APPENDIX 1

JAC letter dated 17 February 2016 to Commission and ESAs

JAC letter dated 17 February 2016 to ESAs.

Commission letter to JAC in response to the letter of 17 February 2016 (the "Commission Response")

JAC letter dated 23 June 2016 to Commission and ESAs

JAC letter dated 17 October 2016 to Commission and ESAs

Mr Jonathan Hill
Commissioner
Financial Stability, Financial Services and Capital Markets Union
European Commission
Rue de la Loi, 200/Weststraat 200
1049 Brussels
Belgium

Mr Steven Maijoor
Chair of ESMA
ESMA
103 rue de Grenelle
75007 Paris
France

Ms Anneli Tuonimen
Vice Chair of ESMA
Chair of the Consumer Protection and Financial Innovation -
Sub-Committee of the Joint Committee of the ESAs
ESMA
103 rue de Grenelle
75007 Paris
France

Mr Gabriel Bernardino
Chair of the European Insurance and the Occupational Pensions Authority
Westhafenplatz 1
60327 Frankfurt am Main
Germany

17 February 2016

Ladies and Gentlemen

PRIIPS Regulation – significant uncertainties

We are strongly in favour of the policy direction which motivated the Packaged Retail and Insurance-based Investment Products Regulation[1] (the "Regulation"). We agree that, as set out in the recent Commission green paper on retail financial services[2], the integration of the EU retail product market will produce "choice, transparency and competition in retail financial services to the benefit of European consumers". A single, harmonised EU-wide Key Information Document (KID) is an important step towards the development of this market, and it clearly supports the objective to give retail investors clear and accurate information on the range of PRIIPs and the ability to compare them for suitability and value without being misleading.

[1] 1286/2014
[2] COM(2015) 630

However, there are still four very significant issues relating to the scope of the PRIIPs regulation which remain unclear, and this lack of clarity could produce serious detriment to EU producers and consumers of PRIIPs. To some extent these are issues which have become clear as the thinking of policymakers as to the development of KIDs has developed. Moreover, they are all issues which arise from the form of the regulation itself, and as such cannot be resolved within the scope of ESMAs existing mandates under the regulation. We are writing this letter to request that these issues be resolved through the issue of guidance, by the commission and ESMA, as to the construction of certain specific terms of the regulation.

1. Scope

The most important of these is the question of which products the regime applies to. PRIIPS is expressed to apply to "investments", but this is not a term with an established EU law meaning. It seems clear that the primary intended meaning of the term "investments" in this context is products which an investor purchases for the sole purpose of obtaining a return on the amount invested – that is, a term investment product in which investment is made at the beginning of an investment period, a return is paid at the end of that period, and a return is calculated by reference to a formula. It is also clear that the definition is intended to be based on functional rather than legal characteristics. This interpretation is supported by Recital 1, the definition of PRIIP in Art 4(1) of the Regulation and the European Commission's Memo (14/299) that indicates that "PRIIPs are the investment products retail investors would typically be offered by their bank when they want to make an investment, e.g. to save for a target amount of money such as buying a house or paying for their children's education".

The PRIIPs Regulation applies to sales of products to a wide variety of commercial entities - municipalities, local authorities and many commercial companies[3]. These entities have a positive requirement for risk management or hedging products, as well as for foreign exchange forwards and derivatives. Risk management and hedging products do not fall within the intended meaning of the definition of 'investment' as reflected by the prescriptive requirements of what a KID needs to include for example a 'risk reward profile' which does not lend itself to these products which are created and sold for non-investment purposes.

The use of KIDs for such products is likely to be completely uninformative, since these products are not purchased as investments, but as risk management tools. Consequently we believe that the imposition of a KID requirement on such products does not support the objective of the information provided to retail investors being accurate, clear and allowing for any meaningful comparability to other products created and purchased for different purposes.

There are three ways in which this problem might be addressed. One would be to confirm that products which do not have an investment purpose are not "investments" as the term is used within the Regulation, and therefore do not require a KID to be prepared. Another might be to provide that, where a product is sold for risk management rather than investment purposes, a pro-forma KID making that fact clear would be required. Such a KID would omit the risk information required for a normal KID, and would simply state that the product concerned should not be regarded as an investment in the normal sense. It is also possible that there may be other available policy options. However, if something is not done to address this issue, the consequence may be to prevent the financial services system from providing essential risk management products to those who require them. An alternative approach for risk management and hedging products would be to provide a separate industry standardised document that would administer the same benefits derived from a KID for the Retail Investor such as transparency and comparability. This document could offer an appropriateness test providing price transparency partnered with a scenario analysis that is relevant

[3] All of these are, or are capable of being, non-professional clients within the meaning of Annex II to MiFID.

and appropriate to risk management and hedging products to assist the retail investor to understand breakages. This approach would provide clear and fair information to the retail investor and would allow comparability across the product range whilst clearly differentiating from products with the purpose of investment rather than of risk mitigation.

2. Territoriality

The PRIIPs requirements as currently drafted apply whenever a PRIIP is sold by an EEA entity to a person who does not fall within the definition of "professional investor" set out in MiFID. The Regulation is silent in the case of where the non-professional investor resides outside of the EU. Accordingly if, for example, a Chinese distributor offers a Chinese retail investor in China a product issued by an EEA entity, it is unclear whether the EEA issuer is thereupon required to create and publish a KID. Given that the legislation is silent and in light of the experience of differing EU regulators in other areas to date, we think it likely that competent authorities will take different views on this issue: therefore, EEA manufacturers in one jurisdiction may be obliged to produce KIDs for non-EEA investors; whereas in other jurisdictions they may not.

We assume that the intention, and the correct position should be, that the KID should not apply outside of the EEA. Otherwise, the above scenario would effectively require the EEA issuer to disregard the rules which apply in the retail investor's domestic market. It is also possible that such publication could constitute a direct breach of the rules applicable in the retail investor's home market. This is particularly problematic where the product concerned is manufactured by a non-EEA branch of an EEA institution for the purposes of being sold in the domestic market of that branch.

Given that the aim of the PRIIPs regulation is to create a common standard for products within the EU, we feel that it is vital that guidance be given that the PRIIPs requirements apply only where the retail investor concerned is in the EEA.

If this is not the case, then detailed thought (including further consultation) may be necessary to consider how the requirements of the proposed RTS should be addressed where they overlap with other competing requirements in the domestic market of the customer concerned.

3. Secondary Trading Issues and Grandfathering

PRIIPs traded in the secondary market should not automatically be regarded as being ‘made available to retail investors’. We do not think that trading in a secondary market is actually a relevant criterion for determining whether or not a PRIIP is ‘made available’. Some PRIIPs which are not traded on a market (such as a unit linked insurance policy) can be 'made available' by insurers actively marketing them throughout the life of the product. We are of the view that ‘made available’ should be interpreted within its literal meaning, i.e. somebody actively ‘makes a product available for sale’ by allowing retail investor to purchase it after a (usually closed) initial offering period.

If the view were taken that secondary market availability, regardless of whether the PRIIPs has been ‘made available for sale’, triggered a requirement to prepare or update a KID, this could strongly disincentivise the development of such markets, thereby depriving investors of a positive liquidity benefit. Even as regards PRIIPS, originators of PRIIPs could eliminate this risk by ceasing to offer liquidity in their products through markets, but this would be an active detriment to investors for no benefit to anyone.

This issue is wrapped up with the issue of the treatment of existing products (i.e. products which have been offered prior to the commencement date of the Regulation, and are traded in the secondary market). If secondary market trading triggers a requirement for a KID to be updated, manufacturers

will be required to create KIDs for all of the products which they offered prior to PRIIPs commencement date, which they simply would not be able to do due to the impossibility to source accurate historical data (for instance data about costs or past performance). Hence we would recommend that no KID should be required for a product where information cannot be accurately sourced on a retrospective basis, on the condition that the manufacturer commits not to make these existing products available to investors. It seems clear that the mere fact that a product was created before the commencement date of the Regulation is not necessarily determinative of this point – the application of the requirement should be triggered by when 'availability is made for sale' (such as a sale, or active marketing), not when the product was created.

It would therefore be helpful to provide guidance that the mere fact that a two-way secondary market exists in respect of an existing product does not constitute "making a product available" to retail investors, irrespective of the initial offering date being prior to or following the commencement date of the regulation.

4. Gold-plating

Finally, we understand that a number of national authorities are contemplating "gold-plating" KID requirements by mandating specific content into the KID in their jurisdictions. National authorities are of course free to impose retail customer protection measures in their jurisdictions which go beyond EU minima. However, we believe that both the Commission and ESMA should take a strong line against measures which directly affect the form of the KID itself. It is an essential element of the creation of a single EU retail product market that the core customer information document should be the same across the EU.

Yours faithfully,

Timothy R Hailes
Chairman, Joint Associations Committee

The European Securities and Markets Authority
CS 60747
103 rue de Grenelle
75345 Paris Cedex 07, France
Attention: Steven Maijoor, Chair

The European Banking Authority
One Canada Square (Floor 46)
Canary Wharf
London
E14 5AA
Attention: Andrea Enria, Chair

The European Insurance and the Occupational Pensions Authority
Westhafenplatz 1
60327 Frankfurt am Main
Germany
Attention: Gabriel Bernardino, Chair

17 February 2016

Gentlemen

On behalf of our members, the Joint Association Committee on Retail Structured Products (the **JAC**) would like to raise a number of concerns in respect of the interpretation and application of the Regulation on key information documents for packaged retail and insurance-based investment products[1] (the **Regulation**) and the draft regulatory technical standards[2] (the **RTS**) (together the **PRIIPs regime**).

Since the publication of the draft RTS in November 2015, the JAC has actively engaged in discussions with its members on the substantive requirements, the various connotations and the practical impact of the PRIIPs regime as a whole. The corollary of this is that the JAC has visibility as to the views of the panoply of manufacturers, distributors and legal advisers that comprise its members. In this letter we have limited ourselves to summarising the key issues that are of concern to the JAC and we should therefore be grateful for the opportunity to discuss our comments and questions in more detail with you and a representative selection of our members.

The JAC members are very much in support of the PRIIPs regime and the initiative to harmonise the regulation of retail structured products on a pan-European level is a welcome development. However, it is clear that further work needs to be done to develop the PRIIPs regime. In addition to our letter to the European Commission and ESMA (Appendix 1) and our response to the Joint Consultation Paper on PRIIPs Key Information Documents[3] (the **CP**) (Appendix 2), the purpose of this letter is to set out in the aspects of the Regulation and the RTS that are of some consternation to the JAC and we feel require clarification prior to implementation. What follows is a summary of these key aspects.

[1] Regulation (EU) 1286/2014
[2] JC 2015 073
[3] JC 2015 073

1. Timing

We should like to make it clear at the outset that members are extremely concerned by the timeframe for implementation and there is an emphatic preference for timing to be extended given the lack of clarity in the PRIIPs regime and the onerous obligations requiring significant systems and technological changes for product manufacturers (for example the development and testing of automation tools to generate the "what is this product" section of the KID). Given that the final RTS are unlikely to be published before the summer and the fact that competent authorities may need to issue consultation papers in respect of amendments to their national regimes, the timing for implementation is unrealistic.

In order to meet the scheduled date for implementation of 31 December 2016, participants would need to carry out (or at least start to implement) these changes before the publication of the final RTS and in the absence of further guidance or clarity. It is our view that carrying out the work required for implementation in this way will be extremely difficult, time consuming and will not permit any margin for testing which is a crucial component for delivering the desired outcome of providing consumers with a useful document.

Since the main objective of the PRIIPs regime is to simplify the information provided to retail investors in respect of PRIIPs and to facilitate comparability of the products, implementation of the regime in the absence of further guidelines will result in further fragmentation which will undeniably exacerbate the very problem that the PRIIPs regime is seeking to address.

Furthermore, in European Commission's announcement of a one year delay to the application of MiFID 2, it states factors such as complexity, the need to avoid legal uncertainty and market disruption as the key reasons as to why a delay was deemed necessary. It is for the very same reasons that we would strongly advise a delay to the date for implementation of the PRIIPs regime.

2. Product scope

There remains considerable uncertainty in respect of product scope and it is unclear how the PRIIPS regime is to be implemented in the absence of guidelines on the products that would and would not fall within scope. Given the breadth of the retail classification under MiFID and the requirement for uniformity, we think that an incontrovertible approach to product scope is a necessity.

One of the key issues raised is whether all derivatives are in scope. Recital 1 of the Regulation states that "Retail investors are increasingly offered a wide variety of packaged retail and insurance-based investment products (PRIIPs) when they consider making an investment. Do the ESAs consider a hedging derivative (that is sold alongside an investment product), an investment and therefore a KID is required? Are the ESAs able to clarify what is meant by "an investment"?

To the extent that certain derivatives are in scope, we are concerned that the requirement to produce a PRIIPs compliant KID cannot be met. For example;

- the granular details of the underlying trade will not be known until the trade is placed, which will be after the product is “distributed” to the retail investor;
- in respect of FX, given the speed of movement of the FX markets, this will constitute a significant impediment for production of a normal KID for these purposes and, as a result, the availability of these products may be significantly impacted. This also raises the question as to whether FX forwards are in scope. It is our view that they should not be

within the scope of the PRIIPS regime since these are not packaged and they do not incorporate an amount repayable that is subject to fluctuations (as defined by the Regulation), they are simply an agreement between parties to exchange pre-determined cash flows.

While there may be scope to deliver a KID after the conclusion of a transaction (as per Article 13), a possible alternative is to permit the preparation of a generic or pro-forma KID with the final trade details available separately. Article 6(3) foresees that the preparation of a detailed KID is not practical in all circumstances and that generic KIDs do have a place in product distribution to retail investors. We believe there is merit in extending this flexibility to scenarios which are not simply limited to "multiple-options" scenarios, but also to OTC transactions to assist with the impracticalities in the application to FX and also the situation where final terms/price is dependent on the execution of a transaction.

In addition to the above, we should like to note the following:

- **Listed options**: for listed options, our understanding is that the Exchange is the manufacturer since they have designed the contract terms and conditions, and hence will be responsible for producing the KID. This gives rise to challenging questions such as how the material is going to be made available and whether Exchanges will have the capacity to adapt. We are of the view that the ESAs should consider a generic form of KID incorporating only high level disclosures and references to term sheets, or final terms, rather than a single KID for each transaction.

- **Online trading systems:** It should be noted that online trading systems are not always used for trading products. Where the purpose of using an online pricing and trading system is price discovery and there is no intention to trade, such activity should be classified as "out of scope" and KIDs should not be required since there is no investor.

3. Mandated 3 page length of the KID

We think that the amount of text and number of tables currently mandated in the RTS makes the KID form and content requirements unworkable. In particular, we should like to draw your attention to the following:

- if you complete the requirements as currently included in the RTS, using the same font size as used in the RTS, the mandatory text alone would run to more than 3 pages and that is without attempting to address the summary description of the product (and indeed without the additional scenarios contemplated for certain products),

- in the example KID given by the ESAs in the materials for the open meeting they omitted some of the mandatory text to allow them to fit it into 3 pages; and

- the liability regime makes the manufacturer liable for failing to comply with the requirements of Article 8 (which include qualitative requirements relating to the summary disclosure of the product) and it will currently be impossible for a manufacturer to do this (given that the space available after including all of the mandatory text falls a long way short of what would be required to provide summary disclosure that is fair, clear and not misleading).

We would request that the ESAs provide sample KIDs for mainstream products[4] at the earliest opportunity so that product manufacturers have a better understanding of how a finalised KID should look in advance of implementation and further to demonstrate that it is possible to fit all of the required information into three A4 sides in a way that is accurate, fair and not misleading.

4. Territorial scope

The territorial scope of the PRIIPs regulation requires further clarification. The matrix below sets out our understanding of how the current provisions apply and the scenarios that require clarification:

Manufacturer	Distributor	Retail Client	In scope?
EEA	EEA	EEA	Yes
EEA	EEA	Non-EEA	Unclear
EEA	Non-EEA	EEA	Yes
EEA	Non-EEA	Non-EEA	Unclear
Non-EEA	EEA	EEA	Yes (Article 19(c))
Non-EEA	EEA	Non-EEA	Unclear
Non-EEA	Non-EEA	EEA	Unclear
Non-EEA	Non-EEA	Non-EEA	No

We are concerned by the possible extension of the PRIIPs regime to third countries for the following reasons:

- There may be conflicts with local short form disclosure regimes and documentation in place in that third country
- If KIDs are translated in the EEA but not in non-EEA jurisdictions, there might be a mismatch or an unlevel playing field and this may not be helpful to end-investors
- Outside the EEA, the manufacturer would not have the benefit of the protections afforded within the EEA, for example, that the civil liability of a PRIIP manufacturer is limited to circumstances where an investor has incurred loss as a result of a KID being misleading, inaccurate or inconsistent with the relevant parts of legally binding pre-contractual and contractual documents. It is also important to note that the explanatory statement set out in Article 8(2) of the PRIIPs Regulation clearly states that the KID does not constitute marketing materials. This is important in terms of the regulatory liability which is imposed as a result of it.

5. Summary risk indicator

The methodology used to determine market risk is dependent on the classification of the PRIIP. Should the relevant classification be included in the KID? Our current understanding is that structured products will fall into category III. However, category II PRIIPS also include PRIIPs which "have, either directly or on a synthetic basis, a delta one or a leveraged exposure on underlying asset(s) that pays a constant multiple of a market price or index". Would this include, for example, Delta-1 certificates or leveraged certificates? Our view is that Delta-1 certificates are classified as 'structured products' (category III) as we think that they are the sum of a zero coupon bond minus 1 put ATM plus 1 call ATM. Do the ESAs think that warrants should be classified as derivatives or structured products?

[4] In respect of structured products, we suggest that the ESAs provide a sample KID for autocallable on indices and stocks

The methodology for calculating the market risk measure in respect of category III PRIIPs is too vague and open to too much interpretation for the relevant calculations to be made. Certain paragraphs (for example, 42 to 44 inclusive on page 39 of the Consultation Paper[5]) are stated to be "deleted" – is this intentional? We think that a more detailed formulaic description of what is required (ideally with a worked example) is required in order to make the calculation.

It is questionable why there is an automatic default option of MRM 1 for category 1 PRIIPs. Where a product has a significant level of protection embedded in it seems unbalanced that complete capital protection will receive an MRM of 1 whereas a significant level of protection may receive an MRM of 4 or 5. The different risk outcome on the SRI indicator is significant relative to different levels of risk the investors experience between the products. The MRM for derivatives should not be 7 across the board as, for example, because the risk profile for long positions in the underlying and call options are different.

We believe the most risky products (where the investors can lose more than the invested capital such as CFDs) should not fall within the same risk class and other PRIIPs but be assigned a specific MRM class of “7+” or “8”. Alternatively a specific label indicating the contingent liability should be displayed next to risk indicator.

6. Performance scenarios

Further clarity is required in respect of performance scenarios and we note the following:

- Since only “scenarios that can reasonably be expected” can be shown (Annex IV paragraph 7 of the CP) does this mean, for example, that the unfavourable scenario should not include the worst possible case if this is highly unlikely to happen? Further guidance required on how to determine reasonably expected outcomes.

- It is not clear if the evaluation of scenarios should be based on market outcomes (i.e. the underlying of the product) or outcomes of the structured product itself (which is different and may result in different scenarios). There appears to be some inconsistency between paragraphs 1(b) and 4 on page 51 of the CP. Is, for example, a flat market outlook a reasonable moderate scenario?

- If each product manufacturer must determine, based on its policy, what is “reasonable” this could lead to difficulties for investors in using KIDs for comparative purposes as the assessment of what is reasonable may differ between product manufacturers. Furthermore, we think that the statement in the KID that the performance scenarios facilitate comparability because they are calculated under similar conditions is misleading since this is clearly not the case. We are of the view that Appendix 1 paragraph [b] must be amended. Please see "Proposed amendments to the draft RTS" below.

For the performance scenario methodology we would favour an approach where performance scenarios correspond to a percentile of the payoff distribution at maturity, computed with the same model than the one used by the manufacturer to price the product, together with an asset risk premia. For equities and commodities, should performance scenarios be probabilistic, a growth rate set to the risk free rate would not be satisfactory because a risk premium exists for these products. We are in favour of a solution whereby the asset grows at the risk free rate adjusted by an asset specific risk premium, constant and explicitly set by regulators (e.g. for equities the risk premium

[5] JC 2015 073

should probably be between 4% and 7% p.a.). This would ensure all manufacturers use the same equity risk premium and would be simple to implement. The ESAs should set some risk premium per asset classes and regularly review it.

7. Review

The 'ad hoc' review requirements are still unclear. What would constitute a material change which triggers and ad hoc review and revision of the KID? We are of the view that guidelines are required to ensure that the process is consistent across all manufacturers.

8. Updating

For products that are continuously marketed the manufacturer will require sufficient time to update the KID and it will not be possible for real-time/same day updates to be available.

Since the updating requirements are different for products that are made available to investors in a non-continuous manner, further guidance is required as the meaning of "non-continuous manner". Our view is that 'made available in a non-continuous manner' should be interpreted within its literal meaning, i.e. the product is actively made available for sale for example by allowing retail investor to purchase it after an initial offer period. We would therefore propose that the following guidelines as to the updating requirements:

- There should be no update requirement where an investor is 'divesting' rather than investing
- Where products are not actively marketed/there is no open offer period/liquid secondary market, requiring a manufacturer to review and update the KID would be disproportionate. If the opposite view were taken by the ESAs, the unintended consequence of this could be to deprive investors of positive liquidity in the secondary market
- The KID should be updated and republished if and when an investor requests to buy it (i.e. when the product is 'made available for sale')

9. Provision of the KID to investors

Further practical guidance is required on what constitutes "good time" in relation to the provision of the KID to investors. Article 20 of the draft RTS provides some colour but further information (e.g. practical examples) would help in determining what should be considered good time (e.g. what would be considered sufficient reading/consideration time for an inexperienced investor investing in a complex product where timing is not urgent? Would 2 hours, for example, be sufficient? How would this differ if the timing was urgent and/or the product was not complex etc.?). In addition, if the derogation relating to reverse enquiries (paragraph 3, Article 13 of the PRIIPs Regulation) is relied upon (i.e. the investor consents to receiving the KID without undue delay after the conclusion of the transaction), further clarity is required on what should be considered an "undue delay" (e.g. would two business days, for example, constitute an undue delay?).

10. Discretionary mandates

Under Article 13(2) of the PRIIPs Regulation, it states that a person advising on, or selling, a PRIIP may satisfy the requirements under Article 13(1) (provision of the KID) by providing the key information document to a person with written authority to make investment decisions on behalf of the retail investor in respect of transactions concluded under that written authority. We would like the ESAs to clarify that where a manufacturer of a PRIIP deals exclusively with a discretionary manager and does not advise or sell to the underlying retail client, they are out of scope and would not be obliged to provide a KID. Our view is that there should not be a requirement for a KID to be

sent to a discretionary manager on the basis that, by definition of their role, the discretionary manager should be able to fully comprehend the relevant product features and therefore effectively provides the same role in terms of investor protection as the KID when acting on behalf of the retail investor.

11. MiFID 2

Following the European Commission's announcement of a delay to the application of MiFID 2, are the ESAs prepared to comment on how this will impact the PRIIPs regime? We note the view that there is no issue of dependency between the two regimes however there is clearly one of alignment since there is overlap between MiFID 2 and the PRIIPs Regulation in a number of areas including product governance and disclosure of costs and charges, and more importantly a mismatch in the requirements of each. How are the ESAs planning on dealing with the mismatch between the PRIIPs Regulation and the legislation in force prior to the implementation of MiFID 2?

There is a need for consistency between MiFID 2 and the PRIIPs Regulation and issues around the overlap remain unclear. Our view is the regimes should be as closely aligned as possible and, for example, the MiFID 2 requirement to define a target market (Article 24(2)) and to indicate if the product is aimed at retail or professional clients (Article 24(4)(b)) should be satisfied by the requirement in Article 8(3)(c)(iii) of the PRIIPs Regulation to describe: "the type of retail investor to whom the PRIIP is intended to be marketed, in particular in terms of the ability to bear investment loss and the investment horizon."

12. Liability

We think that issue of liability is unclear where there is more than on PRIIPs manufacturer and further whether they are located in different jurisdictions.

13. Application of the PRIIPs Regulation to products manufactured before 31 December 2016

The application of the PRIIPs regime to products issued prior to the effective date of the new regulation is an area of great concern. There would be significant costs involved for manufacturers in complying with the Regulation in relation to pre-existing products and such products would have been manufactured without knowledge of the requirements of the PRIIPs Regulation and the costs of complying with this Regulation would not have been taken into account when pricing the product.

At in the ESAs public hearing in Frankfurt in December 2015, it was stated that products that are no longer 'open for business' by 31 December 2016 will not require a KID. We suggest that the scope should be reduced to products which are in their public offer period and this should be tied in to the definition in the Prospectus Directive.

If pre-existing PRIIPs do require a KID then timing in respect of implementation is a problem as further changes will be required. It has been suggested that this issue will be addressed in the Level 3 measures which are unlikely to be available prior to 31 December 2016.

14. The KID and existing disclosure regimes

For German and Italian investors, will the PRIIPs KID and the PIB (product information document) or the Schetta Prodotto coexist for a time? If so, then responsibilities will need to be clarified for the cases where two parties need to produce the documents so as to minimise any potential for misalignment/inconsistencies.

Is early compliance for UCITS possible? Will early compliance constitute non-compliance with the PRIIPs Regulation?

15. Proposed amendments to the draft RTS

In addition to our comments above, we have reviewed the draft RTS in detail and propose the following amendments to the draft RTS:

15.1 Review, revision and republication – structured products - costs – primary and secondary offers

We suggest amendments to paragraphs 37, 45, 46 and 47 of Annex VI and to Annex VII of the Draft RTS below.

(a) Subscription Period - Fixed Product Terms

We consider the scenario of a structured product with a **subscription period and with fixed product terms**.

Since (i) the fair value of the PRIIP is likely to fluctuate throughout the subscription period and (ii) the entry cost is derived from the difference between the offer price and the fair value, the entry cost calculation (and therefore the RIY) will fluctuate throughout the subscription period (assuming the offer price remains fixed and/or is not adjusted proportionally with the fair value). This gives rise to the concern that the KID will need to be adjusted during the term of the subscription period to account for the change in the derived entry cost calculation (and hence RIY).

In this regard, it is important to understand that the entry cost calculation is an indirect one derived using the difference between offer price and fair value. This results in the nonsensical situation of the derived entry cost of the PRIIP for one investor being different to that of another investor purchasing at different times, notwithstanding that the actual entry costs would not have changed. As the ESAs note in the 23 June 2015 Technical Discussion Paper (section 3.1.3.2 on page 90): "…[E]ach investor will have the same product terms so it might be difficult to communicate that they are paying different structuring costs."

Indeed, the indirect entry cost calculation will become misleading when it is calculated after the economics are set. For example, if during the subscription period the fair value moves from EUR 900 to EUR 890 and the offer price is constant, the indirect entry cost would appear to have increased by EUR 10, whereas in practice the actual entry costs of hedging and structuring the PRIIP have not changed since they were set at the beginning of the subscription period. It is worth noting that (as discussed in the 23 June 2015 Technical Discussion Paper (section 3.1.3 on page 84)), instead of the indirect calculation method, the ESAs could have decided that entry costs should be estimated directly, in which case the above concern would fall away.
For these reasons, there should be no requirement to review or revise an updated KID during the subscription period in respect of changes to the costs or RIY which are caused solely due to changes in the fair value. See revised wording proposed below.

(b) Subscription Period - Preliminary Product Terms

Where preliminary terms are used, the KID produced at the beginning of the offer will use values of such terms that result in the highest cost that could apply. Once the actual cost is known (on the strike date, being on or around the end of the subscription period), a revised KID should be published. Otherwise, for the reasons given in (a) above, there should be no requirement to review or revise the KID for changes to the costs or RIY between the initial publication of the key information document and the strike date.

(c) Secondary market

The draft RTS is silent on the position as to disclosure of cost in secondary market offerings. As noted above, where a structured product is offered in the secondary market, the fair value will vary almost continuously.

It would be a disproportionate and unrealistic result if the KID of a structured product needed to be constantly updated due to changes in the fair value. There should be no requirement to review, revise or republish key information documents to reflect changes to the costs, other than in the event of a periodic review or an ad hoc review arising for other reasons.

Instead, a qualitative statement should be added under the cost disclosure that if investors purchase in the secondary market, the price will include an amount equal to the difference between the purchase price and the fair value. Proposed wording has been added below.

(d) Proposed amendments
Annex VI of the Draft RTS

37. For the purposes of the calculation of the implicit costs embedded in PRIPs, the manufacturer shall refer to the issue price and, after the subscription period, to the price available to purchase the product on a secondary market. There shall be no requirement to review or revise the entry cost information after the subscription period, where the only change to such cost calculation is due to changes in the fair value.

45. In the case of subscription products, the fair value must be calculated on the date when the product terms are determined. This valuation date shall be close to the beginning of the subscription period ~~and a criterion to update cost information, in case of long offering periods or in case of high volatility in the markets, has to be defined~~. There shall be no requirement to review or revise the entry cost information during the subscription period, where the only change to such cost calculation is due to changes in the fair value.

46. If preliminary terms are used, costs need to be calculated by using the minimum or maximum, as applicable, terms of the product such that the cost is maximised. The costs shall be recalculated upon the final terms being determined and a revised key information document shall be prepared and published accordingly.

47. If variable subscription prices are used~~, a procedure on how to incorporate and disclose the cost effect of the varying subscription price, has to be defined~~ the cost calculation should reflect a representative sample of such prices.

Annex VII of the Draft RTS

The figures assume you invest €1 000 (or €15 000 for insurance PRIIPs). The figures shown are partially based on data from the past and therefore may change in the future.

[As certain terms of the product have not been determined, the costs are based on estimates and may change. A key information document with revised costs will be published once the terms of the product have been determined. This is expected to be on or around […].]

[If you purchase in the secondary market, the price will include an amount equal to the difference between the purchase price and the fair value.]

15.2 Products made available to retail investors in a non-continuous manner (Reg Art 5, Draft RTS Art 20, recital 20)

Many structured products are listed on an exchange for regulatory (rather than liquidity) purposes - a so-called 'technical listing'. In such case, those products not sold in the initial distribution to investors are held by the issuer and are not actually traded on the exchange. Accordingly, in such circumstances, notwithstanding the listing (and assuming that the product is not otherwise being offered to retail investors), the PRIIP is not made available to retail investors. Therefore no KID is required.

By analogy, we note that under the Prospectus Directive regime, the listing of a product does not constitute an offer to the public; there needs to be something over and above the listing. We refer to the response to question 74 of the Q&A in respect of Directive 2003/71/EC (the Prospectus Directive) which states: "*In general, the simple indication of secondary market prices should not be considered an offer to the public if there are no further circumstances which might altogether amount to an offer to the public*".

However, we feel that the last sentence of recital 20 of the Draft RTS introduces uncertainty in the context of a listing. We propose the following amendment by way of clarification to recital 20 of the Draft RTS:

> "Where a PRIIP is not currently available for retail investors, the continued review and revision of the key information document for that PRIIP would be disproportionate, however a review and revision of the key information document should be undertaken if such a PRIIP is to become available to retail investors again. The trading of a PRIIP on a secondary market however would not exempt the PRIIP manufacturer from the obligation to continue to review and revise the key information document for that PRIIP. However, where a PRIIP is listed but not traded on an exchange or otherwise made available to a retail investor it shall be considered as not currently available for investors."

15.3 Cost Disclosure for interim holding periods

For illiquid products, there is an exemption from the requirement to include performance scenarios for interim holding periods. We presume this should also extend to cover the disclosure of interim holding period costs. We therefore suggest the addition of the following text to the end of para 85 of Annex VI of the Draft RTS:

> "Where products are considered to be illiquid according to Annex II part 5 paragraph 76, the total costs may be shown only at the recommended holding period."

15.4 Performance scenarios (Annex V, Appendix 1)

As noted above, the fact that each manufacturer must determine what is "reasonable" may affect comparability of products by the investor who will not necessarily be aware that the assessment of what is reasonable may differ between manufacturers. We think the wording of Appendix 1 paragraph b is therefore somewhat misleading and we would therefore propose the following amendment:

[b] The scenarios shown, are a simplified representation of possible outcomes. ~~You can use these scenarios to compare with the scenarios of other products, because they are calculated under similar conditions.~~

The standard wording included in square brackets under the performance scenarios in paragraphs d), e) and f) is unclear and does not seem to cover all possibilities. A placeholder for free text should be added to allow for all possibilities, as suggested below.

"[d] For the **favourable scenario** a rise in the market of […]% is shown. So if the market goes up by […]% the money you may get back will [not rise /equally with the market/ not rise any longer/be cancelled][…].

For the **moderate scenario** a [rise/drop] in the market of […]% is shown. So if the market goes up/down by […]% the money you get back will [not rise/ not rise equally with the market/ not rise any longer/ be cancelled][…].

And –for the **unfavourable scenario** a fall in the market of […]% is shown. So if the market drops by […]% the money you get back will [not drop any further/ not drop equally with the market price/is cancelled][…].

Examples of sample wording:

With current text	With alternative text
For the **favourable scenario** a rise in the market of 25% is shown. So if the market goes up by 25% the money you may get back will not rise any longer.	For the **favourable scenario** a rise in the market of 25% is shown. If the market goes up by more than 25% the money you may get back will not increase any further.
For the **moderate scenario** a rise in the market of 10% is shown. So if the market goes up by 10% the money you get back will not rise any longer.	For the **moderate scenario** a rise in the market of 10% is shown. If the market goes up by more than 10% the money you get back will not increase any further.
And –for the **unfavourable scenario** a fall in the market of 25% is shown. So if the market drops by 25% the money you get back will not drop any further.	And –for the **unfavourable scenario** a fall in the market of 25% is shown. If the market drops by more than 25% the money you get back will not decrease any further.

15.5 Description of the underlying

Clearly the information in respect of the underlying instrument(s) or reference value(s) is key information in relation to a PRIIP. However, given that the KID is limited to three pages, it will not be possible to include a meaningful description and other material information to assess the likely performance of the underlying instrument(s) or reference value(s). Therefore, absent a clear statement in the RTS as to the specific information that shall be provided in the KID in relation to the underlying instrument(s) or reference value(s), there is a liability concern that the KID does not provide "key information" and/or that it is

"accurate, fair, clear and not misleading" given the omission of meaningful information to assess the likely performance of the underlying instrument(s) or reference value(s).

In this regard, it is helpful that Article 4(3)(a) of the draft RTS provides that the KID shall "*identify* …the underlying investment assets or reference values" (italics added). However, we feel further clarity is needed. We therefore suggest amending draft RTS Art 4(3) – through the addition of new sub-paragraph (a) and amendments to sub-paragraphs (b) and (c) as follows:

> "(a) shall identify the underlying investment assets or reference values by (i) naming the index, in the case of an index, or the share issuer and type of shares in the case of shares or equivalent information in relation to any other type of asset or value, together with, (if applicable) the International Securities Identification Number or other securities identification code(s) and/or (if applicable) a web-site where more information may be obtained."
> (b)< change (a) to (b) and delete ", the underlying investment assets or reference values," >
> (c) < change (b) to (c) >

Yours faithfully,

Timothy R Hailes
Chairman, Joint Associations Committee

APPENDIX 1

Letter from the Joint Associations Committee on Retail Structured Products to the European Commission and ESMA dated 17 February 2016

APPENDIX 2

Response of the Joint Associations Committee on Retail Structured Products to the ESAs Joint Consultation Paper on the PRIIPs Key Information Document

EUROPEAN COMMISSION
Directorate-General for Financial Stability, Financial Services and Capital Markets Union
FINANCIAL MARKETS

Asset Management

Brussels,
FISMA.C4/DG/sd/Ares(2016)
fisma.ddg.c.4(2016)1298480

Timothy R. Hailes
Chairman
Joint Associations Committee

ISDA
International Swaps and Derivatives Association
c/o NCI Park Leopold Business Centre
4th floor, 38/40 Square de Meeûs
Brussels 1000

ICMA
International Capital Market Association
Dreikönigstrasse 8
CH-8002 Zurich

By e-mail:
hailes.timothy@jpmorgan.com

Subject: Your letter dated 17 February 2016 - PRIIPS Regulation – significant uncertainties

Dear Mr Hailes,

Thank you for sharing with our Commissioner your views and concerns relating to the PRIIPs Regulation. He has asked me to reply to you on his behalf.

On the wording of the PRIIPs definition, any investment product for which the investor gains exposure to assets/underlying values that he/she is not acquiring directly fulfils the definition of a PRIIP and must therefore come with a key information document (KID), unless it is explicitly exempted.

The PRIIPs Regulation does not make any distinctions in relation to the product's intended purpose, such as, for investment, risk management or hedging purposes. Given that the KID is a pre-contractual document and is to be used both in advised and non-advised sales of PRIIPs,

the KID needs to present the product features on a stand-alone basis, i.e. not based on the investor's targeted objective.

It is for product manufacturers to assess the application of these requirements to individual products. However, we are aware of your concerns and we will closely cooperate with the ESAs to ensure that guidances is provided as soon as possible to take into account the particular features certain of investment products, such as derivatives.

On territorial scope, where a PRIIP is offered to a non-EU retail investor by a European manufacturer via an intermediary established in the non-EU country, the obligations of the PRIIPS Regulation do not apply. The Regulation will apply to PRIIPs offered to retail investors domiciled in EEAs countries, but as for the timing of its application we advise you to refer to the EFTA Surveillance Authority (http://www.eftasurv.int/).

Another comment that you raised is related to the transitional provisions for existing PRIIPs (i.e. PRIIPs offered prior to the application date of the Regulation and that are traded on secondary markets). The PRIIPs Regulation does not provide any grandfathering provisions, therefore all PRIIPs offered to retail investors as of the date of application of the Regulation need to come with a KID, regardless of whether they are new or existing products. We are aware of the challenges and complexity associated with implementing the requirements and stand ready to work with you to provide additional clarity as needed.

Yours sincerely,

Sven Gentner
Head of Unit

Contact:

Daniela Gariboldi, Telephone: +32-2-296.86.95
E-mail: daniela.gariboldi@ec.europa.eu

Mr Jonathan Hill
Commissioner
Financial Stability, Financial Services and Capital Markets Union
European Commission
Rue de la Loi, 200/Weststraat 200
1049 Brussels
Belgium

Mr Sven Gentner
Head of Unit
Financial Stability, Financial Services and Capital Markets Union
European Commission
Rue de la Loi, 200/Weststraat 200
1049 Brussels
Belgium

Mr Steven Maijoor
Chair of ESMA
ESMA
103 rue de Grenelle
75007 Paris
France

Ms Anneli Tuominen
Vice Chair of ESMA
Chair of the Consumer Protection and Financial Innovation
– Sub-Committee of the Joint Committee of the ESAs
ESMA
103 rue de Grenelle
75007 Paris
France

Mr Gabriel Bernadino and Mr Tim Shakesby
European Insurance and the Occupational Pensions Authority
Westhafenplatz 1
60327 Frankfurt am Main
Germany

23 June 2016

Ladies and Gentlemen,

Subject: PRIIPs Regulation – follow up

We refer to and would like to thank Mr Gentner for the helpful response of the Commission (the "**Commission Letter**") to the JAC letter dated 17 February 2016 (the "**JAC Letter**") on some of the

outstanding and open questions on the PRIIPs Regulation. We are writing a follow up letter to request that the following issues be resolved through further guidance by the Commission and ESMA, as to the construction of certain additional terms of the Regulation.

FX Forwards in deliverable currencies

We highlighted in the JAC Letter a key scoping issue relating to the inclusion of certain derivatives within the PRIIPs Regulation. We understand this issue has also been raised by the German Banking Industry Committee. In order to fall within the scope of the PRIIPs Regulation (1286/2014), a product must be, under Article 4(1), "*an investment…where regardless of the legal form of the investment, the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the retail investor*".

In the case of certain FX Forwards in deliverable currencies and other related derivative instruments (including commodity forwards with physical delivery) with similar characteristics, the amounts to be paid by the two parties (the bank or investment firm as one counterparty and the retail investor as the other counterparty) are already fixed at the point at which the agreement is concluded. The amount repayable to the retail investor is not subject to any fluctuations on their return. All parameters are fixed at the point at which the agreement is concluded, with only the fulfilment of the obligations entered into deferred to a later point in time. The only element that may be "*subject to fluctuations*" is the market value of the FX Forward contract itself (much like the secondary market price of a fixed rate security will change due to market conditions even though the amount repayable to investors who hold the security is fixed), not "*the amount repayable to the investor*", which is the requirement for an FX Forward to satisfy the Article 4(1) definition.

For example:

- on 10 June 2016, a retail investor enters into an FX Forward contract to sell USD 1,000 on 10 September 2016;
- the amount of USD the retail investor will sell and the rate at which the retail investor will sell those USD are agreed on 10 June 2016;
- on 10 September 2016, the market value of the FX Forward contract may have changed since 10 June 2016, but the amount repayable to the retail investor on 10 September 2016 is not subject to fluctuations because the terms were agreed at the outset of the contract;
- on 10 June 2016, the retail investor knew the amount he would receive on 10 September 2016.

In addition, in the draft MiFID2 delegated regulation, certain FX Forwards which are either spot or relate to payment obligations in specified circumstances, would not be financial instruments for the purposes of MiFID2 which we believe is an additional justification for their removal from the scope of the PRIIPs Regulation. In particular, such contracts would not fall within the Category 1 PRIIPs class (Annex II, Part 1, paragraph 4 of the RTS) as they would not be a MiFID instrument. Equally, such contracts would also not fall within scope of any of the other categories outlined in the RTS.

A significant number of FX Forwards will be entered into by a wide variety of commercial entities: municipalities, local authorities and many commercial companies. There is a significant risk that by extending the PRIIPs Regulation to include instruments such as FX Forwards (which by definition should not fall within the scope of the PRIIPs Regulation), the availability of such derivatives will be restricted. This, in turn, potentially increases the financial risks to such entities of doing business in

Europe and is in direct contradiction to certain objectives of the Capital Markets Union where financial markets should contribute to financial growth, not constrain it.

Request: In order for firms to properly scope their PRIIPs implementation projects, we would request urgent clarity that certain FX Forwards in deliverable currencies and derivatives with similar characteristics with no fluctuation, are outside the scope of the PRIIPs Regulation and therefore a KID does not need to be prepared for these products. We ask for clarity on this important point prior to the publication of the final regulatory technical standards. We note that this issue is of pan-European importance and understand it is being considered by regulators in a number of Member States.

Generic KID for OTC derivatives

We understand from the Commission Letter that the PRIIPs Regulation does not make any distinctions in relation to the product's intended purpose, such as, for investment, risk management or hedging purposes and, therefore, that KIDs will be required for OTC derivatives.

We believe that, according to the same rationale as for the "special cases" outlined in the RTS, generic KIDs should be permitted for certain OTC derivatives. We foresee great difficulty, if not impossibility, in such a document being completed for OTC derivatives pre-trade and therefore allowing comparability with other products for the retail investor for the reasons set out below.

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 the retail investor may receive, using the formulas 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 entered into. Therefore, it would not be possible to provide the retail investor with the completed KID pre-trade.

In relation to the performance scenarios section of the KID, one solution is to allow OTC derivatives to be presented in the same way as exchange traded derivatives – i.e. in a graph format, rather than following the tabular format as currently contemplated, where appropriate.

More generally, a workable solution for firms would be if a form of generic KID were permitted for OTC derivatives and provided to the retail client pre-trade. Bespoke information relating to the specific product could be provided to the client post-trade if necessary. This solution would offer retail clients the opportunity to compare products pre-trade and in good time prior to the proposed trade and allow for an informed investment decision. This two-tier approach is permitted for PRIIPs that offer multiple investment options.

ISDA is seeking to assist with the preparation of a generic KID for certain types of OTC derivatives and has formed a Legal Working Group from within our own Joint Associations Committee on Retail Structured Products, which I chair.

Request: In order for firms to continue with their PRIIPs implementation preparation, we would ask for urgent clarity that a form of generic KID is permitted for OTC derivatives and that in relation to the performance scenarios section of the KID, OTC derivatives may be presented in the same way as exchange traded derivatives – i.e. in a graph format. ISDA would propose to share a form of generic KID shortly.

Grandfathering and ongoing updating

Regarding the matter of existing PRIIPs, we welcome your offer to work with us to provide additional clarity as needed. We also refer you to paragraph 3 of the JAC Letter which discusses "Secondary Trading Issues and Grandfathering".

As noted in the JAC Letter, the requirements of the PRIIPs Regulation should not automatically apply to PRIIPs traded in the secondary market but should instead be triggered where a PRIIP is "made available to retail investors". In accordance with this principle, where instruments (primarily securities) are listed and/or admitted to trading on a relevant exchange, a KID should only be required in relation to any trades (both in relation to PRIIPs issued or entered into prior to 31 December 2016 and for updating purposes), where there is a clear secondary market in the relevant instruments such that buying and selling can and does occur on the basis of firm two way pricing available from the manufacturer (acting as a market maker) via an exchange.

Territorial scope

We thank you for the clarification that where a PRIIP is offered to a non-EU retail investor by a European manufacturer via an intermediary established in a non-EU country, the obligations of the PRIIPs Regulation do not apply and that the PRIIPs Regulation only applies to PRIIPs offered to retail investors domiciled in EEA countries. We understand, therefore, that if there were an EEA manufacturer selling through an EEA distributor to a non-EEA retail client that the PRIIPs Regulation also would not apply as the rationale is to apply the PRIIPs Regulation only in circumstances where there is an EEA retail client.

Yours faithfully,

Alderman Tim Hailes, JP
Chairman, Joint Associations Committee

Mr Valdis Dombrovskis
Vice-President of the European Commission
European Commission
Rue de la Loi, 200/Weststraat 200
1049 Brussels
Belgium

Mr Sven Gentner
Head of Unit
Financial Stability, Financial Services and Capital Markets Union
European Commission
Rue de la Loi, 200/Weststraat 200
1049 Brussels
Belgium

Mr Steven Maijoor & Mr Wijnand van de Beek
Chair of ESMA & Chair of the Consumer Protection and Financial Innovation - Sub-Committee of the Joint Committee of the ESAs
ESMA
103 rue de Grenelle
75007 Paris
France

Mr Gabriel Bernardino and Mr Tim Shakesby
Chair of the European Insurance and the Occupational Pensions Authority
Westhafenplatz 1
60327 Frankfurt am Main
Germany

Mr Andrea Enria
Chairperson of the European Banking Authority
One Canada Square (Floor 46)
Canary Wharf
London E14 5AA
UK

17 October 2016

Dear Sirs,

We are writing to you further to the European Parliament's rejection on 14 September 2016 of the proposed Regulatory Technical Standards (**RTS**) in relation to the presentation, content, review and revision of key information documents under the Packaged Retail and Insurance-based Investment Products Regulation (the **PRIIPs Regulation**)[1].

[1] 1286/2014

The members of the JAC[2] 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 and has been actively following and engaging in the regulatory debate and development of the PRIIPs rules. Please see Appendix 1 to this Response for further details of the members of the JAC.

We are strongly in favour of the policy direction which motivated the PRIIPs Regulation. We agree that, as set out in the recent Commission green paper on retail financial services[3], the integration of the EU retail product market will produce "*choice, transparency and competition in retail financial services to the benefit of European consumers*". A single, harmonised EU-wide Key Information Document (**KID**) is an important step towards the development of this market, and it clearly supports the objective to give retail investors clear and accurate information on the range of PRIIPs and the ability to compare them for suitability and value without being misleading.

However, we are very concerned that the PRIIPs Regulation is due to apply as of 31 December 2016 and there is still no agreed form of Level 2 RTS. We see three potential eventualities as of 31 December:

Option (a): The rejected RTS have been very swiftly revised and agreed politically but without any meaningful consultation and apply from 31 December 2016;

Option (b): The PRIIPs Regulation applies with no RTS. The RTS are not yet settled and work to revise the RTS continues so that the RTS are in a form amenable for political agreement; or

Option (c): Application of the PRIIPs Regulation is delayed to allow sufficient time for the RTS to be settled. There will need to be sufficient time for the industry to review, comment and act upon its contents.

There is an urgent need for open communication with market participants as to the intended outcome. Lack of forthcoming information is damaging to the markets and undermines the ability of stakeholders to participate in the markets.

However, in our view, given there are now only two and a half calendar months until the application of the PRIIPs Regulation, the only viable option to safeguard the interests of retail investors and ensure properly functioning markets is Option (c), where the application of the PRIIPs Regulation is postponed.

We have set out below the reasons why we consider this to be the only viable course of action.

1. Option (a) is not viable - repeated delays in the legislative process and the absence of final RTS means that PRIIPs manufacturers do not have time to comply with the timetable for application of the PRIIPs Regulation. The timetable is no longer tenable.

The clear intention of the PRIIPs Regulation is that a final version of the RTS should be published and provided to the Commission in sufficient time for the industry to reflect this in its preparations for implementation. This has not happened:

- Importantly, the work items under Articles 10(2) and 13(5) were required to be provided by 31 December 2015. This date was missed and those work items were included with the work on Article 8(5) in the draft RTS published in March 2016.

- Further slippage occurred when the Council exercised its option to allow an extra month for the RTS to be considered under Article 31 of the PRIIPs Regulation (i.e. until the end of September 2016). See http://data.consilium.europa.eu/doc/document/ST-10955-2016-INIT/en/pdf.

[2] 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.
[3] COM(2015) 630

Given the permitted timetable for Level 2 work has not been achieved, the political will and intentions of EU legislators in the PRIIPs Regulation are not being followed. **It is possible that challenges could now be made to the legal basis of the PRIIPs Regulation if the RTS are adopted without a meaningful consultation.**

The commitment of the EU to deliver better legislation clearly requires proper consultation. As noted in section 3.2 of the Commission's Better Regulation Guidelines[4], "*Stakeholder consultation is an essential element of policy preparation and review. Good policy development is built on openness. Stakeholder inputs provide feedback and evidence for all types of evaluation, impact assessments and political decisions"*.

There will certainly not be sufficient time for proper consultation in respect of revised RTS that have been hastily amended to provide a "quick-fix" for the issues with which the Parliament expressed concerns as part of its decision to reject the RTS in September 2016.

2. Option (b) is not viable - the detail contained in the RTS is fundamental to the ability to comply with the PRIIPs Regulation

The technical grounds on which the PRIIPs Regulation can apply in the absence of the Level 2 work are not clear. The two key policy objectives of the PRIIPs regime are comprehensibility and comparability of short form disclosure for in-scope retail products. It is clear from the PRIIPs Regulation that the Level 2 work items are essential in delivering these policy objectives. The main work items are those set out in: Article 8(5) on presentation of a significant proportion of the KID content, Article 10(2) on the review and republication requirement for the KID, and Article 13(5) on arrangements for providing the KID to an investor.

In particular, without the RTS there is no methodology for the summary risk indicator (**SRI**), for how to calculate costs or for the performance scenarios. Without this methodology, manufacturers will necessarily need to make a number of assumptions with the result that different manufacturers may adopt in good faith very different approaches to these items. Even if there is some consistency across some markets, at best this would likely be across national markets only, or across specific product markets. Furthermore, the presentation of these items and the template KID is described in the RTS and, without an agreed form for presenting this information, it is probable that PRIIPs manufacturers will organise the contents of the KID in a variety of formats that best suit their own products and markets. Hence, the key policy objectives of comprehensibility and comparability will not be achieved. Investors are likely to mistrust KIDs from the outset and such trust may never be restored. The PRIIPs regime will then have failed to achieve its aims[5].

Furthermore, without an RTS, the legal effect of key parts of the PRIIPs Regulation (such as the SRI) is uncertain. European case law has confirmed that only provisions which are sufficiently clear, precise and unconditional can be relied upon by individuals. Therefore, in circumstances where the technical requirements expressly contemplated in the PRIIPs Regulation have still not been provided, the legal status is questionable and is open to challenge.

In this context, the potential for litigation is clear. There are onerous sanctions under Chapter V of the PRIIPs Regulation (including administrative fines of up to EUR 5,000,000 or 3% of the total annual turnover of the legal entity), and these apply for infringements of the KID content requirements or the KID being misleading. If there are no RTS in place, this would bring significant legal risk to manufacturers and distributors of PRIIPs, including in particular a greater potential for claims alleging civil liability on the part of manufacturers, given the lack of detailed rules in respect of the content requirements. Even if competent authorities do not actively pursue potential breaches of the PRIIPs Regulation in any interim period prior to the RTS being finalised, this will not prevent investors launching civil actions. Manufacturers should not be exposed to such legal risk as a result of shortcomings in the legislative process.

[4] http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf

[5] We note this view is one that has been echoed by Markus Ferber, MEP, who is reported to have informed a MiFID II workshop held at the EU Parliament on 27 September 2016 that he was "clear in his mind" that the PRIIPs Level 1 text cannot operate in the absence of the Level 2 text.

Faced with such legal risk and inconsistency and uncertainty, many manufacturers may of course decide this is unacceptable and markets in existing and new PRIIPs products may be very adversely affected.

3. Option (c) is now the only viable option - the overwhelming political will is for a delay

EU Parliament: On 14 September 2016, the European Parliament called on the Commission "*to consider a proposal postponing the application date of Regulation (EU) No 1286/2014 without changing any other provision of level 1 in order to ensure a smooth implementation of the requirements set out in the Regulation and the delegated regulation, and avoid the application of level 1 without RTS being in force in advance*[6]". The European Parliament's resolution was passed by an overwhelming majority of 602 votes to four (with 12 abstentions).

EU Council: A joint statement by a number of members of the EU Council, representing 24 of the 28 Member States, has also called on the Commission, in the light of the rejection of the RTS, "*to consider postponing only the application date of the PRIIPS Regulation (thus without any change to any other provision of the level 1 Regulation). In our view, the Commission should propose a postponement of the application date by 12 months in order to provide sufficient time to clarify open questions and reach the goals of the PRIIPs Regulation*[7]." These 24 Member States back a one-year delay to the application of the PRIIPs Regulation to 1 January 2018.

ESAs: The Chair of EIOPA, Gabriel Bernardino, also stipulated that he would like a nine month delay to the introduction of the PRIIPs Regulation during the Eurofi Financial Forum conference on 8 September 2016[8].

Market participants: Many market participants have repeatedly called for a delay[9].

In short, fundamental flaws and omissions have been identified in the RTS which must be rectified and any change to the RTS cannot be rushed through. There must be sufficient time for industry review and comment to ensure that any proposed amendments are viable and to enable the industry to implement technical solutions and update their systems and models, as well as translation work.

We note that the application of MiFID II/MiFIR has been postponed until 3 January 2018. Given the fact that there is overlap between this legislative package and the PRIIPs Regulation, it would make sense for the PRIIPs Regulation to apply from the same date. The MiFID II regime itself is also a precedent case where implementation was very properly delayed. Similarly, the only viable course of action at this stage is to delay application of the PRIIPs Regulation to give the markets the necessary time to ensure a high quality implementation of the regime in order to protect the interests of retail investors.

4. The markets need proper lead-in time to avoid major dislocation

Firms have been working for several years in order to meet the PRIIPs implementation deadline. Any rushed amendments to the RTS at this stage would not afford markets sufficient time to implement the necessary technical and systems solutions, including translation work. There would also be a real risk that any such rushed amendments would be similarly unfit for purpose as there would be no time for industry review and comment on the proposals. Industry has already expended significant time and cost in preparing for the regime when it has not been clear what is required.

5. Level 3 guidelines still not forthcoming

[6] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0347+0+DOC+PDF+V0//EN
[7] http://data.consilium.europa.eu/doc/document/ST-12160-2016-ADD-1-REV-3/en/pdf
http://data.consilium.europa.eu/doc/document/ST-12160-2016-ADD-1-COR-1/en/pdf
[8] http://blogs.deloitte.co.uk/financialservices/2016/09/priips-delay-looking-more-likely-but-implementation-timeline-still-challenging.html
[9] See, for example, the statement by Insurance Europe (January 2016), the joint letter from Insurance Europe and three other European financial associations of 27 April 2016, and the letter from the Association of Mutual Insurers and Insurance Cooperatives in Europe (AMICE) at the end of July 2016.

The industry has repeatedly raised questions in relation to various key areas of uncertainty in the Level 1 and Level 2 texts. The ESAs announced an intention to publish Level 3 guidance by the end of the summer noting the fact that:

"The timing of implementation has been a key issue arising from consultations with stakeholders and also with members of the Boards of the ESAs. Given the technical challenges in preparing for the implementation, even a six-month window will be challenging for some stakeholders.

The ESAs have therefore now focused on developing supporting level three material to aid implementation and consistent supervision of the KID. This material will mainly take the form of 'questions and answers' and relates to the technical methodologies included in the draft PRIIPs RTSs on risk, rewards and cost disclosure requirements.

Such questions and answers might notably relate to the technical details of the calculation of actual transaction costs and the calculation of transaction costs for new PRIIPs, as well as the calculation of the market risk and credit risk measures for the different types of PRIIPs.

Against that background and in the interest of transparency, the ESAs would like to draw the attention of the European Parliament and the Council to our intention to publish the prepared questions and answers in the course of this summer, so that the publication can best aid implementation of the KID…."

These Level 3 Q&A are however still not available. We note that Level 3 PRIIPs Q&As are mentioned in the Joint Committee of the European Supervisory Authorities' 2017 work programme (JC 2016 042), but given the time remaining until application of the Level 1 Regulation, there is already no time for the industry to absorb, comment on and implement necessary technical solutions to comply with such Level 3 Q&A.

We would also like to emphasise that any Level 3 guidance should not address issues that should properly be addressed in the Level 2 RTS. Level 3 guidance will lack the legal precision or binding nature of a Delegated Regulation. In the absence of finalised RTS which are fit for purpose, any such Level 3 guidance will almost certainly be confusing and could lead to divergences in interpretation which would run contrary to the stated purpose of the KID to provide comprehensibility and comparability to retail investors.

6. Significant risk of divergence

We note that the press have suggested that the Commission's preferred option, for the sake of consumer protection, is to revise the RTS quickly such that the PRIIPs Regulation can still apply as of 31 December 2016 with guidance to cover the interim period[10] (i.e. Option (a) or (b)).

If the PRIIPs Regulation applies in the absence of finalised RTS, the absence of detailed Level 2 rules at implementation is likely to lead to a patchwork of implementation across jurisdictions and manufacturers. This is confirmed by the final draft RTS[11] which state:

"In the absence of the draft RTS, the obligations in the PRIIPs Regulation – which clearly require summary figures – would, however, in the view of the ESAs, have raised significant cost implications in any case, whilst a lack of consistency across sectors and national markets would significantly reduce the effectiveness of the PRIIPs KID for consumers."

[10] The FT article dated 19 September 2016 entitled "Priips stalemate risks legal hazards for advisers" states:
"*Vanessa Mock, European Commission spokesperson for financial services, said the body's best option was to "work quickly" to amend the RTS and have this approved within the deadline. Ms Mock said the commission still wanted the Kid to be applied by January 1 for the sake of "consumer protection", and suggested the organisation and its regulatory authorities could provide guidance to cover the interim period*."

[11] Final draft Regulatory Technical Standards dated 31 March 2016:
https://www.esma.europa.eu/sites/default/files/library/jc_2016_21_final_draft_rts_priips_kid_report.pdf

For these reasons we believe any attempt to quickly fix the issues in the Level 2 text in order to meet the 31 December 2016 deadline is misguided.

Conclusion:

If the PRIIPs Regulation applies without RTS, even if there is detailed Level 3 guidance, it will be impossible for the PRIIPs Regulation to be applied in a coherent and efficient manner across the EU and across sectors. This runs contrary to the very purpose of the PRIIPs Regulation. Any "soft" approach to enforcement taken by regulators will not remove the risk of potential civil liability for manufacturers.

Even if the flaws and omissions in the RTS are quickly rectified prior to 31 December 2016, there is now insufficient time for firms to meet the implementation deadline.

As a result, the JAC considers that the only viable option that allows for the effective implementation of the PRIIPs Regulation at this point is for the application of the PRIIPs Regulation to be delayed by one year to the 3 January 2018 in order to allow for the Level 2 text to be amended, agreed and consulted on. It will also allow for manufacturers and product distributors to implement technical solutions and systems updates and deliver these in a coordinated way with the MiFID II changes.

Yours faithfully,

Mr. Alderman Timothy R Hailes, JP

Alderman Tim Hailes, JP
Chairman, Joint Associations Committee
JAC contact, Fiona Taylor, ISDA
ftaylor@isda.org, 0044 203 808 9707

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**), the Global Foreign Exchange Division of the Global Financial Markets Association (**GFMA**) and FIA. 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 FIA

FIA is the leading global trade organisation for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry. FIA's mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system, and promote high standards of professional conduct.

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)/.

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.