

UK PROSPECTUS REFORM

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The Public Offers and Admissions to Trading Regulations 2023 (11 July near-final version)

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ICMA technical comments

1. Introduction

- (A) ICMA welcomes the publication, by HM Treasury (HMT) for technical comments, of the [11 July near-final version](#) of the statutory instrument (SI) on the new UK prospectus regime. This follows ICMA's [14 February comments](#) on HM government's prior [1 December 2022 illustrative version](#) of the SI that HMT published as part of the Edinburgh Reforms.
- (B) ICMA's technical comments below suggest just three discrete changes to the near-final SI: (i) a correction in the definition of "non-equity securities" (in #2), (ii) a clarification in the grandfathering provision (in #3) and the correction of two apparent typographic errors (in #4). ICMA would also welcome clarification of two points (raised in #7(B) and in #8(C)).
- (C) The comments also include a few other points for information and not requiring further amendment of the near-final SI as such – namely (i) on engaging the London Stock Exchange (LSE) regarding any implication for its International Securities Market (ISM) (in #5), (ii) on advance notice of the SI coming into force (in #6), (iii) welcoming several specific changes effected by HMT from the illustrative SI to the near-final SI (in #7), and (iv) highlighting several points of ongoing ICMA engagement with the Financial Conduct Authority (FCA) consequent to the SI (in #8).
2. **"Non-equity securities"** – The revised definition of "non-equity securities" in regulation 3 of the near-final SI is now based on "relevant securities". → The definition of "non-equity securities" should be amended to instead be again based on "transferable securities" as in the illustrative SI. This is for two reasons.
- (A) **Definitional circularity** – The use of "relevant securities" leads to the definition in regulation 5(1)(a) carving-out "excluded securities", which are in turn defined in regulation 6(1)(b) to again reference "non-equity securities".
- (B) **Incorrect use in admission contexts** – Regulations 23(4) and 23(5) reference "non-equity securities" (and so also, on the basis of the near-final SI, "relevant securities") in the context of admission prospectuses. This seems, however, to be inconsistent with the apparent policy approach of HMT to:
- (i) set requirements and related exemptions for the offer context directly in the SI – thus primarily referencing the narrower concept of "relevant securities" (from which "excluded securities" have already been carved-out); but

- (ii) leave the FCA with subsidiary powers to set requirements and related exemptions for the RM/MTF admission context – which would thus primarily reference the wider concept of “transferable securities” (from which FCA would subsequently specify applicable carve-outs, as noted in #9a of ICMA’s 14 February comments).
3. **Grandfathering** – ICMA understands Regulation 49(2) to provide that offers, and RM/MTF admissions, of bonds under base prospectuses that were approved under the retained EU Prospectus Regulation will be unaffected by the new regime through to the expiry date of such base prospectuses (12 months after their initial approval). → It would be clearer if “together” was inserted into the final sentence so that it reads “...reliance on that prospectus, together with any supplementary prospectus, during the period...”
4. **Typographic errors** – There seem to be two small cross reference errors.
- (A) Schedule 2, Part 3, paragraph 11(8) cross-refers to "Part 1 of this Schedule". → This would seem to need replacing with a cross-reference to "Part 2 of this Schedule".
- (B) Schedule 3, Part 1, paragraph 15 inserts a new s.138E(e) into FSMA 2000 that cross-refers to “paragraph (2) of regulation 32”. → This would seem to need to be amended to include a further cross-reference to paragraph (3) of that regulation and so read "paragraphs 2 and 3 of regulation 32".
5. **Primary MTF qualified investor condition / any additional challenges for ISM** – Regulation 16 sets out various requirements primary MTFs must comply with. Bearing in mind improving the efficiency of public capital-raising and facilitating international competitiveness are understood to be the policy approaches underpinning the replacement of retained EU law and the making of this SI, it is important that regulation 16 does not present practical challenges to the operation of the ISM or risk causing it to be treated as a retail MTF. → HMT may wish to specifically check with the LSE if any such challenges or risks arise and, if so, on how to address this.
6. **Notice of SI coming into force and content** – Presumably HMT will give appropriate advance notice of the “main commencement day” under regulation 2(3) (ICMA notes “before the end of 2023” at p.10 of HMT’s [July Plan for Delivery](#)) and of its content (with similar FCA notice of its final rules). This is important so that issuers embarking on new prospectus preparation are clear as to whether this will be under the old or new regimes.
7. **Notable welcome changes**
- (A) **Definition of “relevant securities” / simpler for bonds** – ICMA welcomes, from the perspective of bonds, the simplification of the definition “relevant securities” in regulation 5. The revised formulation may also address concerns previously raised relating to loans and derivatives and ICMA assumes other relevant trade associations will be in touch with HMT to the extent that is not the case.
- (B) **Necessary information test / “prospects” meaning “creditworthiness” for bonds** – Regarding regulation 23(1)(a)’s requirement that prospectus disclosure contain information on the “prospects” of the issuer and of any guarantor (as necessary information material to an investor for making an informed assessment), ICMA welcomes the clarification in regulation 23(3) that the reference to “prospects” is to be read, in relation to “debt securities”, as a reference to their “creditworthiness”. Incidentally, the distinction between “debt securities”, which is used here, and “non-equity securities” (as amended per #2 above), which is used to define certain official sector “excluded securities” in regulation 6(1)(b) and also to articulate the necessary information test for certain asset-back securities in regulation 23(5), seems to relate to bonds convertible into shares/equivalents issued by an entity outside the bond issuer’s group. Such 3rd party

convertibles (or exchangeables, as they are often called) seem to be excluded from “debt securities” (under (b) of the definition in regulation 23(8)) but included in “non-equity securities” (by virtue of (c)(ii) of the definition of “equity securities” in regulation 3). → It would be helpful if HMT could confirm the reasoning in this respect.

- (C) **Liability alleviation for “protected forward-looking statements” / application also to others (such as bond underwriters)** – ICMA welcomes that paragraph 11(3) in Schedule 2, Part 3 provides that the liability alleviation relating to “protected forward-looking statements” will also apply to persons who are not formally responsible for a prospectus but who might otherwise face such liability. (ICMA notes such persons might notably include bond underwriters.)
8. **ICMA engagement with FCA** – Several aspects (and notably those listed below) are not addressed in the near-final SI and ICMA is engaging with the FCA in this respect.
- (A) **Definition of “advertisement” / “communication” meaning “announcement”** – The regulation 3 definition of “advertisement” referencing of a “communication” is in line with the retained EU Prospectus Regulation status quo. However the EU’s prospectus regime initially defined “advertisement” as an “announcement” and the change to “communication” created unnecessary practical challenges for new bond issues – as ICMA initially highlighted in its [September 2017 response](#) to ESMA’s consultation on format and content of the prospectus (at point E on p.8) and then in its [March 2018 response](#) to ESMA’s consultation on draft RTS under the new Prospectus Regulation (at p. 5 and also regarding Qs19-22 at pp.17-21). ICMA will continue to engage with the FCA in this respect, with a view to its application of the definition addressing these challenges (to the extent HMT does not replace “communication” with “announcement” in Regulation 3’s definition of “advertisement”).
- (B) **MTF advertisement regime / limitation to retail context** – Regulation 15(2)(b) empowers the FCA to make rules relating to the communication of MTF admission-related advertisements. The retained EU Prospectus Regulation does not however cover MTF admissions and so neither do its advertisement requirements. In this respect, applying advertisement requirements under this SI to MTF admissions would mean new administrative burdens inconsistent with the understood policy approaches underpinning the replacement of retained EU law and the making of this SI (improving the efficiency of public capital-raising and facilitating international competitiveness). To the extent there is any perceived overriding concern from an investor protection perspective, then this would presumably be in a retail context only (as there has been no mention of any regulator concern arising in the institutional context). ICMA will continue to engage with the FCA in this respect with a view to any MTF admission advertisement rules applying in the context of retail MTFs only.
- (C) **‘Voluntary’ RM-admission prospectuses / “approval” rather “validation”** – Regulation 21(1)(b)(ii) provides that a document, whose publication is not required by regulated market admission rules, but which is described by those rules as a prospectus, may be subject to “validation” as an alternative to formal “approval” (which has been the only option under the retained EU Prospectus Regulation). → It would be helpful if HMT could confirm if this provision relates to ‘voluntary’ prospectuses or to another document. If this relates to ‘voluntary’ prospectuses, and with the objective of maintaining the substantive status quo (with ‘voluntary’ prospectuses having fully the same status as other prospectuses), ICMA will continue to engage with the FCA with a view that voluntary prospectuses are “approved” rather than “validated”.
- (D) **Admission prospectus exemption / money market instruments** – In line with the apparent policy approach of HMT to set requirements and related exemptions for the offer context directly in

the SI but leave the FCA with subsidiary powers to set requirements and related exemptions for the RM/MTF admission context:

- (i) the offer-related provisions in the SI only apply to “relevant securities” and so *inter alia* carve out money market instruments (MMIs) in regulation 6(1)(g) as “excluded securities”;
- (ii) the admission-related provisions in the SI (including the FCA’s powers) apply to all “transferable securities” without exception and do not carve out MMIs.

ICMA will continue to engage with the FCA in this respect with a view to it exempting MMIs from its admission prospectus requirements, in line with the retained EU Prospectus Regulation status quo that does not require a prospectus for MMIs.

(E) Withdrawal rights / inapplicable in admission-only context (institutional at least) – Regulation 32(1) references FCA rule-making regarding withdrawal rights.

- (1) The FCA’s powers generally relate to “designated activities” in the context of RM admissions, MTF admissions and/or public offers. However, as confirmed by ESMA in its [July 2018 Final Report](#) on draft regulatory technical standards under the Prospectus Regulation (#238 on p.63 and #268 on pp.68-69), the EU Prospectus Regulation provides that withdrawal rights only arise when prospectuses are supplemented in relation to non-exempt offers. They do not arise in the context of admission-only prospectus supplements (as any accompanying offers would be exempt from the Regulation’s prospectus requirements). Applying regulatory withdrawal rights under this SI, in admission-only (including MTF) contexts, to any otherwise exempt offers would mean new administrative burdens inconsistent with the understood policy approaches underpinning the replacement of retained EU law and the making of this SI (improving the efficiency of public capital-raising and facilitating international competitiveness).
- (2) To the extent there is any perceived overriding concern from an investor protection perspective, then this would presumably be in a retail / otherwise non-exempt offer context only (as there has been no mention of any regulator concern arising in the institutional, including MTF, context). ICMA will continue to engage with the FCA in this respect with a view to its rules limiting the arising of withdrawal rights just to offers that are conditional on admission and that would not otherwise be exempt from the public offer prohibition in regulation 12 (through one of the other exemptions in Part 1 of Schedule 1, such as paragraphs 1-5, as indicated in #4c of ICMA’s 14 February comments).
- (3) ICMA will also engage with the FCA in terms of (i) clarifying the mechanics of how withdrawal rights are envisaged to mechanically operate outside the context of prospectus supplements and (ii) potential risks around any automatic transaction voiding (further to regulation 32(4)*) for failing to notify any withdrawal rights (since investors may well wish that their transactions not be so voided).

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* Bearing in mind also related amendment being made to s.138E of FSMA 2000 by paragraph 15 in in Schedule 3, Part 1.