UK prospectus regime: ICMA comments on near-final statutory instrument

On 21 August 2023, ICMA submitted technical comments to HM Treasury (HMT) on its 11 July near-final version of a statutory instrument (SI) on the new UK prospectus regime. This follows ICMA’s 14 February comments on HMT’s prior 1 December 2022 illustrative version of the SI published as part of the UK’s Edinburgh Reforms (which was reported on page 35 of the Second Quarter 2023 edition of this Quarterly Report).

ICMA welcomed several changes effected by HMT from the illustrative SI to the near-final SI: (i) the simplification of the definition “relevant securities”; (ii) clarification that, for debt securities, the necessary information test’s reference to an issuer’s “prospects” is to be read as a reference to “creditworthiness” (although ICMA queried the reasoning for some seemingly divergent treatment for bonds convertible into shares/equivalents issued by an entity outside the bond issuer’s group); and (iii) the provision that the liability alleviation relating to “protected forward-looking statements” will also apply to persons (such as bond underwriters) who are not formally responsible for a prospectus but who might otherwise face such liability.

ICMA however queried the reasoning for some seemingly divergent treatment for bonds convertible into shares/equivalents issued by an entity outside the bond issuer’s group.

ICMA suggested a few discrete changes to the near-final SI: (i) some clarification in the grandfathering provision; (ii) the correction of two apparent typographic errors; and notably (iii) a correction in the definition of “non-equity securities” (although ICMA queried the reasoning for some seemingly divergent treatment for bonds convertible into shares/equivalents issued by an entity outside the bond issuer’s group).

ICMA lastly noted its presumption that HMT will provide appropriate advance notice of the SI coming into force.

ICMA will continue to liaise with its members as the SI is finalised. In this respect, HMT’s policy note accompanying the near-final SI referenced HMT’s Smarter Financial Services Regulatory delivery plan that states (at page 10) an intention to lay the SI before the UK’s Parliament before the end of the year. ICMA’s current expectation is that the SI will not come into force before 2025 (bearing in mind also the FCA’s rulemaking work consequent to the SI).