

Ms. Susan Cooper

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BY EMAIL

19 September 2016

Dear Ms. Cooper

JAC¹ Response to FCA Consultation Paper (CP16/18): Changes to disclosure rules in the FCA Handbook to reflect the direct application of the PRIIPs Regulation (the "Response")

This Response provides feedback to the FCA Consultation Paper (CP16/18): Changes to disclosure rules in the FCA Handbook to reflect the direct application of the PRIIPs Regulation (the "**Consultation**"). The Consultation sets out the FCA's approach and proposals to amend affected disclosure provisions in the FCA Handbook so that they reflect the PRIIPs Regulation, in particular so they do not duplicate or conflict with the requirement to produce a KID.

We have addressed our responses to the questions posed in the Consultation which we believe are particularly relevant to the Joint Associations Committee on Retail Structured Products (the "**JAC**") and the concerns of its members. The JAC welcomes the opportunity to comment on the issues set out in the Consultation and we would be happy to engage in any further discussions the FCA would find helpful in order to clarify or expand upon any of the points raised in our Response.

The members of the JAC comprise most of the major financial institutions (both investment and private banks) involved, among other things, in the creation, manufacturing and distribution within the EU of structured notes and derivatives. The JAC is therefore well positioned to comment on the specifics of the PRIIPs Regulation. Please see Appendix 1 to this Response for further details of the members of the JAC.

Yours sincerely,



Mr. Alderman Timothy R Hailes, JP

Alderman Tim Hailes, JP
Chairman, Joint Associations Committee

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¹ The JAC is sponsored by multiple associations with an interest in retail products. In the first instance, queries may be addressed to ftaylor@isda.org.

PART 1

General points the JAC would like to raise relating to the application of the PRIIPs Regulation

1. FX forwards

The FX market is the world's largest financial market and forms the basis of the global payments system. As such both the number of market participants and the volume of transactions are high.

FX global notional turnover, per the last BIS report, is US\$5.1 trillion/day.² Of that US\$5.1 trillion/day, 51% is intermediated in Europe and the UK. It was reported that 14% of the global US\$5.1 trillion/day turnover was for FX forwards and 47% was for FX swaps (a FX swap comprises of 2 FX forwards). FX forwards and FX swaps are generally short dated compared to other financial instruments. BIS concluded in the same study that 39% of FX forwards had a contractual maturity of 7 days or less, with 69% of FX swaps having a maturity of 7 days or less.

The term FX forward means a transaction that solely involves the exchange of 2 different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange³. This is a globally established definition of a FX forward, including Europe. FX spot transactions generally settle within 2 days of the trade date, as recently clarified in Europe under MiFID.⁴ A FX forward has exactly the same financial characteristics as a FX spot trade but will generally settle greater than 2 days from trade date.

By construction, FX Forwards do not meet the definition of a PRIIP. The JAC's view is that FX forwards are not PRIIPs and should not trigger the requirement to draw up a KID or provide a KID to a retail client.

In this respect, FX forwards share the same financial certainty as an FX spot or a deposit, in that there is no fluctuation in the notional amount exchanged on the Settlement Date versus that agreed upon the Trade Date. Concerning the KID itself, the JAC believes that:

- due to a lack of a single, harmonized product identifier, the FCA should, together with the ESAs, look to promote regulatory consistency and support the use of developing standards, such as the UPI;
- consideration needs to be made to the practicalities of issuing KIDs in products that are typified in having sub-second quoting mechanisms; and
- alternative, more practicable KID designs may be appropriate for widely traded, more vanilla products.

Specific request to the FCA: We would ask the FCA to confirm that FX forwards would not fall within the scope of the PRIIPs Regulation.

2. Generic KIDs for OTC derivatives and certain structured products

² <http://www.bis.org/publ/rpfx16.htm>

³ (24) <https://www.law.cornell.edu/uscode/text/7/1a>

⁴ (Article 10) http://ec.europa.eu/finance/securities/docs/isd/mifid/160425-delegated-regulation_en.pdf

As previously noted in our letters to the European Commission sent on 17 February 2016 and 23 June 2016, our members are concerned that for over the counter (“OTC”) derivatives concluded on a bilateral basis with retail clients, as well as certain structured products, the current methodologies prescribed by the regulatory technical standards dated 30 June 2016 (“RTS”) (which we note were rejected by the European Parliament on 14 September 2016) and resulting disclosures will result in misleading KIDs that will not achieve the objectives of the PRIIPs Regulation and as such, PRIIP manufacturers should be permitted to make use of a generic form of KID.

The existing provisions in relation to performance scenarios require the PRIIP manufacturer to set out the retail investor’s potential return in three different scenarios. In order to calculate the return which the retail investor may receive on the basis of the formulae set out in the RTS, a PRIIP manufacturer would need to know the price at which the PRIIP was traded with the retail investor. For an OTC derivative, this would not be known until the trade is concluded. OTC derivative trades are structured such that the PRIIP manufacturer obtains a price from other investment firms which it then offers to the retail investor. Under Article 21(1) of Directive 2004/39/EC (“MIFID1”) (and Article 27(1) of Directive 2014/65/EU (“MIFID2”)), the manufacturer is required to take all sufficient steps to obtain the best possible result for the retail investor. Prices are not held for long if at all, such that in order that the trade is executed at the price offered to the retail investor and if the PRIIP manufacturer is to comply with Article 21(1) MIFID1 or Article 27(1) of MIFID2, then the trade must be concluded almost immediately after prices are offered, which does not leave time for a KID to be prepared on the basis of the execution price.

Similarly, for structured products, certain information, such as the strike and barrier levels, will not be known until immediately prior to trading.

However, Article 13(1) of the PRIIPs Regulation requires that the retail investor is provided with the KID “*in good time*” before the transaction for the PRIIP is concluded. It would be impossible for firms to produce the performance scenarios on the basis prescribed in the RTS and to provide the KID to the retail investor “*in good time*” before the transaction.

Whilst there may be some scope to deliver a KID after the conclusion of a transaction (per Article 13(3) of the PRIIPs Regulation), firms will not be able to rely on this in many cases because the requirements of subsections (a) to (d) of Article 13(3) must be met, including the requirement that the transaction is concluded by means of distance communication.

A practical solution would be to permit a form of generic KID for OTC derivatives and certain structured products. This would be provided to the retail client prior to the trade and bespoke information relating to the specific bilateral contract could be provided post-trade if necessary. This would offer retail clients the opportunity to compare products in good time pre-trade and allow for an informed investment decision. For structured products, a KID could be provided in advance of trading containing a description of the strike (e.g. the “closing level of the index on the initial valuation date”) and barriers (e.g. 80% of the strike) rather than indicative numbers. This could extend to a range of KIDs with, for example a range of capital protection barriers (e.g. 50%, 55%, 60%) and/or autocall barriers (e.g. 90%, 95%, 100%) to allow for the scenario where these parameters vary at the point of execution depending on live pricing. If a product continues to be made available, this might then be updated post trade with final numbers if required. The purpose of the KID is not to provide actual levels but rather to give an explanation of the mechanics of the product.

We note the following comments by representatives of the European Commission and the ESAs at the technical workshop hosted by the European Commission in Brussels on 11 July 2016 (the “Brussels Workshop”), which indicate that a generic KID would be permissible:

- the KID is a pre-contractual document and as such, need not be trade-specific. It sits outside the boundaries of the contractual relationships between the investor and the manufacturer;
- the KID must be given in advance so it is possible to have a KID where no individual product terms are included. In particular, OTC derivatives were mentioned and it was stated that a standardised KID for an OTC derivative can be used provided it uses the general standardised features of the product in question;
- a detailed KID could also be used if so desired; and
- indicative information can be used where detailed information (such as coupon details) can't be sourced.

We also note that the slides to the Brussels Workshop (which are available on the website of the European Commission) explicitly state (at slide 3) that the KID should contain standardised product information for a target retail client and not individual contractual information.

The JAC would propose to prepare a number of template KIDs for certain products and payoffs in the OTC derivatives space in order to provide some consistency of approach in the market.

Specific request to the FCA: We would ask the FCA to clarify that the use of a generic KID is possible for OTC derivatives concluded by way of a bilateral contract with investors and for certain structured products.

3. “Exchange-traded products (“ETPs”) should be assimilated to Exchange-traded derivatives

We would ask the FCA to clarify that certain exchange-traded warrants and certificates (such as mini-futures, turbos, constant leverage) which are manufactured for purposes of trading on exchanges, should be treated as exchange-traded derivatives and as such should use an SRI of 7, a performance scenario presented in the form of a diagram and the information in the KID can be provided as at issue date and is not subject to further update requirements.

These products are designed for a specific target market of sophisticated retail investors, looking for a leveraged exposure to specific underlying names. They are typically leveraged and typically open ended. For these products, investors are more interested in the trading price rather than the actual payout available to them upon an exercise, termination or maturity (for the subset of exchange-traded products that are closed-ended) event, as they will be seeking to realise a profit by purchasing and selling the product on exchange. Very often, these products are held intra-day.

Due to the characteristics of these products and of their target market, the requirements of the PRIIPs rules would entail an ongoing need to update the KID, due to changes in costs, performance scenarios and SRI. A continuous update of the KID would be unnecessary for investors (due to the sophistication of the typical investor) and potentially confusing, and could not be supported efficiently even by the most sophisticated technology, therefore exposing firms unreasonable risks of non-compliance.

Specific request to the FCA: We would ask the FCA to clarify that warrants and certificates that are designed for investment directly on an exchange (such as mini-futures, turbos and constant-leverage) should be treated in line with exchange-traded

derivatives and, for this purpose they can use a fixed SRI of 7, use a performance scenario presented as a diagram and would not be subject to updating requirements.

4. Requirement to draw up the KID – the meaning of “made available”

We would ask the FCA to clarify that a PRIIP should be regarded as “made available” to retail investors (thereby triggering the PRIIP manufacturer’s obligation to produce the KID) only where it is possible for a new retail investor to invest in it. We believe that this is the view adopted by the European Commission and the ESAs, as expressed in:

- comments made in the ESA public hearing in Frankfurt in December 2015 that products “no longer open for business” at 31 December 2016 will not require a KID;
- comments made by Ursula Gerold of BaFin at the Brussels Workshop that when “no new business is being made” and “the book of business is closed” then the PRIIP should no longer be regarded as being “made available”; and
- the slides for the Brussels Workshop, which state that the following are typical examples of where the manufacturer’s KID obligation ceases: (i) when retail investors cannot buy the product or enter the contract anymore, (ii) when the manufacturer offers prices for redemption only and (iii) when the “books of business” are closed.

Specific request to the FCA: We would ask the FCA to clarify that a PRIIP should not be regarded as “made available” to retail investors where it is closed to new investors.

5. Requirement to review and revise the KID – interpretation of “remains available”

We would ask the FCA to clarify that a PRIIP should be regarded as remaining available to retail investors (thereby triggering the PRIIP manufacturer’s obligation to review and potentially revise the KID) only where it is still possible for a new retail investor to invest in it by offer of the manufacturer, after 31 December 2016. This view is supported by:

- the spirit and purpose of the PRIIPs Regulation, which is to provide retail investors with the information necessary for them to make an informed investment decision and compare different PRIIPs (per Recital 15 to the PRIIPs Regulation) – its purpose is not to create a ‘live’ document;
- the November 2015 Joint Consultation Paper,⁵ which states (at p. 84) that the “primary purpose” of the KID is “as a pre-contractual rather than post-contractual communication document” and (at p. 135) that “in general, periodic and ad hoc reviews are relevant where a PRIIP remains ‘open’ to retail investors. In principle, if the product is no longer on offer to new investors, there will be no new investment decisions to be made by such investors”; and
- the slides for the Brussels Workshop, which state that the following are typical examples of where the manufacturer’s KID obligation ceases: (i) when retail investors cannot buy the product or enter the contract anymore, (ii) when the manufacturer offers prices for redemption only and (iii) when the books of business are closed. Our view is that the “obligation” referred to here is both the obligation to draw up the KID and the obligation to review and revise it.

⁵ JC 2015 073

Specific request to the FCA: We would ask the FCA to clarify that a PRIIP should not be regarded as remaining available to retail investors where it is closed to new retail investors (i.e. it is not possible for a new retail investor to invest in the PRIIP as at 31 December 2016).

6. Requirement to review and revise the KID – interpretation of “*significantly affects or is likely to significantly affect*”

The requirement to review the KID is set out in Article 15 of the RTS. This provision requires PRIIP manufacturers to review the information contained in the KID every time there is a change that significantly affects or is likely to significantly affect the information contained in the KID and, at least every 12 months following the date of the initial publication of the KID.

The requirement to revise the KID is set out in Article 16 of the RTS. This provision requires PRIIP manufacturers to revise the KID where a review pursuant to Article 15 concludes that changes to the KID need to be made.

Our members are concerned that these requirements could potentially impose a continuous requirement to revise the KID with respect to risk, costs and performance scenarios.

Specific request to the FCA: We would ask the FCA to provide examples of changes that would significantly affect or be likely to significantly affect the information contained in the KID.

7. Bilateral transactions between retail investors

We would ask the FCA to clarify that if PRIIPs are only available for purchase by new retail investors by way of a bilateral transaction between two retail investors, then the PRIIP should not be regarded as “*made available*” or remaining available within the meaning of the PRIIPs Regulation and as such, there would be no requirement on the PRIIP manufacturer to draw up a KID or review (and potentially revise) an existing KID.

We believe that from a regulatory intention standpoint, it was clearly never intended that retail to retail transactions would be in scope and in our view, if PRIIPs are only available for purchase by new retail investors by way of a bilateral transaction between two retail investors, then the PRIIP is not “*made available*” and does not “*remain available*” within the meaning of the PRIIPs Regulation and there is no requirement on the PRIIP manufacturer to draw up a KID or review and revise an existing KID.

Specific request to the FCA: We would ask the FCA to clarify that if a PRIIP is only open to new retail investors in that it is available for purchase by way of a bilateral transaction between two retail investors, then the PRIIP should not be regarded as “*made available*” or remaining available.

8. Transactions with discretionary investment managers

We note that at paragraph 2.14 of the Consultation, the FCA provides a non-exhaustive list of the FCA-authorized firms to which it expects the PRIIPs Regulation will apply, which includes “*discretionary investment management firms*”. We assume that the FCA is not suggesting that such firms must provide a KID to retail investors from whom they have a discretionary investment mandate whenever they transact in PRIIPs in the name and for the account of such retail investor.

We note in support of this view that at the Brussels Workshop, the representatives of the European Commission and the ESAs stated that where discretionary investment managers transact in PRIIPs in the name and for the account of a retail investor, there is no requirement to provide the retail investor with a KID. We also note that the slides for the Brussels Workshop state (at slide 2) that circumstances where PRIIPs are bought and sold by a portfolio manager, including in the name and for the account of a retail investor, constitute a typical example of where there is no KID obligation.

Specific request to the FCA: We would ask the FCA to clarify that the PRIIPs Regulation does not apply where discretionary investment management firms transact in PRIIPs in the name and for the account of retail investors from whom they have a discretionary investment mandate.

9. Definition of retail investor under the PRIIPs Regulation

We would ask the FCA to clarify that until the implementation of MIFID2 in January 2018, the PRIIPs Regulation only applies if the PRIIP is made available to “*retail clients*” as defined under Directive 2004/39/EC (“MIFID1”).

We note that Article 4(6) of the PRIIPs Regulations states that “*retail investor*” means a “*retail client*” as defined in MIFID2 and that the Consultation states at para 2.17 that the “*PRIIPs Regulation only applies if the PRIIP is made available to retail investors. Retail investors are defined as ‘retail clients’ in MiFID II.*”

However, whereas the implementation dates of the PRIIPs Regulation and MIFID2 were initially aligned, the implementation of MIFID2 has been delayed until January 2018 because the EU recognised that firms would not be in a position to comply by January 2017. MIFID2 alters the MIFID1 definition of “*retail client*” in that local authorities and municipalities will automatically be treated as retail clients (unless they opt up in accordance with the qualifying criteria), whereas under MIFID1 local authorities and municipalities are considered professional clients (unless they opt down).

To nonetheless import the MIFID2 definition of “*retail client*” into the PRIIPs Regulation would bring in MIFID2 via the backdoor in that it would require firms to reclassify clients using the MIFID2 criteria, even though the implementation of MIFID2 was delayed precisely because firms would not be in a position to reclassify ahead of January 2018. This would defeat the purpose of the MIFID2 delay and frustrate the intentions of the EU legislative branches.

Accordingly, we believe that Article 4(6) of the PRIIPs Regulation must be construed against the context that the implementation of MIFID2 has been delayed and as such, ‘retail investor’ should be interpreted as meaning ‘retail client’ under MIFID1 until such time as MIFID2 is implemented.

Specific request to the FCA: We would ask the FCA to clarify that until the implementation of MIFID2 in January 2018, the PRIIPs Regulation only applies if the PRIIP is made available to ‘retail clients’ as defined under MIFID1.

General points the JAC would like to raise relating to the RTS

We note that the RTS were rejected by the European Parliament on 14 September 2016. However, our comments below will apply to the extent that the relevant sections of the RTS are retained.

JAC members would also like to raise the need for a delay to the PRIIPs Regulation, in order to leave enough time for the European Commission and ESAs to re-draft the Delegated Regulation with the necessary amendments. Postponing the application date of the PRIIPs Regulation (without changing any other provision of Level 1) will ensure a smooth implementation of the requirements set out in the PRIIPs Regulation and the Delegated Regulation and avoid the application of Level 1 without the Delegated Regulation being in force in advance.

Specific request to the FCA: We would therefore ask the FCA to support the proposal for a delay in the implementation of the PRIIPs Regulation.**10. Conditions for returns and performance caps – Article 8(3)(d)(iv) PRIIPs Regulation**

We would ask the FCA to clarify that information on conditions for returns and performance caps should, where relevant, be included in the “*What are the risks and what could I get in return?*” section of the KID by way of a separate narrative, the text of which is not prescribed in the RTS.

Article 8(3)(d)(iv) of the PRIIPs Regulation requires that the section of the KID titled “*What are the risks and what could I get in return?*” includes, where applicable, information on “*conditions for returns to retail investors or built-in performance caps*”. The Template KID contained in Annex I of the RTS also states next to the heading “Performance Scenarios”: “*Performance Scenario templates and narratives as set out in Annex V including where applicable information on conditions for returns to retail investors or built-in performance caps...*”

The draft RTS contained in the November 2015 Consultation Paper contained prescribed narratives on conditions for returns to retail investors or built-in performance caps at Annex V Appendix 1, which were to be included where applicable. However, these narratives were removed from the April 2016 draft of the RTS and are not contained in the RTS adopted by the European Commission on 30 June 2016. Accordingly, we assume that PRIIP manufacturers should include such information (where applicable) by way of a separate narrative, the text of which is not prescribed in the RTS. We note that the slides to the Brussels Workshop state at slide 5 that “*Where the PRIIP Regulation requires information not addressed in the RTS, the RTS do not prevent it being included [sic]*”.

Specific request to the FCA: We would ask the FCA to clarify that PRIIP manufacturers should include information on conditions for returns or built-in performance caps by way of an additional narrative in the “*What are the risks and what could I get in return?*” section.**11. Capital / principal protection – Annex III point 4(b) RTS**

We are concerned that the mandatory narrative on capital protection could be misleading to retail investors in circumstances where the capital invested by the retail investor is different from the principal amount of the PRIIP.

Annex III point 4(c)(i) requires that the “*What are the risks and what could I get in return?*” section of the KID includes Annex III Element F where the PRIIP holds capital protection:

“[Where applicable:] [Element F] [You are entitled to receive back at least [insert %] of your capital. Any amount over this, and any additional return, depends on future market performance and is uncertain.]”

However, PRIIPs may be transacted with retail investors at a price above or below their principal value. In such circumstances, the capital investment made by the retail investor will not be the same as the principal value of the PRIIP. Where a PRIIP holds capital protection, this will cover a percentage of the principal value of the PRIIP rather than a percentage of the capital investment made by the retail investor.

For example, a PRIIP may have a principal value of EUR 1000 and may hold 100% principal protection. The KID drawn up and published by the manufacturer would state that *“you are entitled to receive back at least 100% of your capital”*. However, a distributor may sell the PRIIP to a retail investor for EUR 1250. Pursuant to the terms of the capital protection, the retail investor would only be entitled to receive back at least EUR 1000, which comprises only 80% of the capital investment which he has made. In such circumstances, the KID provided to the retail investor (which states *“you are entitled to receive back at least 100% of your capital”*) would be misleading.

Accordingly, we would suggest that manufacturers amend Annex III Element F so that it makes clear that where a PRIIP holds capital protection, the retail investor is entitled to a percentage return of the principal amount of the PRIIP rather than the capital amount which he has invested. We note that at the Brussels Workshop, the representatives of the European Commission and the ESAs stated that manufacturers could diverge from the prescribed text of the RTS where such text would be inaccurate, which would clearly be the case in the circumstances described above.

Specific request to the FCA: We would ask the FCA to clarify that Annex III Element F may be amended to reflect the fact that where a PRIIP holds capital protection, the retail investor is entitled to a percentage return of the principal amount of the PRIIP rather than the capital amount which he has invested.

12. Article 8(3)(d)(i) PRIIPs Regulation and Annex III point 4(b) and Element E

We would ask the FCA to provide greater clarity on the requirement to explain in the KID those risks which are materially relevant to the PRIIP but which are not adequately captured by the SRI.

Article 8(3)(d)(i) of the PRIIPs Regulation provides that the KID should include *“a narrative explanation of the risks which are materially relevant to the PRIIP and which are not adequately captured by the summary risk indicator.”*

The RTS specify prescribed wording to capture liquidity risk and currency risk, which are risks that are not captured by the SRI. Annex III point 4(b) also provides that where applicable, the PRIIP manufacturer should explain in Element E in a maximum of 200 characters other risks materially relevant to the PRIIP and which could not be adequately captured by the SRI.

PRIIP manufacturers usually outline multiple risks in product offering documentation. Given that the explanation in Element E should not exceed 200 characters and that PRIIP manufacturers would not want to give undue prominence to one of the many risks which they have identified in product offering documentation, we would suggest that the FCA clarifies the type of risk which it envisages should be explained in Element E of the *“What are the risks and what could I get in return?”* section.

Specific request to the FCA: We would ask the FCA to clarify which type of risk it envisages should be explained in Element E of the “*What are the risks and what could I get in return?*” section of the KID.

13. Annex V Element D

We are concerned that the RTS appear to contain an error at Annex V Part 1 point 2. That provision states that: “*Where performance scenarios may be shown only at maturity or at the end of the recommended holding period, as for the PRIIPs referred to in point 16 of Annex IV, that shall be clearly explained in the narrative set out in element D in Part 2 of this Annex.*”

Point 16 of Annex IV refers to PRIIPs with a recommended holding period of 1 year or less. However, Annex V Element D is relevant where a PRIIP is illiquid or has materially relevant liquidity risk, and not where the recommended holding period / maturity is one year or less. It states: “*This product cannot be [easily] cashed in. This means it is difficult to estimate how much you would get back if you cash in before [the recommended holding period/maturity]. You will either be unable to cash in early or you will have to pay high costs or make a large loss if you do so.*”

The inclusion of this narrative where a PRIIP has a recommended holding period / maturity of one year or less would therefore be inaccurate and misleading where the PRIIP can easily be cashed in or terminated without incurring a penalty.

We would suggest that Annex V Element D should only be included where a PRIIP is illiquid or has materially relevant liquidity risk. We note that this is consistent with the approach adopted in the first draft of the RTS set out in the November 2015 PRIIPs Consultation Paper. These stated at Annex V point 5 that: “*Where a product is considered to be illiquid as set out under paragraph 77 of Annex II the performance scenarios may be shown only at maturity or at the recommended holding period, this should be clearly explained in the narrative under Appendix 1 [element g] shall be included.*”

The “Appendix 1 element g” referred to is almost identical to Annex V Element D of the RTS. It states: “[g] *This product cannot be [easily] cashed in, meaning it is very hard to estimate the money you would get back if you cash in before the recommended holding period/maturity. It may be that cashing in is not possible or, if possible, by incurring high costs or by making a large loss.*”

Specific request to the FCA: We would ask the FCA to clarify that Annex V Element D should only be included where a PRIIP is illiquid or has materially relevant liquidity risk.

14. Disclosure of distributors’ costs – Article 8(3)(f) PRIIPs Regulation

We are concerned that the RTS require PRIIP manufacturers to include a statement in the KID on costs disclosure which may be incorrect and misleading because of the delay to the implementation of MIFID2.

Article 8(3)(f) of the PRIIPs Regulation requires that the KID contains “*a clear indication that advisors, distributors or any other person advising on, or selling, the PRIIP will provide information detailing any cost of distribution that is not already included in the costs specified above...*”

Accordingly, the RTS provide (at Annex VII p.53) the following wording to be inserted above the costs tables: “*The person selling you or advising you about this product may charge*

you other costs. If so, this person will provide you with information about these costs, and show you the impact that all costs will have on your investment over time.”

There is an obligation to disclose certain specific costs under Directive 2014/65/EU (“MIFID2”) and it was initially intended that the PRIIPs Regulation and MIFID2 would enter into force simultaneously such that the wording above from Annex VIII would align with distributors’ disclosure obligations under MIFID2.

However, the implementation of MIFID2 has been delayed until January 2018 and MIFID1 will remain in place until then. There are certain obligations to disclose costs arising under the MIFID1 inducements regime and under the FCA’s Retail Distribution Review for UK-authorized entities but these do not exactly align to the MIFID2 requirements. Accordingly, distributors are not necessarily required to disclose their distribution costs and the inclusion of this sentence may be misleading for the retail investor.

Specific request to the FCA: We would ask the FCA to clarify that PRIIP manufacturers may leave out or amend the wording at Annex VII p. 53 on distributors’ costs where its inclusion would otherwise be misleading for the retail investor.

PART 2

Responses to FCA Consultation Paper (CP16/18): Changes to disclosure rules in the FCA Handbook to reflect the direct application of the PRIIPs Regulation

We welcome the opportunity to provide feedback on the FCA's Consultation on the changes to disclosure rules in the FCA Handbook to reflect the direct application of the PRIIPs Regulation. We set out below our responses to the questions posed in the Consultation which we feel are particularly relevant to the JAC and the concerns of its members. We would be happy to discuss or provide further elaboration in respect of any of the points raised.

Q1: Do you agree with the proposal to delete or amend the KFD and KFI disclosure requirements in COBS so they no longer apply in relation to PRIIPs for which a KID must be prepared?

No comment.

Q2: Do you agree with our proposals in relation to disclosures for NURSSs, in particular the proposal to provide firms with the option of producing either a NURS-KII document or KID and our proposals about the contents of the NURS-KII document?

No comment.

Q3: Do you agree with our proposals for rules and guidance concerning NURSSs that are money-market funds or feeder funds?

No comment.

Q4: Do you agree with our proposed disclosure requirements in relation to NURS and s272 schemes, in particular the proposal to remove the requirement to provide a KFD or simplified prospectus to professional clients?

No comment.

Q5: Do you agree with our proposed disclosure requirements in relation to QISs, in particular the proposal to remove the requirement to provide a KFD to professional clients?

No comment.

Q6: Do you agree with our proposal, regarding the disclosure rules relevant to AIFMs, to remove the need to provide a simplified prospectus or KFD following introduction of the KID?

No comment.

Q7: Do you agree with our proposal to require that firms, in order to comply with the AIFMD where the PRIIP is an AIF, disclose AIF information in either a scheme prospectus or in another disclosure document, that will supplement the KID (or NURS-KII document)?

No comment.

Q8: Do you agree with our proposed rules and guidance concerning the information to be provided to retail clients investing in PRIIPs that are unauthorised AIFs?

No comment.

Q9: Do you agree with our views of how the requirements of the PRIIPs Regulation might apply to (a) third-country (non-EEA) manufacturers and distributors and (b) EEA manufacturers and distributors producing PRIIPs for, and/or selling PRIIPs to, third-country (non-EEA) retail clients

We agree with the views of the FCA as set out in paragraphs 3.39 – 3.45 of the Consultation, in particular that:

- a third-country manufacturer of a PRIIP to retail clients in the EEA will be required to prepare, and a third-country distributor of a PRIIP to retail clients in the EEA will be required to produce a KID; and
- where a manufacturer or distributor is based in the EEA and targets only non-EEA retail clients, the PRIIPs Regulation will not apply and KID will not need to be prepared or produced.

We note that there are a number of provisions within the PRIIPs Regulation and the RTS which indicate that the PRIIPs Regulation is intended to apply to the sale of PRIIPs to EEA retail investors only (our emphasis):

- Recital 22 (PRIIPs Regulation): “*It should also be ensured that all retail investors across the Union have the same right to seek compensation for damage suffered due to failure to comply with this Regulation*”.
- Recital 24 (PRIIPs Regulation): “*The competent authority of the Member State where the PRIIP is marketed should be responsible for supervision of the marketing of that PRIIP*”.
- Article 7(1) (PRIIPs Regulation): “*The key information document shall be written in the official languages, or in one of the official languages, used in the part of the Member State where the PRIIP is distributed*...”.
- Background and Rationale (draft RTS dated 31 March 2016): “*The explanatory memorandum to the proposal of the European Commission outlined the intention to improve the comparability and comprehensibility of information being provided to retail investors in the EU, as an important step to improve the protection of retail investors, to aid those investors in comparing between different PRIIPs, and to support the European single market*”.

Q10: Do you agree with our proposal to include guidance in the PR that refers to the requirements of the PRIIPs Regulation?

We agree with the FCA’s proposal to include guidance in the Prospectus Rules Sourcebook which refers to the PRIIPs Regulation.

Q11: Do you agree with our proposal that firms can provide any necessary Solvency II information in a KID or in another document?

No comment.

Q12: Do you agree with our proposals to amend the definition of ‘structured deposit’, to align with MiFID II, and to refer in BCOBS to the requirements of the PRIIPs Regulation?

We agree with the FCA’s proposal to clarify in the Banking: Conduct of Business Sourcebook that in addition to existing requirements, the PRIIPs Regulation may also be relevant in relation to structured deposits. We also agree with the FCA’s proposal to amend the Glossary definition of structured deposit to align it with the definition in MiFID II.

Q13: Do you agree that we should clarify firms have the option to provide personalised projections?

No comment.

Q14: Do you agree that firms should ensure their disclosure documents use colours that can be printed or photocopied in black and white without diminishing comprehensibility?

We agree that firms should ensure their disclosure documents use colours that can be printed or photocopied in black and white without diminishing comprehensibility.

Q15: Do you have any comments on the consequential amendments proposed or the proposal to modify the COBS general application rule?

We agree with the consequential amendments proposed and the proposal to modify the COBS general application rule, except for the proposed amendment to the definition of “*Holloway policy special applications conditions*” in the Glossary, in respect of which we have no comment.

Q16: Do you have any comments on our CBA?

No comment.

Q17: Do you have any comments on the compatibility statement?

No comment.

APPENDIX 1

PARTICIPATING ASSOCIATIONS

About the Joint Associations Committee

The JAC is sponsored by multiple associations with an interest in structured products, including the International Swaps and Derivatives Association (**ISDA**), the International Capital Market Association (**ICMA**) and the Global Foreign Exchange Division of the Global Financial Markets Association (**GFMA**). The members of the JAC comprise most of the major firms (both financial institutions and law firms) involved in the creation, and to some extent, distribution of structured securities, which are distributed to retail investors.

About GFMA

The Global Foreign Exchange Division of the Global Financial Markets Association (GFMA) was formed in co-operation with the Association for Financial Markets in Europe (AFME), the Securities Industry and Financial Markets Association (SIFMA) and the Asia Securities Industry and Financial Markets Association (ASIFMA). Its members comprise 24 global FX market participants, collectively representing more than 80% of the FX inter-dealer market. Both the GFXD and its members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators. More information is available at:

[www.gfma.org/initiatives/ForeignExchange-\(FX\)/Foreign-Exchange-\(FX\)/](http://www.gfma.org/initiatives/ForeignExchange-(FX)/Foreign-Exchange-(FX)/).

About ICMA

ICMA represents financial institutions active in the international capital market; its members are located in 55 countries, including all the world's main financial centres. ICMA's market conventions and standards have been the pillars of the international debt market for over 40 years, providing the framework of rules governing market practice which facilitate the orderly functioning of the market. ICMA actively promotes the efficiency and cost effectiveness of the capital markets by bringing together market participants including regulatory authorities and governments. For more information see: www.icmagroup.org.

ICMA is listed on the EU Register of Interest Representatives, registration number 0223480577-59.

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

ISDA is listed on the EU Register of Interest Representatives, registration number: 46643241096-93.