

FCA Discussion Paper - *Future Disclosure Framework (DP22/6)*

ICMA response

Introduction

- (1) ICMA is responding to this discussion paper (**DP**) from the perspective of the primary international debt capital markets (over USD 6 trillion raised in bond funding for companies in 2022¹) and welcomes the opportunity to engage with UK authorities on the PRIIPs regime.
- (2) **Also, ICMA understands that the debt capital markets (excluded from the scope of the Consumer Duty) are not currently intended to be within the scope of the FCA's replacement regime.** ICMA agrees with this approach and notes it will need to be clearly delivered, perhaps based on the existing Consumer Duty exclusions² in [Policy Statement PS22/9](#):
 - (a) “non-retail financial instrument” definition (on the 95th page); and
 - (b) specific carve-out (3) from the “*retail market business*” definition (on the 97th-98th pages).
- (3) **In light of the above, the following responses to this discussion paper are limited and aimed at illustrating why it is appropriate to exclude the debt capital markets from the scope of the FCA's replacement regime.**
- (4) One should note generally the intrinsic limitations of retail disclosure as set out in ICMA's recent [response](#) to HM Treasury's consultation *PRIIPs and UK Retail Disclosure* and in ICMA's May 2022 [response](#) to IOSCO's March 2022 Retail Market Conduct Task Force Consultation Report.

Delivery

Q1: What are the benefits or drawbacks of the timing of disclosure being prescribed by the FCA? Or should it be left to firms to find the right time for their target consumer?

No response.

Q2: Will a durable medium requirement constrain your ability to deliver innovative disclosure? Are there any other rules that may constrain the medium in which information can be provided?

No response.

¹ ION Analytics / Dealogic [DCM Highlights: FY22](#).

² Assuming that these are not undermined by any amendments to the Consumer Duty regarding financial promotions further to FCA Consultation CP22/26 (which ICMA [responded](#) to on 16 January) and distinctly bearing in mind that the UK's retained prospectus regulation regime (a potential alternative source to model exclusions from) is currently being replaced (with the final detail outcome unknown).

Q3: Do you agree that we should future proof the disclosure requirements? How else can we do this? Do you have any views or evidence on the merits and drawbacks of different approaches to future-proofing?

European Commission attempts to future proof the PRIIPs regime effectively involved its scope being disproportionately and ambiguously wide in the hope of catching unknown or future products that it was feared might otherwise skirt around the regime. This approach contributed to the PRIIPs regime impacting in apparently unintended areas, such as debt capital markets. Instead of over-reaching, the FCA should rather look to monitor market developments and efficiently update its future disclosure framework if and when necessary (nimbleness being one of the intended advantages of the UK's future approach to regulation).

Q4: How do you envision the distribution of retail disclosure changing over the next 5-10 years?

No response.

Q5: Who should have responsibility for producing retail disclosure?

No one should deliver disclosures to an investor (i.e. most likely at point of sale) without being clear on who is responsible. With that action comes responsibility, subject only to specific arrangement otherwise. If a 'distributor' is specifically retained by a 'manufacturer' to distribute products, it might well look to the manufacturer in this respect. A manufacturer seeking to facilitate sales of its products might well volunteer disclosure material. Responsibility might even be split, depending on whether the content is more product-specific or investor specific. However, a 'distributor' selling off its own initiative without manufacturer cooperation should expect to take full responsibility. (And ultimately distributors should not be selling anything they are unable to explain to a typical retail investor.)

Q6: How should it be determined that a product is suitable for the retail market and therefore that regulated disclosure should be produced? Does this need to be balanced with choice for retail investors?

That a product may be suitable for / compatible with retail investors does not mean law/regulation should mandate retail availability and thus retail disclosure. Any offers are voluntary and should not be coerced.

Under the current PRIIPs regime, if a "distributor" sells an in-scope product to a retail investor without delivering a KID, then that "distributor" is in breach of PRIIPs Regulation Art.13.1. Such an illegal sale by a "distributor" does not *per se* retroactively trigger liability by a "manufacturer" for not having produced a KID. A manufacturer would also be liable only to the extent it was complicit (directly or indirectly) in making the product available without producing a KID.

In this respect, "manufacturers" (bond issuers) have tended to adopt proactive mitigating steps such as (i) legending their new bond issues as not being for retail and/or (ii) applying high denominations. Such consequent restrictions on retail availability illustrate why it is appropriate to clearly exclude debt capital markets from the scope of the FCA's replacement regime.

Presentation

Q7: Do you agree with these principles for effective disclosure design? Are there any other principles we should assess?

No response.

Q8: Do respondents have any evidence or consumer testing results on the merits or drawbacks of different forms of presentation?

Broadly it seems that UCITS KIID testing³ and subsequent PRIIPs KID testing⁴ found misunderstanding rates of 30% or more.

Q9: Evidence suggests that layering in retail disclosure can improve consumer understanding. Do you agree with this and can layering also reduce the burden on firms? Are there any challenges we should consider?

No response.

Q10: Are there other interactive disclosure approaches we should evaluate?

No response.

Q11: How can disclosure requirements facilitate firms to use plain language to further consumer understanding while balancing accuracy, particularly with complex products?

No response.

Content

Q12: What do you consider the appropriate balance between flexibility and prescription in disclosure? Does comparison feature in this balance?

This is difficult to respond to – even the prospectus regime has been criticised for being too prescriptive in many areas.

Q13: What information, if any, should be comparable? Do you have evidence to support or refute comparability between similar product types?

See response to Q3 in ICMA's recent [response](#) to HM Treasury's consultation. Also, it is unclear how debt capital market risk exposures can be simply compared – assuming official policy (following the 2008 financial crisis) continues to be not to enshrine reliance on credit ratings.

Costs and Charges

Q14: What level of prescription should be involved in the calculation of costs to ensure clarity and consistency for consumers while also prioritising the need for accuracy?

No response.

Q15: What are the pros and cons of presenting cost as single figure, with more detailed information layered in disclosure?

No response.

³ [ICMA 2012Q4 Quarterly Report](#) referencing the June 2009 UCITS Disclosure Testing Research Report prepared for the European Commission (which seems to have since been taken down from the Commission's website).

⁴ [Final Report](#) FISMA/2019/016/C and [Final Report](#) MARKT/2014/060/G.

Risk

Q16: What level of flexibility should there be in the calculation and presentation of costs and risks?

No response.

Performance

Q17: What is the purpose of performance disclosure?

No response.

Q18: To what extent should the FCA prescribe the performance information to be provided to retail investors? Should the FCA categorise products for the purpose of performance disclosure?

No response.

Q19: Would tailoring or flexibility promote accuracy and enhance consumer engagement?

No response.

Q20: Are there other content requirements that should be included in regulated disclosure? Should this content be disclosed alongside product information?

No response.

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