

To: Jonathan Hill, Baron Hill of Oareford

By email: [ListingsReview@hmtreasury.gov.uk](mailto:ListingsReview@hmtreasury.gov.uk)

18 December 2020

Dear Lord Hill

**Call for evidence – UK Listings Review**

The International Capital Market Association (ICMA) is responding to the call for evidence on the UK Listings Review.

ICMA is the trade association for the international capital market with over 600 member firms from more than 60 countries, including issuers, banks, asset managers, central banks, infrastructure providers and law firms. See: [www.icmagroup.org](http://www.icmagroup.org).

This response has been developed by ICMA's [primary markets](#) constituency, which includes banks that underwrite, and law firms that advise on, syndicated new issues of vanilla debt securities. This constituency deliberates principally through ICMA's [Primary Market Practices Committee](#) and [Legal & Documentation Committee](#).

We note that the UK Listings Review is focused primarily on UK equity markets, although the questions related to prospectuses in section 4 appear to be aimed at both debt and equity markets. ICMA's remarks set out in the annex to this letter relate to the UK prospectus and related regulatory regimes as they apply to debt capital markets, which we consider to be an important part of UK financial markets. We discuss:

- the current functioning of the prospectus regulation regime in a wholesale, debt capital markets context;
- areas for consideration under the UK Prospectus Regulation;
- the development of a suitable regulatory framework for a UK retail bond market; and
- certain additional technical points that UK authorities might wish to consider.

We would be happy to discuss any aspect of our response in due course.

Yours sincerely

A handwritten signature in black ink that reads "C. Bellamy". The signature is written in a cursive, flowing style.

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## ANNEX

### Current functioning of the prospectus regulation regime in a wholesale, debt capital markets context

1. Participants in primary UK debt capital markets are familiar with the current EU Prospectus Regulation regime, which will be onshored at the end of the Brexit transition period creating a new UK Prospectus Regulation regime. This familiarity has meant that borrowers have not typically faced significant barriers from an EU Prospectus Regulation perspective when they have wished to access wholesale debt capital markets. This is particularly the case when they are issuing new vanilla bonds that are subject to the “wholesale” disclosure regime under the EU Prospectus Regulation. Because of the way that the UK Prospectus Regulation regime will be onshored, we do not envisage any barriers for issuers that wish to access both the EU and UK wholesale debt capital markets immediately after the end of the Brexit transition period.
2. It is also worth noting that, for bonds, compliance with the EU (and soon to be UK) Prospectus Regulation regime is to some extent optional in that many issuers of bonds choose to conduct their offers on an exempt (“wholesale”) basis and some issuers choose not to admit their bonds to trading on an EU regulated market. This arrangement works well for issuers and there is no indication of investor detriment in the exempt (“wholesale”) market.
3. It seems likely that many issuers of wholesale vanilla bonds will wish to continue to access funding on a pan-European basis (i.e. in both the EU and the UK) going forward. **It is therefore important that any changes that are made to the UK prospectus regime are made in such a way that preserves the smooth functioning of the pan-European wholesale market for new bond issues.** One way to ensure this would be to continue to align the exemptions and thresholds for (lighter) wholesale disclosure<sup>1</sup> (“wholesale thresholds”) in the two prospectus regimes. An alternative way would be to ensure that the exemptions from the UK regime and UK wholesale thresholds are not narrower than the exemptions and wholesale thresholds in the EU regime. This would give issuers the choice of issuing debt that is exempt from, or qualifies for wholesale disclosure under, the EU regime (and also exempt from, or qualifies for wholesale disclosure under, the UK regime) or issuing debt that is exempt from, or qualifies for wholesale disclosure under, the UK regime (but which might not necessarily be exempt from, or qualify for wholesale disclosure under, the EU regime).

### Areas for consideration under the UK Prospectus Regulation

4. While the current regime broadly works in practice for new issues of “wholesale” vanilla bonds, there are some areas that could be improved without damaging the smooth functioning of that market.

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<sup>1</sup> This includes applying the “wholesale” annexes in the EU or UK Prospectus Regulation Delegated Regulation and not preparing a prospectus summary.

## **Facilitating the use of periodic disclosures for the purposes of new issue disclosure: incorporation by reference of future financial information**

5. ICMA has previously called for EU policy makers to consider the extent to which more reliance can be placed on a bond issuer's periodic disclosures.<sup>2</sup>
6. One option might be for a bond issuer that has previously made periodic disclosure in accordance with the ongoing requirements of the onshored Transparency Directive and Market Abuse Regulation regimes to be obliged to prepare only a very short document with information on the terms of the securities, without needing to incorporate anything else into the prospectus by reference.
7. This would, however, be a radical step and would have significant implications for issuers and investors. In particular, the liability regimes attached to disclosure of periodic information would need to be reviewed. It is also not certain that issuers would take advantage of this option, in particular if their securities will be offered to US investors.
8. **A preferable option would be to make a relatively minor amendment to the "incorporation by reference" rules in the UK Prospectus Regulation.**
9. Currently, the EU (and soon to be UK) Prospectus Regulation allows an issuer to incorporate by reference certain past regulated information in its prospectus only. A useful (and simple) amendment would be to permit, additionally, future financial information to be incorporated by reference. This approach is permitted under the London Stock Exchange's International Securities Market Rulebook<sup>3</sup> and in other jurisdictions such as the US<sup>4</sup>.
10. In order to ensure that the information incorporated into a prospectus does not become too difficult to track, the option to incorporate by reference future financial information should not be "open-ended" and should not replace the need for a base prospectus to be updated annually. It could, though, be used to limit the need for base prospectuses to be supplemented during the year, thus avoiding additional costs for issuers.

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<sup>2</sup> See pages 53 – 56 of ICMA's [response](#) to the European Commission's consultation on the Review of the Prospectus Directive, May 2015.

<sup>3</sup> See Section 2, item 2, in the [LSEG International Securities Market Rule Book](#).

<sup>4</sup> In the United States, the phrase used to describe incorporation by reference of future information is "forward incorporation by reference". This is governed by Rule 411 under the Securities Act of 1933, as amended and Rule 12b-23 under the Securities Exchange Act of 1934, as amended.

## Supplements to a base prospectus

11. ICMA has also previously called for two aspects of the EU Prospectus Regulation regime relating to base prospectus supplements to be clarified. The UK authorities may wish to consider these points now. The two points are:
  - i. **Allowing supplements to be used to include additional, or amend existing, securities note information in a base prospectus** (e.g. to add a change of control provision or provisions related to index-linked securities to a base prospectus that did not previously include these provisions). If an issuer is unable to use a supplement to amend its base prospectus to include a new change of control provision or new index-linked securities, for example, its options are either to update the whole base prospectus or to publish a drawdown prospectus. These options are more time-consuming and more costly than the publication of a supplement and may therefore reduce the ability of an issuer to access the markets for funding. From the perspective of an investor, it seems unlikely to matter if the relevant disclosure is contained within a supplement or a drawdown prospectus or an updated base prospectus. ICMA members therefore consider that issuers should be able to use a supplement to include additional, or amend existing, securities note information in a base prospectus.
  - ii. **Allowing issuers to prepare a supplement to include additional information, voluntarily, which is not "significant" within Article 23 of the UK Prospectus Regulation.** This might include information which may, nevertheless, either be deemed to be important for investors (e.g. securities codes, ambiguities in certain terms) or simply be revisions which may not be "significant" or "material" but which an issuer may wish to make.
12. For further information on these points, see paragraphs 44 – 47 on pages 61 – 62 of ICMA's [response](#) to the European Commission consultation on the review of the Prospectus Directive of May 2015.

## Refining the Article 6 test to ensure that prospectuses only contain the information bond investors need

13. Article 6 of the EU (and soon to be UK) Prospectus Regulation sets out the general test for the information that is required to be included in a prospectus. In summary, Article 6 states that a prospectus must contain the necessary information which is material to an investor for making an informed investment decision; and that information may vary depending on, among other things, the type of securities.

14. ICMA has previously noted that, in the context of a prospectus for a new issue of bonds, this test should be interpreted as requiring information related to the issuer’s credit (i.e. its ability to repay its indebtedness and pay any interest)<sup>5</sup>.
15. The FCA acknowledged that information related to an issuer’s credit was the relevant test for the information to be included in a bond prospectus in its response to the European Commission on the Review of the Prospectus Directive in 2015.<sup>6</sup> More recently, in its Draft Technical Note on Disclosures in relation to ESG matters including climate change<sup>7</sup>, the FCA indicated alignment with this interpretation by noting that climate-related risks and opportunities may need to be disclosed if they are “financially material” and highlighting that International Accounting Standard (IAS) 1 clarifies that “items are material if they could individually or collectively influence the economic decisions that users make on the basis of financial statements.”.
16. The interpretation of Article 6 as requiring information relating to the issuer’s credit in a bond context is important because it provides a clear, objective test for the information that issuers need to include in their prospectus, which helps issuers to produce prospectuses that are easier to read and understand for investors and contain only the information that investors actually need.
17. While bond market participants generally interpret Article 6 of the EU Prospectus Regulation in this way (and will interpret Article 6 of the UK Prospectus Regulation in the same way), the drafting of the legislation could be made clearer. This is an area that UK authorities may wish to consider. As a consequential change, the Annexes to the UK Prospectus Regulation Delegated Regulation would need to be revised, either by deleting the extraneous requirements or by including a general provision stating that the disclosure items in the Annexes are needed only to the extent they are necessary to meet the Article 6 disclosure standard.

### **Removing the need for a prospectus for secondary market non-exempt offers**

18. Currently the EU Prospectus Regulation requires (and the UK Prospectus Regulation will require) anyone who makes an offer of securities to the public that is not exempt to produce a prospectus before doing so, due to the broad definition of “offer of securities to the public”.
19. ICMA has previously noted that there should not be a requirement to produce a prospectus for secondary market offers of securities listed on a regulated market or an exchange-regulated

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<sup>5</sup> See pages 52 – 53 of ICMA’s [response](#) to the European Commission’s consultation on the Review of the Prospectus Directive, May 2015.

<sup>6</sup> See page 13 of the FCA [response](#) to European Commission Consultation on the Review of the Prospectus Directive, May 2015: “For example the necessary information in a bond deal would be that information that would enable an investor to assess the ability of the issuer to repay its indebtedness.”

<sup>7</sup> FCA [CP20/3: Proposals to enhance climate-related disclosures by listed issuers and clarification of existing disclosure obligations \(fca.org.uk\)](#), March 2020

market. There was no such requirement under the Public Offers Directive (Directive 89/298/EEC), because it applied to the first public offer of securities only and did not apply at all to listed securities.<sup>8</sup>

20. This also reflects the position in practice in relation to secondary market activity via screen-based trading in securities that are admitted to trading on a regulated market, an exchange regulated market or other MTF, which does not require a prospectus under the EU Prospectus Regulation.<sup>9</sup>
21. ICMA believes this suggestion would be relevant for the equity market as well as the debt market.
22. For further information on the rationale for removing the need for a prospectus for secondary market offers, please see pages 56 – 57 of ICMA’s [response](#) to the European Commission consultation on the review of the Prospectus Directive of May 2015.

## **Development of a suitable regulatory framework for a UK retail bond market**

23. In addition to the areas for consideration outlined above, UK authorities may wish to consider putting in place a regulatory framework that would encourage the development of a UK retail bond market. As noted above, this would need to be done in a way that did not impact upon the current smooth functioning of the pan-European wholesale bond market. We consider that should be possible.
24. There are strong policy reasons for aiming to develop and encourage UK retail investor participation in capital markets. One of these is the need to ensure that, as the UK population ages, retail investors have effective ways of funding their retirement.
25. There are thought to be various reasons for the UK retail bond market having not developed historically, including both commercial and regulatory considerations. Overall, the sense is that bond issuers have not found it to be commercially beneficial enough to spend the additional resource on preparing increased disclosure (and incurring increased liability for it) in order to borrow in relatively small issue sizes from the UK retail market, when they can more easily access the funding they need in the wholesale markets. It is also worth noting that there are currently additional stylistic, as well as substantive, disclosure requirements associated with a retail base prospectus approved by the FCA, such as the need to separate information that relates to bonds that are exempt from the Prospectus Regulation into a separate section of the base prospectus<sup>10</sup>, which add to the perceived cost/benefit imbalance.

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<sup>8</sup> See Article 1.1: “*This Directive shall apply to transferable securities which are offered to the public for the first time in a Member State provided that these securities are not already listed on a stock exchange situated or operating in that Member State.*”

<sup>9</sup> This was the view expressed by the Commission Services in a letter to the London Stock Exchange in 2005.

<sup>10</sup> See [FCA Primary Market Technical Note 629.4](#), August 2020.

26. Developing a new framework would therefore need to involve a consideration of how to leverage different retail investor protection tools (such as financial intermediation (e.g. financial advice), disclosure, and possibly schemes similar to the FSCS deposit protection scheme) to ensure that UK retail investors are appropriately protected, whilst not imposing regulatory burdens upon issuers that make it unattractive or commercially unviable for them to offer their securities to UK retail investors. This would require a holistic consideration of the different regulatory regimes, such as the PROD chapter of the FCA Handbook, the UK Prospectus Regulation and the UK PRIIPs Regulation. There would also be a question as to whether all UK retail investors should be treated the same or whether different types of UK retail investor should be treated differently (e.g. high net worth or sophisticated retail investors might be treated differently from other retail investors).
27. ICMA would be happy to discuss ideas with UK authorities on how such a regime could be developed, if this were to be of interest.

## **Technical points**

28. In addition to the more conceptual and structural points noted above, there are also some technical changes that could be made to the UK prospectus and associated disclosure regimes in order to ensure the various rules align appropriately, among other things.

### **Alignment of availability of UK prospectus and transparency “wholesale” disclosure regimes**

29. The EU’s prospectus and transparency regimes are not aligned in certain areas, because the EU Prospectus Regulation was reformed in 2017 and the EU Transparency Directive has not been updated to reflect those changes. This misalignment applies equally to the UK’s onshored versions of these regimes. The main example of this misalignment is the situation for issuers of “wholesale” low denomination bonds admitted to a “qualified investors only” segment of a regulated market. Under the new EU Prospectus Regulation, issuers of these bonds benefit from the “wholesale” disclosure regime and do not need to prepare a prospectus summary. However, such issuers do not benefit from the same alleviations that an issuer of “wholesale” bonds with a high denomination would have under the EU Transparency Directive, because the EU Transparency Directive has not been updated to reflect the new “wholesale” regime for low denomination bonds admitted to a “qualified investors only” segment of a regulated market, which was introduced under the new EU Prospectus Regulation. The UK could fix this misalignment via amending DTR 4.2 so that it aligns with the UK Prospectus Regulation.

### **Alignment of UK Prospectus Regulation and UK Listing Rules exemptions (charities and social housing associations)**

30. The exemptions from Listing Rules in the FCA Handbook are not fully aligned with the EU (soon to be UK) Prospectus Regulation in certain areas. This means that, in some cases, an issuer who is exempt from the obligation to produce a prospectus under the UK Prospectus Regulation will nevertheless be required to produce listing particulars under the Listing Rules (which are very

similar in nature to a prospectus under the UK Prospectus Regulation). This could be an issue for bonds issued by certain social housing associations and charities, because the Listing Rules only include an exemption for securities issued by member states and local authorities, and not the exemption in Article 1(2)(e) of the UK Prospectus Regulation for securities issued by “securities issued by associations with legal status or non-profit-making bodies, recognised by a state, for the purposes of obtaining the funding necessary to achieve their non-profit-making objectives”.

### Sources of prospectus-related rules and guidance in the UK regulatory framework

31. We note that HMT is currently consulting upon the Financial Services Future Regulatory Framework<sup>11</sup> and states in its consultation:

*“In the onshored regime, regulatory requirements will continue to be spread across a range of sources, a patchwork of domestic and retained EU legislation, regulator rules made under FMSA and onshored EU technical standards. This fragmented rulebook is challenging for firms and consumers to navigate and is difficult to maintain efficiently. The links and interaction between regulator rules and statute are complex and could quickly become outdated.”*

32. ICMA agrees that the regulatory requirements in respect of the UK prospectus regime are difficult to navigate and could benefit from being streamlined. We think there could be some benefit in:

- a. streamlining the cornerstone obligations of the prospectus regime set out in FSMA and the UK Prospectus Regulation so as to avoid duplication;
- b. consolidating the detailed binding rules on the content of prospectuses set out in the UK Prospectus Regulation and UK Prospectus Regulation Delegated Regulations into the FCA Handbook, which would allow the FCA more flexibility to make changes to these provisions in line with its statutory objectives;
- c. removing any duplicative or unnecessary provisions from other pieces of legislation such as the UK Prospectus Regulation Regulatory Technical Standards;
- d. consolidating all non-legislative guidance (e.g. current ESMA guidelines and Q&As and FCA materials) in one place such as the FCA website; and
- e. consolidating and aligning the UK “listing” regime with the “admission to trading on a regulated market” regime.

33. There may be similar streamlining exercises that would be helpful in other non-listing areas such as the transparency and market abuse regimes.

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<sup>11</sup> [HMT Financial Services Future Regulatory Framework Review](#), October 2020

## Ensuring the UK's "equivalence regime" for prospectuses works effectively

34. Under Article 29 of the UK Prospectus Regulation: *"The [FCA] may approve a prospectus for an offer of securities to the public or for admission to trading on a regulated market, drawn up in accordance with, and which is subject to, the national laws of the third country issuer, provided that: (a) the information requirements imposed by those third country laws are equivalent to the requirements under this Regulation..."* HM Treasury has already helpfully made an equivalence determination in relation to prospectuses drawn up under the EU Prospectus Regulation.
35. However, at the time of writing the FCA has not yet published information concerning its approval process in relation to prospectuses drawn up under the EU Prospectus Regulation that benefit from equivalence. ICMA members consider that it would make sense for the FCA simply to require evidence that the prospectus has been approved under the EU Prospectus Regulation in order to make its approval. Any additional checklists would make this process less efficient (and undermine the effectiveness of the equivalence regime).
36. Because of the way Article 29 of the UK Prospectus Regulation is drafted (which reflects similar drafting in the EU Prospectus Regulation), it appears that only EEA incorporated issuers are able to benefit from the equivalence that the UK has granted to prospectuses drafted under the EU Prospectus Regulation. This seems unnecessarily restrictive: UK incorporated issuers and other issuers incorporated in the rest of the world should also be able to benefit from the equivalence determination. This could be achieved by replacing the words "the third country issuer" in Article 29 of the UK Prospectus Regulation with the words "a third country".