



5 December 2012

Mr. Jonathan Faull
Director General, Internal Market and Services
European Commission
1049 Brussels
Belgium

By email: Jonathan.Faull@ec.europa.eu

Dear Mr. Faull,

Re: BVCA Regulatory Committee Comments on the European Commission's Proposal for a Regulation for Packaged Retail Investment Products

Introduction

This letter sets out some comments from the Regulatory Committee of the British Private Equity and Venture Capital Association (the "BVCA") on the European Commission's (the "Commission's") proposal for a Regulation for Packaged Retail Investment Products (the "PRIPs Regulations" or the "Regulations").

The BVCA is the industry body and public policy advocate for the private equity and venture capital industry in the UK. The BVCA Membership comprises over 250 private equity, midmarket and venture capital firms with an accumulated total of approximately £32 billion funds under management; as well as over 250 professional advisory firms, including legal, accounting, regulatory and tax advisers, corporate financiers, due diligence professionals, environmental advisers, transaction services providers, and placement agents.

Please note that our comments relate to the version of the Regulations initially proposed by the Commission. We note that, on 27 November 2012, the Presidency of the Council of the European Union (the "Council") published a compromise proposal relating to the Regulations (the "Compromise Proposal"). We will review the Compromise Proposal in detail and, if necessary, send any additional comments to the Council. On an initial reading, the Compromise Proposal does not appear to address the high-level concerns we set out below. Where the Compromise Proposal impacts upon our comments set out under the heading "Specific Concerns", we have included a footnote to indicate the impact.



Background

The BVCA fully supports the Commission's proposal to improve the transparency of information available to retail investors in retail investment products. The BVCA does, however, consider that the PRIIPs Regulations may have some unintended consequences, in particular in relation to private equity and venture capital firms' marketing strategies.

The key investor base for private equity and venture capital funds is comprised of institutional investors such as sovereign wealth funds, banks and pension funds. However, some funds may also have a limited number of individual investors. Such individuals would not be "average or typical retail investors" as described in the Commission's Explanatory Memorandum and would commonly have a high level of sophistication and experience. However, as a result of the definition of "retail investor" used in the PRIIPs Regulations, they would most likely be classified as a "retail investor" for the purpose of the Regulations and therefore the relevant fund manager would be required to prepare a Key Information Document ("KID"). All investors perform a significant amount of professional due diligence and receive large amounts of information in relation to the fund and the manager before any commitment is made. Therefore the preparation of a KID would be of no benefit to these investors and would simply add extra expense and create unnecessary administration for the manager.

In addition, given that the number of "retail" investors in a private equity or venture capital fund would be very limited, it is not proportionate to require the marketing materials to refer to the KID for all investors. This may also raise concerns amongst non-retail investors regarding non-parity of information.

Carry and Co-investment Arrangements

Private equity and venture capital funds commonly have in place co-investment arrangements which permit fund executives to invest alongside the main fund or funds. In addition, senior executives are commonly awarded interest in a limited partnership "carry" fund which is, in turn, a limited partner in the main fund. The individuals investing in these funds will be "retail investors" for the purpose of the PRIIPs Regulations notwithstanding that they will be the same individuals responsible for the management of the underlying fund. These individuals will be experienced, sophisticated and knowledgeable executives who would not be considered to be "average or typical retail investors". Indeed it will, most likely, be these same individuals who both provide the information for the KID and subsequently receive the KID. This seems inappropriate and unnecessary.



Existing UK Legislation

The PRIPs Regulations are being implemented against a backdrop of increased legislation and scrutiny in relation to the promotion of fund interests and other financial products to retail investors. The BVCA considers that the existing legislation in the UK provides a sufficiently robust framework to ensure retail investors receive appropriately open and balanced marketing materials. Additional rules should aim to complement, rather than cut across, existing legislation.

Specific Concerns

In addition to our general concerns above, we set out below the issues which we have identified in relation to the Regulations which are of particular concern to private equity and venture capital funds:

- Article 5 – the requirement under Article 5 is contrary to the requirements under Article 13 which suggest that there are a number of ways in which the KID can be provided. In addition, the requirements of Article 5 may be contrary to securities marketing laws in third country jurisdictions. In particular, firms which are registered with the Securities and Exchange Commission are subject to specific requirements regarding the information that may be presented to investors.
- Article 7 – the requirement to have information translated into the local language is a further administrative burden which will incur additional costs. This will, in turn, mean that there are fewer funds available to invest into the local economy.
- Article 8(2)(g) – it will not be possible for new funds which are being raised to give details of their past performance.¹
- Article 9 – as noted above, the majority of investors investing in private equity and venture capital funds are institutional investors and the KID will be of no relevance to them. It is therefore impractical, unnecessary and burdensome to include a cross-reference to the KID in marketing materials which would be sent to institutional investors.
- Article 11 – the liability regime is very strict, reverses the burden of proof and, we believe, will create legal uncertainty, in particular as regards the concept of a direct civil claim for damages where such claim is made under an EU regulation. We are concerned that such a regime will create uncertainty for, and place an unduly onerous burden on, fund managers.²

¹ We note that this has become Article 8(3)(h) in the Compromise Proposal.

² We note that the Council has suggested alternative provisions relating to liability in its Compromise Proposal. We will need to review the Compromise Proposal in detail in order to ascertain whether these amended provisions address our concerns.



- Article 12(1) – it is not clear what “in good time” means and some fund managers may, therefore, be in accidental breach of the requirements.

We would be happy to discuss any of the issues we have raised in this letter.

Yours sincerely,

A handwritten signature in black ink that reads 'Margaret Chamberlain'.

Margaret Chamberlain
Chair - BVCA Regulatory Committee

cc. Mr. Daniel Rusbridge, Policy Advisor, Financial Regulation and Markets Group, HM Treasury