International
Capital
Market
Association

ICMA

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UK Listing Authority
Financial Services Authority

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(Submission by e-mail to primarymarketbulletin@fsa.gov.uk)

8 April 2013

Dear Sirs,

Consultation on the UKLA's Primary Market Bulletin No. 5 (PMB5) – February 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.

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[1], which gathers the heads and senior members of the syndicate desks of 30 ICMA member banks, and ICMA's Legal and Documentation Sub-committee[2], 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,

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[1] http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Primary-Market-Practices-Sub-committee/.
[2] http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Legal-and-Documentation-Sub-committee/.

Annex 1
Response

General remarks

1. Clarity and consistency of individual regulators' approaches to the prospectus regime are crucial to the smooth running of the primary markets and European businesses' access to capital funding. The UKLA should ensure that changes it makes to its policies first emerge, not in the context of specific transactions, but through industry engagement and public consultation. This approach is also likely to aid the UKLA in its review and approval of documentation. PMB5 is a welcome step towards clarifying the UKLA's approach to the prospectus regime, as are two recent roundtable meetings with representatives from certain law firms.

2. In PMB5 (and also at the roundtable meetings) the UKLA refers to confusion in the market around new requirements of the prospectus regime and a degree of reluctance over their adoption. This unfortunate market confusion is ultimately due to changes to the underlying legislation (Directive 2003/71/EC, as amended by Directive 2010/73/EU, the "Prospectus Directive", and Regulation 809/2004/EC, as amended, including by Regulation 486/2012/EU and Regulation 862/2012/EU, the "Prospectus Regulation") which are in many respects unclear. The UKLA is of course not to blame for unclear legislation. We recognise that unclear legislation places competent authorities in a difficult position and it is unsurprising that different competent authorities have taken different approaches in their interpretation and application of this unclear legislation. Where possible, changes to the legislation should be read and applied in a way that is both compatible with the spirit of the prospectus regime and efficient market practice.

3. In many places in the technical and procedural notes the expression "shareholder" is used in relation to a rule or concept that applies equally to debt as well as to equity. In these places, it would be more appropriate to use the expression "security holder" or "investor".

4. It would be preferable in future consultations on changes to existing technical and procedural notes if the UKLA were to make available "blackline" versions of the proposed revised notes as well as clean versions, to ease review and facilitate feedback. It would also be useful if the UKLA were to keep prior versions of the technical and procedural notes readily available on its website for reference purposes.

Revised procedural note "Eligibility process" – UKLA/PN/901.2

5. There are no substantive comments on the proposed revised version of this note and the clarification in relation to the eligibility review process for non-equity issuances is welcome.

Revised procedural note "Review and approval of documents" – UKLA/PN/903.2

6. There are no substantive comments on the proposed revised version of this note other than the term "shareholder" under the sub-heading "*What happens during the approval process?*" should be replaced by "security holder" or "investor" as this point could apply equally to documents that might be made available to investors other than shareholders.

New technical note "Indemnities, guarantees and similar arrangements" – UKLA/TN/310.1

7. There are no substantive comments on this note other than to suggest that the UKLA considers clarifying in the note that it is still possible for issuers to seek from them a formal derogation from the PD requirement to produce audited accounts on the basis that guarantor's accounts are sufficient in some circumstances.

New technical note "Periodic financial information and inside information" – UKLA/TN/506.1

8. There are no comments on this new technical note.

Revised technical note "Supplementary prospectus" – UKLA/TN/605.2

9. ESMA published a consultation paper on regulatory technical standards relating to supplementary prospectuses on 15 March 2013. Paragraphs 22, 23 and 24 of this consultation paper and the statement that "*significance or materiality should be assessed according to the same qualitative and/or quantitative criteria used when drafting the prospectus*" are particularly helpful and the UKLA might consider referring specifically to these provisions.

10. The technical note should clarify that the decision over whether or not an event meets the "significant new information, material mistake or inaccuracy" test is one for an issuer to make rather than the UKLA, given that it is issuers who take responsibility for and are liable for prospectuses.

11. The Prospectus Directive and Prospectus Regulation (and their UK implementing legislation) do not limit changes to "securities note" disclosure and in particular changes to terms and conditions of base prospectuses by way of supplementary prospectus in the way described in the proposed revised technical note. The UKLA's policy of only accepting changes to terms and conditions "*where following the amendment or change to the T&C, the securities are manifestly the same securities*" seems to have no basis in law and in any event it is not being correctly applied by the UKLA. By way of analogy, an issuer of bonds would generally be able to make certain changes to existing bonds (for example, the insertion of a change of control provision) using a consent solicitation process, without the consent solicitation being characterised as a new offer or the amended securities being considered new securities. It is therefore the case that a change (along the lines of the insertion of a change of control provision in terms and conditions via a prospectus supplement) results in securities that are manifestly the same securities. Moreover, requiring the addition of, for example, a change of control provision to be made by way of drawdown prospectus rather than supplementary prospectus does not offer investors any better protection, but instead adds costs and delays to the ability of an issuer to access the markets.

12. The final line under the sub-heading "*Amendments relating to the offer period or the offer amount*" is misleading given that "reasons for the offer and use of proceeds" is a Category C item in Annex XX to the Prospectus Regulation and disclosure relating to use of proceeds may therefore be included within final terms and it will generally not be necessary to supplement the prospectus at all for this disclosure. The technical note should be clarified to reflect this.

13. The final paragraph under the sub-heading "*Our approach to supplementary prospectuses*" in PMB5 indicates that the technical note has been revised to describe the UKLA's policy, subsequent to the changes to Article 16(2) of the Prospectus Directive and the related changes to FSMA s87G and s87Q, discussed at the roundtable meetings, of not requiring supplementary prospectuses that relate to prospectuses describing exempt offers to include a "walkaway rights" legend. The technical note should be revised to reflect this policy.

14. In this note the UKLA sometimes uses the expression "shareholder" where it might be more appropriate to use "security holder" or "investor".

Revised technical note "Risk factors" – UKLA/TN/621.2

15. The requirement for summaries to contain "*key information on key risks that are specific to the issuer and its securities*" in Annex XXII to the Prospectus Regulation and the requirement for the prospectus to contain risks "*which are specific to the situation of the issuer and/or the securities and which are material for taking investment decisions*" in Article 2(3) of the Prospectus Regulation use different terms "*key*" and "*material*", which suggests a different standard of disclosure. It is not clear, as matter of legislative construction, the extent to which these standards differ or as a matter of policy why they should differ. An issuer that has concluded that certain

risks are material and should be disclosed in the prospectus should be able to summarise these. Inability to do so because "key" is a different standard opens the issuer to potential liability as the summary will be inconsistent with the rest of the prospectus.

16. Just as issuers are best placed to assess the material risks that are relevant to them (as mentioned under the heading "*Our approach to risk factor sections in documents*"), issuers are also best placed to assess the key information on the key risks that are specific to them for the purposes of disclosure in a summary. The technical note should clarify this.

17. If the UKLA continue to hold the view that "key" is a sub-set of "material" for the purposes of summarising risk factors, then the proposed legend that may be included in the preamble to the risk factors section of the prospectus is not as helpful as it could be as it only appears in the risk factors section and not in the summary. Also, the proposed legend refers only to "*shares*" and it should be clarified that it is also relevant for prospectuses for debt securities.

Revised technical note "Final terms" – UKLA/TN/629.2

18. The Prospectus Regulation as amended does not prohibit an issuer from including drafting notes in a pro forma final terms in a base prospectus. The requirements of the Prospectus Regulation in relation to final terms relate to final terms as completed and filed for a specific issuance of notes rather than to the pro forma in a base prospectus. Removing the drafting notes from the pro forma final terms undermines one, very effective, procedural mitigant to final terms for a specific issuance of notes being completed incorrectly due to human error, unnecessarily exposing investors and issuers alike to potential damage.

19. ESMA Q&A 49 does not relate to documents that have been approved as prospectuses being used to issue PD exempt notes, but instead relates to documents being labelled a prospectus when they have not been approved as such. In this respect, the UKLA's proposed policy in relation to "combined documents" (requiring *inter alia* any information in relation to exempt notes to be in a single segregated section) seems unnecessarily complex and burdensome, since an appropriately legended form of pricing supplement would make perfectly clear that any issues thereunder are not within the PD regime and do not stem from a UKLA-approved PD prospectus. In other parts of the prospectus, the requirement for the prospectus to be presented in easily analysable and comprehensible form can be achieved by clear demarcation of information, rather than by segregation into different sections.

20. The UKLA's policy of requiring wholesale final terms to include an issue specific summary for combined wholesale and retail bases prospectuses does not have a clear legislative basis. It is not a requirement of regulation that a single base document allowing for the issue of retail debt securities and wholesale debt securities should have an "overview" section specific to the "wholesale base prospectus" and this may not always be appropriate. Information in the overview section may relate equally to retail debt securities and wholesale debt securities.

21. It would be helpful if the UKLA could confirm that the issue specific summary only needs to include information from the summary of the base prospectus which is relevant to the securities being issued and that it does not need to include the generic information about the programme, which is not specific for the issue, from the summary of the base prospectus.

22. The Prospectus Regulation merely allows base prospectus summaries to include placeholders left in blank, but does not prescribe this. Base prospectus summaries historically have served a useful role as an introductory read to the base prospectus, enabling investors to navigate more easily through the overall document. Requiring base prospectus summaries to effectively become pro-formas for issue-specific summaries will undermine this. Rather, issuers should be permitted to include in the base prospectus distinct base prospectus summaries and issue-specific summary pro formas.

23. It is worth recalling that low denomination issuances do not necessarily equate to PD non-exempt offers, since such offers may be made on the basis of PD exemptions other than the high denomination one.

24. Whilst examples may indeed be useful to explain complex securities, this may only be the most effective way for some securities – as recognised in the Prospectus Regulation. Individual examples may in some circumstances actually be misleading and so the choice of whether to include examples should appropriately sit with issuers, who are the ones bearing consequential liability.

New technical note "PD disclosure issues relating to non-equity securities" – UKLA/TN/631.1

25. The UKLA's confirmation in this new technical note is welcome. It would be helpful if this note also confirmed that zero coupon notes redeemed significantly above par, or indeed any other notes which are not linked to an underlying but which redeem at something other than par, also do not fall within the disclosure requirements set out in Annex XII or XX(12).

New technical note "Sponsor services" – UKLA/TN/710.1

26. There are no comments on this new technical note.

New technical note "Sponsor notification requirements" – UKLA/TN/602.1

27. There are no comments on this new technical note.