

## FCA Guidance Consultation

-

### ***Guidance on the Anti-Greenwashing rule***

-

### **ICMA response**

- 
- 1. Introduction** – ICMA’s response (from the perspective of the international bond markets) to the FCA’s Guidance Consultation ([GC23/3](#)) on the Anti-Greenwashing rule (AGR) is limited to high-level remarks, as the scope of the AGR is not immediately clear and therefore any practical implications for the bond context are still to be fully determined. In addition, member deliberations have been limited by the consultation period spanning the year-end holidays. However, ICMA is concerned that the implications of the AGR have not been fully considered from the perspective of the international bond markets and ICMA would urge the FCA to consider engaging further with stakeholders before finalising its Guidance. ICMA would be keen to discuss this further on a call, in order to expand on its concerns and suggest how best to clarify the scope in the finalised Guidance.
  - 2. Global approaches to greenwashing** – ICMA has previously attempted to clarify the different potential types of greenwashing, as well as reviewing various existing regulatory approaches, with a view to focusing ongoing regulatory interventions on any relevant areas that are not already covered by existing rules and also to mitigating global inconsistencies in this respect. See further ICMA’s October 2023 paper [Market integrity and greenwashing risks in sustainable finance](#). In order to ensure that issuance of bonds with sustainability characteristics and investment in such bonds continues in the UK and isn’t driven to another jurisdiction through fear of damage to reputation or litigation, regulation applicable to the market needs to be clear and stable and not out of line with requirements in other jurisdictions.
  - 3. Proportionate approach** – Paragraph 2.10 (of the Summary) and Paragraph 7 of the draft Guidance in the Guidance Consultation refer to the existing guidance in the FCA Handbook which “*elaborate[s] on what the “fair, clear and not misleading” requirement means in specific contexts”*. COBS guidance (4.2.2G) states that the rule “*applies in a way that is appropriate and proportionate taking into account the means of communication, the information the communication is intended to convey and the nature of the client and of its business, if any. So a communication addressed to a professional client or an eligible counterparty may not need to include the same information, or be presented in the same way, as a communication addressed to a retail client.*” In addition, Paragraph 18 of the draft Guidance states that “*The claims firms make should be transparent and straightforward, and the meaning of all the terms should be generally understood by the intended audience.*” In the wholesale bond markets, professional investors have knowledge and experience in relation to their investments and therefore ICMA assumes that a proportionate approach can be taken in relation to the information they need to receive in relation to the sustainability

characteristics of a bond, in accordance with COBS 4.2.2G. ICMA would therefore be grateful to have this specifically referred to in the finalised Guidance.

4. **No application to bond underwriting** – ICMA queries application of the AGR to underwriting (see specifics below) and is otherwise *not* commenting on the draft Guidance in the context of underwriting.
- (A) ICMA understands that the AGR is intended to apply to all FCA-authorized firms who make sustainability-related claims about products and services, including firms that approve financial promotions for unauthorised persons. [CP22/20: Sustainability Disclosure Requirements \(SDR\) and investment labels](#) states that the proposed AGR “*aims to clarify existing rules*” by “*reaffirming that existing requirements around clear, fair and not misleading communications apply in the context of sustainability-related claims*” (see paragraphs 1.19 and 6.4) and as such, this rule is not intended to change the law or the scope of obligations for FCA-authorized firms under the FCA Handbook. In addition, paragraph 2.9 of the Guidance Consultation states the rule is aligned with the “*existing requirements and expectations for firms*”, and “*impose[s] a minimal burden on firms*”, as suggested in paragraph 2.17 of the Guidance Consultation.
- (B) However, the publication of the final rule and GC23/3 introduced a previously unforeseen element of doubt, with unexpected and potentially unintended results. Of particular concern to ICMA is that the wording of the AGR could bring within its scope a firm’s underwriting and bookrunning activities, to the extent the authorised firms are communicating a financial promotion.<sup>1</sup> Any such financial promotion would usually be subject to certain exemptions, particularly in respect of a typical primary market debt offering by a third-party issuer targeted exclusively at non-retail investors in the UK. However, these exemptions do not appear to have been carried across in relation to the anti-greenwashing rule.
- (C) If this position is not rectified (or clarified), it would result in inconsistencies with the existing conduct of business rules in the FCA Handbook. In COBS 4.2.1R(2)(b) (*Fair, clear and not misleading communications*) for example, third-party prospectuses and certain other communications are carved out – including relevant communications that are “*excluded communications*” (namely, communications which would benefit from an exemption in the UK Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (and which therefore fall out of scope of the UK financial promotion regime in the Financial Services and Markets Act)).
- (D) Additionally, an interpretation which brings third-party prospectuses and certain other communications within scope of the AGR would cut across the well understood position on responsibility for the contents of prospectuses under the existing prospectus regime. It is well understood that issuers take responsibility for the contents of their own prospectuses under the existing prospectus regime (as set out in the UK FCA Prospectus Regulation Rules). The key communications in the international bond markets are prospectuses, investor presentations and announcements and since these are already regulated by the prospectus regime, including in relation to advertisements, ICMA would therefore be grateful for confirmation in the finalised Guidance that the AGR is not seeking to change this current position.
- (E) ICMA would therefore be grateful for confirmation in the finalised Guidance of its assumption that the publication of the final rule and GC23/3 is not intended to change the obligations and liabilities of FCA-authorized firms when undertaking underwriting activities in respect of bonds issued by third parties.

---

<sup>1</sup> In the Guidance Consultation there are inconsistent references to, for example (underlining added for emphasis), “*claims about the sustainability of a product or service*” (paragraphs 1.1 and 2.3 and Annex 1 paragraph 1) vs “*that sustainability-related claims made by authorised firms about their products and services are fair, clear and not misleading*” (paragraph 1.6 and Annex 1 paragraph 6).

- (F) The following are examples of particular scope points that ICMA would be grateful to be addressed in either the AGR itself or the finalised Guidance:
- (i) critically, clarification that reference to financial promotions in ESG 4.3.1 brings in all applicable exemptions by implication;
  - (ii) confirmation that “*communicates*” in ESG 4.3.1R(1)(a) is intentionally italicised and links to a definition in relation to financial promotions;
  - (iii) italicising and defining “*fair, clear and not misleading*” in ESG 4.3.1(2)(b) by reference to the definition in COBS 4.2 such that the associated exemptions to that requirement apply;
  - (iv) clarifying that the term “*consistent*” in ESG 4.3.1R(2)(a) should be read in the same way as used in COBS 4.5A and COBS 4.5.8 in relation to financial promotions and that the same applicable exemptions should apply.

## 5. The ICMA Principles

- (A) The majority of sustainable issuances in the debt capital markets follows the [ICMA Principles](#).
- (B) Several states and public bodies have issued sustainable bonds aligned with the Principles (e.g. the UK’s green gilts).
- (C) As globally accepted market standards, the Principles are the fruit of extensive work and input from over 420 organisations including issuers, investors, and various other stakeholders. Members of the Principles also participate in the drafting and elaboration of standards mainly via working groups and to the election of the Executive Committee (consisting of 8 issuers, 8 investors, and 8 underwriters) each year with their votes. The Executive Committee is currently chaired by EBRD, and in the past, by EIB, IFC, and NIB.

6. **No change of approach regarding ICMA Principles** – In its June 2022 [Feedback Statement FS22/4](#) and [Primary Market Bulletin 41](#), the FCA encouraged issuers to consider relevant industry standards – such as the ICMA Principles and Guidelines for green, social, and sustainability bonds – when issuing ESG-labelled debt instruments. In this respect, ICMA assumes the current market approach of following the ICMA Principles and describing the eligible projects and assets or categories and themes of eligible projects and assets, together with how projects are selected, proceeds are managed and reporting to the market fulfils the reference to “*firms should be able to support those claims with robust, relevant, and credible evidence. Claims should be capable of being substantiated at the point in time at which they are made.*” (paragraph 15) and “*The use of vague, broad, or general terms may be also unclear and confusing.*” (paragraph 20). ICMA would therefore be grateful for confirmation of this in the finalised Guidance, consistent with PMB 41 and paragraphs 2.9 and 2.17 of the Guidance Consultation.

## 7. Specific points

- (A) **Life of claim** – ICMA notes that paragraph 16 of the Guidance Consultation states that “*It is also important that firms regularly review their claims and any evidence that supports them*”. ICMA notes that in relation to approval of a financial promotion this applies to the financial promotion during the “*lifetime of the promotion*”. Similarly, in the international bond markets, any claim is therefore reviewed for when it will be “live”, i.e. when it is made, with issuers ensuring that the disclosure contained in prospectuses and any associated advertisements complies with the prospectus regime and is accurate at its date. ICMA would be grateful for recognition of this practice to be included in the finalised Guidance.
- (B) **Individual communication ‘completeness’ requirement satisfied by compliance with and consistent with the existing prospectus regime** – Offering materials for bond issuances are

already subject to comprehensive disclosure requirements under the existing prospectus regime in the UK. In particular, pursuant to the general disclosure test, a prospectus shall contain the necessary information which is material to an investor for making an informed investment decision (PRR 2.1.1). Related communications, including advertisements, must (among other things) be consistent with the information contained in the prospectus (PRR 3.3.1 and PRR 3.3.2). Advertisements must also clearly identify the prospectus and indicate where investors are or will be able to find it (PRR 3.3.2). The prospectus is the document that contains all information that is material for an investor to make an investment decision. It is not practicable and would be inconsistent with the prospectus regime for all related communications to be “complete”. ICMA would be grateful for confirmation in the finalised Guidance that such communications relating to sustainability claims will be complete where they cross-reference the issuer’s prospectus or other applicable offering document.

(C) **Balanced claims and disclosure of risks and limitations** – Additionally, under the existing prospectus regime, issuers shall include disclosure in prospectuses about risks specific to the issuer and/or the securities which are material for making an informed investment decision. The current market approach is to use risk factors which “*clearly and prominently disclose..*” risks, including regarding “*the limitations of any information, data or metrics used in a claim...*” as well as the fact that the product may cease to fulfil its sustainability characteristics during its tenor (“*firms should consider the whole life cycle of a product or service when making sustainability claims*”) – as envisaged in paragraphs 25 and 27 of the draft Guidance. In addition, ICMA Principles already require consideration and mitigation of negative social and/or environmental impacts. ICMA would be grateful for confirmation in the finalised Guidance that the existing prospectus regulation requirements and current market approach to disclosure and risk factors is sufficient and that no further elevation of specific risks is required.

8. **Coming into force on 31 May** – Should the confirmations in relation to scope sought above not be forthcoming, there will be concerns with this short timeline (particularly given the potential impact on the current market practice of following the ICMA Principles and adherence to the UK Prospectus regime). ICMA would be pleased to discuss such concerns further and to assist the FCA in relation to clarifying scope and any impact on procedures. Once engagement with market participants is complete and the extent of any change in requirements made clear, ICMA would suggest a six-month implementation period.

---

#### ICMA contact

Ruari Ewing: [Ruari.Ewing@icmagroup.org](mailto:Ruari.Ewing@icmagroup.org)

#### International Capital Market Association

ICMA Brussels | Avenue des Arts 56, 1000 Brussels | T: +32 2 801 13 88

ICMA London | 110 Cannon Street, London EC4N 6EU | T: +44 20 7213 0310

ICMA Hong Kong | Unit 3603, Tower 2, Lippo Centre, 89 Queensway, Hong Kong | T: +852 2531 6592

ICMA Paris | 25 rue du Quatre Septembre, 75002 Paris | T: +33 1 8375 6613

ICMA Zurich | Dreikönigstrasse 8, 8002 Zurich | T: +41 44 363 4222

[www.icmagroup.org](http://www.icmagroup.org)