FICC Markets Standards Board
63 St Mary Axe
London EC3A 8AA

(Submitted BY e-mail to Email: standards@fmsb.com*)*

17 January 2017

Dear Sirs,

FMSB: New Issue Process standard for the Fixed Income markets - Transparency Draft

The International Capital Market Association (ICMA)[1] submits comments to the above (the **Draft Standard**).

Representing a broad range of capital market interests including banks, 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 almost 50 years. See: www.icmagroup.org.

ICMA's submission relates to its primary market constituencies that issue or lead-manage syndicated cross-border investment grade debt securities issues in Europe. These constituencies deliberate principally through:

1) the ICMA Financial Institution Issuer Forum[2], which gathers the heads or senior members of the capital raising, funding and treasury departments of ICMA member banks;
2) the ICMA Corporate Issuer Forum[3], which gathers senior representatives of major corporate issuers active in the Eurobond markets;
3) the ICMA Primary Market Practices Committee[4], which gathers the heads and senior members of the syndicate desks of 52 ICMA member banks; and
4) the ICMA Legal and Documentation Committee[5], which gathers the heads and senior members of the legal transaction management teams of 21 ICMA member banks,

in each case active in the above issuance context.

We set out our comments 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] European Transparency Register #0223480577-59
[2] http://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-committees/icma-financial-institution-issuer-forum/
[3] http://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-committees/icma-corporate-issuer-forum/
[4] http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Primary-Market-Practices-Sub-committee/.
[5] http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Legal-and-Documentation-Sub-committee/.

Annex
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Comments

1. **Introduction** – All debate on new market practices is always welcome and so is the FMSB's Draft Standard contribution and its recognition of the ICMA Primary Market Handbook[6]. Many of the practices described in the Draft Standard are generally accepted[7] - at least in the context of syndicated cross-border investment grade debt securities issues in Europe.

2. **Transition** – Whilst many of the practices in the Draft Standard are generally accepted as noted above, not all are. In this respect, a sufficient transition period (say at least 6 months) should be provided following publication of the final standard (the **Final Standard**), to allow widespread familiarisation throughout the market and consequential implementation of any changes to prior practices.

3. **Typographic error** – In III-1/CP1, *"issuer's allocation decisions must take precedent"* is presumably intended to be *"issuer's allocation decisions must take precedence"*.

4. **Transaction 'document'** – In III-1/CP1, it is stated there will be a *"document for the discrete transaction"* on issuer objectives etc. In this respect, it may well be (certainly for frequent issuers) that such objectives etc. will, in practice, be memorialised in e-mail correspondence as the most efficient form of communication for the parties concerned (including the issuers concerned). Such e-mails are, and should be seen as, documents, including for the purposes of this FMSB provision. Distinctly, it should be made clear that any such *"discrete transaction"* documents are not required to be made public. In any case, the production of any such document should be optional for issuers rather than compulsory as between the lead-manager and the issuers. In effect, lead-manager banks should understand the objectives that the issuer has and only produce a document describing these objectives if appropriate, desirable and practicable.

   As far as issuers' allocation preferences and decisions are concerned, many issuers do not, or may simply not wish to, get involved in the actual allocation and placement of their fund raising, either as a general construct or on an issue-by-issue basis. Indeed, many would rather leave allocation and placement entirely under the responsibility of their lead-manager banks (whom issuers pay - as accountable professionals with detailed knowledge of the investor base - to use their expertise). In this respect, references in the Draft Standard to issuer "preferences" should be taken as suffixed by "(if any)".

5. **Generic allocation/sounding policies** – The various references in the Draft Standard (notably under Under III-2/CP1 and CP2) to banks' allocation and sounding polices (that are to made publicly available or at least a summary thereof) must intrinsically mean generic, rather than issuer- or transaction-specific, policies (and c.f. In contrast the distinct transaction "document" commented in #4 above). Requiring issuer- or transaction-specific policies would be hugely inefficient as well as unfairly burdensome on issuers.

6. **MAR duplication** – Under III-2/CP2, it is stated that, where sounding inside information under MAR, the sounder is to *"assess when the information […] is, in its opinion, no longer inside information and inform"* the persons sounded. This seems to duplicate provisions of the EU's Market Abuse

[6] http://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/ipma-handbook-home/
[7] The ICMA Primary Market Handbook is intentionally selective rather than exhaustive and so does not list all accepted practices within its scope.

Regulation (MAR)[8]. This may be intended to the extent practitioners are within a non-EEA jurisdiction whose laws or regulations do not impose such provisions. However, the Draft Standard *"applies […] in Europe [though] it is anticipated that it will be adopted […] in other jurisdictions over time"* (III/2). It is unclear whether "Europe" is really intended to capture non-EEA European jurisdictions. If not, and presuming such extension *"over time"* will be recognised by amending the 'European' scope limitation (if only for consistency and transparency), it would therefore seem this provision is currently redundant and should perhaps be acknowledged as such – if only to avoid any market participants pointlessly checking whether existing practices need changing pursuant to the Final Standard. More generally, it should be clear that the FMSB is not looking to go further than MAR on market soundings.

7. **Investor inside information responsibility** – Notwithstanding the above, investors remain legally responsible under MAR for their own determinations as to what is or what is not inside information.

8. **Information provision to investors** – Under III-2/CP2, it is stated investors are to be "*provided with public information that can be found in the offering prospectus (or is otherwise publicly disclosed)"*. It is not entirely clear what is intended here. Is it (i) bilateral delivery of the offer document (for investor convenience only, to extent generally already public), (ii) bilateral delivery of a compendium of public information (and on what selection/liability basis) and/or (iii) something else? (e.g. prohibition on delivery of all non-public information even if not inside information – which would *inter alia* render MAR's New and detailed market sounding regime pointless). In addition, it is worth bearing in mind that the RTS[9] adopted under Omnibus II effectively restrict the use of information beyond the prospectus. Further clarity may be needed.

9. **Limiting book disclosure frequency** – Under III-3/CP3, it is stated that *"Limiting the frequency […] reduces the risk of creating an exaggerated or misleading impression"*. However, it is unclear why frequent disclosure might *per se* create such an impression. Whilst often true that information cannot be misleading if it is not disclosed, one should not presume that information disclosure of itself is likely to be misleading. In this respect, market practice involves careful analysis of any information to be disclosed, not least since any such disclosure is already required by law to be clear, fair and not misleading. Further clarity may be needed. Incidentally, transactions may also involve no book disclosure at all.

10. **Issuer client discretion** – Under III-3/CP3, there is a proviso *"subject to the discretion of the issuer"*. The implication seems to be that the other provisions of the Draft Standard are not subject to such discretion. It is unclear whether FMSB effectively intends that market practitioners can rely on such other provisions in the Draft Standard to refuse to accede to otherwise lawful issuer client requests – clarity may be needed in this respect (and c.f. #4 above).

11. **Deal announcement *"key"* terms** – In III-3/CP7 it is stated announcements should be *"comprehensive of the key transaction terms"*. This uses terminology that has caused ambiguity concerns when used in a legislative context[10]: what subset of generally-understood 'material' information does 'key' information represent? It seems impossible to prescribe what information should be included in (necessarily) short announcements without being unreasonably prescriptive (bearing in mind that forcibly summarised information may well be misleading and so subject to legal/regulatory sanction). Bearing in mind all material information should be included in the offer document (the provision of which is covered in CP2), investors (being professionals) should, where

[8] Regulation EU/596/2014.
[9] Delegated Regulation EU/2016/301.
[10] Notably in the context of the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation (EU/1286/2014).

they have received insufficient and timely information, refrain from placing an order for a new issue. Further clarity may be needed.

12. **Deal announcement timing** – In III-3/CP7, it is stated announcements should be made available *"at the time of book opening and concurrently with the relevant draft disclosure documentation"*. The precise three-way concurrency may be both unrealistic and unnecessary, with announcement and offer document (whether draft/preliminary or final, and standalone or under a programme) availability no later than the opening of order books being sufficient. Further clarity may be needed.

13. **Announcement 'terms'** – III-3/CP7 covers *"Deal announcement terms"* but presumably the intent is to cover *"Deal announcements"* generally and not just specific parts of such announcements, so amendment may be needed.

14. **Deal statistics dissemination method** – In III-4/CP8, it is stated deal statistics should be disseminated *"effectively through the same communication channels used for all other new issue information"*. In this respect *"effectively"* seems an ambiguous qualifier (dissemination is either through the same channels or not) that perhaps should be deleted. If the intent was to ensure circulation of statistics is not overlooked in the aftermath of a transaction (once practitioners' focus may be under pressure from other ongoing transactions), then it would seem the this is achieved by the *"One bank may be handed this task at the mandate stage"* provision. Incidentally, others tasks cited in the Draft Standard may also well be similarly assigned to one of the lead banks for completion.

15. **Offer document / public terminology** – There are inconsistent references to "offering prospectus", "offering circular", "disclosure documentation", "offering documentation", which should be harmonised for consistency to "offer document" (whether draft/preliminary or final, and standalone or under a programme). Also references in the Draft Standard to information being publicly available / public can only be read in the context of wholesale/institutional market participants (i.e. not meaning general publication also to retail consumers).

16. **Earlier legal/compliance practitioner involvement** – Given the nature of the comments above, it would seem worthwhile that FMSB's granular working groups, in addition to 'commercial' practitioners from amongst FMSB's members, involve at the earliest stage legal/compliance practitioners responsible within the FMSB's members for supporting the 'commercial' practitioners. These legal/compliance practitioners can thus better contribute to FMSB standard-making up front risk and other insights that may significantly mitigate subsequent (and otherwise substantial) review efforts by FMSB members and market participants more broadly.

17. **Competition review** – The standards should be formally reviewed/cleared by competition/anti-trust lawyers before being finalised.