



Retail Distribution Policy
Strategy & Competition
Financial Conduct Authority
12 Endeavour Square
London E20 1JN

By email: PRIIPsCfl@fca.org.uk

30 September 2021

Dear Sir, Madam

Re: FCA CP21/23: PRIIPs – Proposed scope rules and amendments to Regulatory Technical Standards

We are writing on behalf of the British Private Equity and Venture Capital Association (“BVCA”), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 700 firms, we represent the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers and investors. Between 2016 and 2020, BVCA members invested over £47bn into around 3,500 UK businesses, in sectors across the UK economy ranging from heavy infrastructure to emerging technology. Companies backed by private equity and venture capital currently employ 1.1m people in the UK and the majority of the businesses our members invest in are small and medium-sized businesses.

General observations on the application of the PRIIPs regime to private equity and venture capital

The BVCA welcomes the fact that the FCA is proposing amendments to the (on-shored) Regulatory Technical Standards relating to the PRIIPs disclosure regime with a view to addressing the lack of clarity on the PRIIPs scope; misleading performance scenarios and summary risk indicators; and addressing concerns with elements of the transaction costs methodology. The BVCA does, however, have some remaining concerns with the regime and some comments on the proposed amendments. Accordingly, we set out below our response to the consultation questions. We also set out some more general observations below, by way of context.

As we noted in our response to the FCA's 2018 call for input on initial experiences with the PRIIPs regulation, private equity and venture capital (“PE/VC”) managers primarily market their funds to institutional investors, such as pension funds, sovereign wealth funds, insurance companies, family offices, university endowments and government agencies/development funds. PE/VC funds will typically only have these types of institutional investors and will therefore be wholly outside the scope of the PRIIPs Regulation.

There will be some instances where PE/VC funds structured as limited partnerships are within the scope of the PRIIPs Regulation where prospective investors include high-net worth and/or sophisticated individuals, many of whom will have significant experience of investing in PE/VC funds.

For funds that do engage with such investors, these investors would typically only represent a very small proportion of the fund – and are not typically the principal source of fundraising for these funds. These types of investors will not typically meet the MiFID II definition of a professional client (even though they may be eligible under the UK promotions regime) and therefore fall into the category of retail investors, for whom a KID is required.



This is unfortunate as these investors will not be "average or typical" retail investors (as described in the European Commission's Explanatory Memorandum dated 3 July 2012). The MiFID elective professional tests are calibrated for MiFID investment services provided in relation to liquid assets such as traded shares. The tests are extremely difficult to satisfy in the case of individuals (regardless of their wealth, sophistication or experience) who invest in long-term PE/VC funds which make relatively few transactions and who have relevant experience in business (e.g. entrepreneurs) rather than financial services. We have made many representations on the inappropriateness of the MiFID professional client definition over the years and the introduction of the PRIIPs Regulation has potentially limited the number of investment opportunities certain investors previously had, despite them having sufficient wealth, sophistication or experience.

The requirement to produce KIDs and the administrative burden of opting-up investors has dissuaded some fund managers from marketing to high net worth investors and other categories of investor where otherwise permitted under UK/EEA national private placement regimes. Some of our members have deliberately not offered their funds to certain investors that have invested in previous funds, despite those investors being experienced and sophisticated investors/industry experts.

Proposed rules clarifying the scope of the PRIIPs regime in the UK

Q1: Do you agree with our proposed rules to clarify the scope of the PRIIPs regime?

As noted above, the BVCA considers that the requirement to produce KIDs and the administrative burden of opting-up investors has dissuaded some fund managers from marketing to high net worth investors and other categories of investor where otherwise permitted under UK/EEA national private placement regimes. We welcome the additional clarity proposed by the FCA in CP21/23. However, we would also invite the FCA to consider going further and clarifying that firms should be able to disapply the obligation to produce a KID on the basis of proportionality in limited circumstances where a firm is satisfied that to produce a KID would be disproportionate to the nature of the product being promoted and marketing to that investor is otherwise permitted under applicable national private placement regimes. In that context, we consider that much of the substantive reasoning for clarifying that certain corporate bonds should be exempted from the scope of the PRIIPs regime could equally be applied by analogy to the offering of private equity and venture capital funds to high net worth investors and other categories of investor where otherwise permitted under UK/EEA national private placement regimes.

Q2: Are there remaining areas of ambiguity in the scope of the PRIIPs Regulation which would not be addressed by the proposed rules and, if so, which?

Please see the response to Q1 above.

Q3: Do you agree with the proposed guidance on conditions for a PRIIP to be regarded as not made available to retail investors?

The BVCA welcomes the guidance on the meaning of 'made available', which is a helpful clarification of scope. In the BVCA's opinion, this guidance could usefully be further enhanced by including a statement to the effect that offers directed at fewer than 150 participants should not normally be regarded as being made available to retail investors. This would add a useful element of proportionality to the PRIIPs regime.

Information on performance and overall risk

Q4: Do you agree with our proposal to remove the requirement for the KID to display performance scenarios?

The BVCA welcomes the proposal to remove the requirement for the KID to display performance scenarios.

Q5: Do you agree with our proposal to require PRIIP manufacturers to include a narrative description of performance in the KID? a) If so, should the FCA specify the factors that the narrative should cover (as applicable)?

We welcome the proposal to require PRIIP manufacturers to include a narrative description of performance in the KID rather than using proscriptive disclosure methodologies, as this will allow PRIIP manufacturers to produce material that is more tailored to the nature of the product they are offering. We do not consider that the FCA should specify the factors that the narrative should cover, as we consider that this will be highly product-specific and that proscriptive factors could result in an obligation to provide information to investors which is ultimately misleading / not relevant in the context of the product being marketed.

Q6: Do you agree with our decision not to include past performance as part of our proposals for information on performance? a) If not, can you please explain why you think the addition of past performance in the KID alongside a narrative description of performance would be useful to consumers and their investment decision making?

We agree with the FCA's decision not to include past performance as part of the proposals for information on performance.

Q7: Do you agree with our proposal to require PRIIPs manufacturers to upgrade a product's SRI score where the score resulting from application of the RTS methodology seems to underestimate the level of risk?

We consider that if PRIIPs manufactures are to consider whether the SRI score accurately reflects the level of risk this should be a two-way process – in other words they should be able to downgrade a product's SRI score where the score resulting from an application of the RTS methodology seems to overestimate the level of risk, rather than just upgrade the risk where the RTS methodology seems to underestimate the level of risk, otherwise the proposal is not logically consistent. We also consider that PRIIPs manufacturers should be permitted to disapply the RTS methodology altogether where it is not meaningful in the context of the product being offered – for example, interests in a closed-ended limited partnership.

'Retail investors' also covers a wide variety of investor types, including private investors who are deeply knowledgeable about venture capital investing such as business angels. The Use and Impact of Venture Capital Schemes Research Report 355 from HMRC noted "EIS investors were often angel investors who were looking to support specific types of companies for entrepreneurial or philanthropic reasons. Many had previously worked in the industries they were supporting. These investors typically sought out a handful of companies to invest in and were highly engaged with the companies, either by keeping up to date on company performance or by joining company boards. Many also said they intended to hold on to these investments beyond the minimum three year period to continue to support these companies in the longer term."

We believe venture capital should remain as a non-readily realisable security where investors are warned about risk but where they can see promotions, and can invest either where a firm is confirming suitability or where the investor self-categorises and passes an appropriateness assessment. The restricted investor certification available as part of the non-readily realisable security restrictions, enables investors to begin to gain experience in venture capital in a controlled environment. This is needed to enable the sophisticated investors and angel investors of tomorrow gain the experience needed.

EIS and SEIS investments, where not undertaken by angel investors, are frequently intermediated by an FCA regulated firm such as a platform or a fund manager. These parties have an ongoing relationship with the investor where they have and owe ongoing duties to the investor to act in their best interests. As mentioned above they often help the investor to diversify across a portfolio of investments which is important in venture capital investments. We think it is important not to make the regime for such firms so difficult that more capital raising happens outside of the regulated sphere where such safeguards are not in place.

Q8: Do you agree with our proposal that PRIIPs which are issued by venture capital trusts should be assigned a summary risk indicator of at least 6?

We do not agree with this proposal and consider that it would arbitrarily discriminate against a particular product because of its legal form rather than the risks inherent within underlying assets. We do not consider that this would be consistent with the principle of a level playing field between market participants. Nevertheless, we do consider that there should be additional latitude to allow firms to adjust the summary risk indicator of products where that indicator would otherwise risk giving a misleading impression of the risk inherent within a product – for example, to allow the same risk weighting for commonly managed vehicles.

**Q9: Are there other PRIIPs in respect of which the FCA should specify the summary risk indicator?
a) If so, please let us know which, with your reasons and any evidence you may have.**

No.

Q10: Do you agree with our proposal to increase the character limited for disclosures of uncaptured risk?

Yes this seems a pragmatic solution to allow firms more space to explain risks.

Technical amendments to transaction costs disclosure requirements

Q11: Do you agree with technical amendments we are proposing to make to the PRIIPs RTS for transaction costs?

We consider that the PRIIPs RTS on transaction costs should be amended on a more wholesale basis to allow firms to adopt methods of measuring transaction costs that are proportionate and meaningful in the context of the products that they produce. In that context it is important to remember that, as noted above, PE/VC funds invest in unlisted, private companies and this will be over the investment period in the earlier part of a fund's life. The slippage methodology is therefore not relevant. The costs and charges related to a fund's investments do not follow a smooth trajectory as the investments will be of different sizes and occur at different intervals. The costs will also be incurred at different levels

within an investment holding structure. It is not possible to compare costs on an annual basis and costs will be larger in the earlier years of a fund's life and lower when the fund is fully invested and when the underlying investments are exited. LPeC's response also highlights the issues when comparing costs across different fund and fund-of-fund structures where different types of costs will be captured. We therefore do not consider that the RTS methodology for calculating transaction costs is appropriate either currently or following the proposed technical amendments.

Q12: Do you agree with our proposed amendments in relation to anti-dilution?

Please see our comments in response to Q11 above.

Q13: Do you agree with our proposed clarification in relation to OTC bond transactions?

Yes, noting however the more wholistic comments under Q11 above.

Q14: Do you agree with our proposed shift to a spread model in calculating costs for index-tracking funds?

Yes, noting however the more wholistic comments under Q11 above.

Q15: Do you agree with our proposal to clarify how to calculate the average price of transaction costs?

Please see our comments in response to Q11 above.

We would be happy to discuss the contents of this letter with you; please contact Tim Lewis (tim.lewis@traverssmith.com) and Tom Taylor (ttaylor@bvca.co.uk).

Yours faithfully,



Tim Lewis, Chair, BVCA Regulatory Committee