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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**)<sup>1</sup>.

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<sup>1</sup> 1286/2014

The members of the JAC<sup>2</sup> 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<sup>3</sup>, 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>.

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<sup>2</sup> 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](mailto:ftaylor@isda.org).

<sup>3</sup> 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<sup>4</sup>, "*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<sup>5</sup>.

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.

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<sup>4</sup> [http://ec.europa.eu/smart-regulation/guidelines/docs/swd\\_br\\_guidelines\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf)

<sup>5</sup> 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<sup>6</sup>”. 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<sup>7</sup>.” 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<sup>8</sup>.

Market participants: Many market participants have repeatedly called for a delay<sup>9</sup>.

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**

<sup>6</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0347+0+DOC+PDF+V0//EN>

<sup>7</sup> <http://data.consilium.europa.eu/doc/document/ST-12160-2016-ADD-1-REV-3/en/pdf>

<sup>8</sup> <http://data.consilium.europa.eu/doc/document/ST-12160-2016-ADD-1-COR-1/en/pdf>

<sup>9</sup> <http://blogs.deloitte.co.uk/financialservices/2016/09/priips-delay-looking-more-likely-but-implementation-timeline-still-challenging.html>

<sup>9</sup> 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<sup>10</sup> (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<sup>11</sup> 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.”*

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<sup>10</sup> 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.”*

<sup>11</sup> 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](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,

A handwritten signature in blue ink, appearing to read 'Tim Hailes', with a large, sweeping flourish at the end.

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-\(FX\)/](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](http://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](http://www.isda.org).

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