario where this is relevant, namely for bonds with a security or subordination element (either contractually or structurally embedded). However, such detailed description is neither relevant nor appropriate for unsecured unsubordinated bonds (in other words, where the bondholders are treated *pari passu* with all other unsecured unsubordinated creditors of the issuer). The starting premise of the European disclosure regime is that a prospectus should provide the information that investors need to take an informed investment decision. Investors (other than vulture funds) assess unsecured unsubordinated bonds on their probability of default and not on loss given default. If investors were seriously considering loss given default they would not invest at all.
12. There appears to be a typo in the first sentence of paragraph (e) of the technical note, in the sentence: "Retail investors *are may not be nor* knowledgeable of..." (emphasis added).
13. Otherwise, the proposed guidance seems sensible. It is of course important to bear in mind that the more requirements are placed on issuance, the more the challenges for issuers in making a business case to offer securities to retail investors. It is therefore crucial, if a vibrant retail market is desired, that all such requirements really be necessary. This is particularly the case in relation to incentivising blue chip issuers (who face wider consistency concerns for their documentation) to come to market and so increase choice for retail investors beyond small and mid-cap issuers. In this respect the article in Euroweek "UK retail bond growth at risk from prospectus rules", dated 1 November 2013, is interesting. A flexible solution to allow otherwise wholesale blue chip issuers

to include a retail element in their programme and to avoid limiting such issuer's access the retail bond market to distinct separate standalone prospectuses only would be valuable in this respect.

**Other new / amended procedural and technical notes – UKLA/PN/910.1; UKLA/TN/712.1; UKLA/TN/705.2; UKLA/TN709.2; UKLA/PN/909.2; UKLA/TN/713.1**

14. There are no comments on the above.