6 June 2023

The MiFID II product governance (PG) and Packaged retail investment and insurance products Regulation (PRIIPs) regimes: An approach for the Equity-Linked markets

EU Version

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Explanatory note

Introduction

1. This paper sets out an approach for the Equity-Linked (convertible and exchangeable bond) markets (i.e. syndicated cross border convertible and exchangeable bond issuance), to the PG and PRIIPs regimes, which came into effect on January 1 2018. The approach in this paper does not purport to be exhaustive or exclusive, but is anticipated to be useful to the extent transaction parties wish to minimise deal/syndicate-level deliberations, to maximise execution efficiency and speed.

   AFME has had regard to a similar paper prepared previously, in relation to the EU PG and PRIIPS regimes by AFME in 2018 (and updated in February 2021 following Brexit), and in relation to the EU and UK PG and PRIIPS regimes, for use in the (non equity-linked) Eurobond market by the International Capital Market Association (ICMA) in 2017 (subject to amendments set out in the ICMA Primary Handbook and with Schedule 1 (target market assessment for each of ICMA1 and ICMA2 approaches replaced in October 2022). The focus of this paper is on conventional equity-linked securities, whether convertible or exchangeable bonds; additional consideration may be appropriate in more specific cases with an equity-linked element (such as a financial institution issued coco). In addition, the paper focuses on transactions aimed at a professional/institutional investor base, and not those involving a retail element (whether inside or outside the EEA), which will again require further consideration.

   References in this paper to “bonds” include references to convertibles and exchangeable bonds.

   This paper has been updated to reflect changes to the EU product governance regime effective from 22 November 2022, as reflected in amendments to the MiFID II Delegated Directive and ESMA Guidelines on the EU MiFID II product governance obligations. It replaces the February 2021 version of this paper, including all Schedules thereof.

   Note that this paper focuses on relevant EU requirements. However, the AFME Working Group expects that compliance with the approaches set out in this paper should also meet relevant UK requirements, although not all of the recent changes to the EU product governance requirements are reflected in the current UK product governance regime.

Background (EU PG/PRIIPs regime scope)

2. For PRIIPs, summarising substantially:
   (a) any person manufacturing a *"packaged"* product, before it is *"made available"* to retail investors in the EEA, must publish a key information document (KID) and then regularly[1] review it, and if needed, publish a revised KID; and
   (b) any person advising on, or selling, such a product must provide retail investors in the EEA with the KID in good time before those retail investors are bound by any contract or offer.
3. For PG, summarising substantially and focusing on target market identification:
   (a) persons that *"create, develop, issue and/or design financial instruments, including when advising corporate issuers on the launch of new financial instruments"*[2] are *"manufacturers"* for EU PG purposes (with co-manufacturing documented in an agreement);
   (b) persons that *"offer or sell"*[3], or *"offer or recommend"*[4], financial instruments are *"distributors"* for EU PG purposes (with no connection to the manufacturer being explicitly required);
   (c) manufacturers must identify, and communicate to distributors[5], a compatible target market of investors and periodically review that target market; and
   (d) distributors must identify their own target markets (by either adopting the manufacturer's target market or refining it[6]),

   all on a *"proportionate"* basis[7].

4. Neither regime grandfathers pre-existing bonds[8] and, distinctly, there has been limited consensus on what does not constitute a 'packaged' product. This is partly due to various public statements by the European Commission (EC) and ESMA that seemingly purport

[1] Whenever any change significantly affects the KID's content (or is likely to do so) and at least annually.

[2] See MiFID II Delegated Directive, Recital 15. [**Note:** We have retained links to the original text of the MiFID II Delegated Directive in those footnotes which refer to the recitals, as the amended version of the MiFID II Delegated Directive on EUR-Lex does not contain the recitals.]

[3] See MiFID II Delegated Directive, Recital 15.

[4] See MiFID II Art.16.3#6 and MiFID II Delegated Directive, Art.10.1.

[5] See MiFID II Delegated Directive, Art.9.13: *"Member States shall require investment firms to ensure that the provision of information about a financial instrument to distributors includes information about the appropriate channels for distribution of the financial instrument, the product approval process and the target market assessment and is of an adequate standard to enable distributors to understand and recommend or sell the financial instrument properly. The sustainability factors of the financial instrument shall be presented in a transparent manner and provide distributers with the relevant information to duly consider any sustainability related objectives of the client or potential client."*

[6] See ESMA's 2023 Final Report: Guidelines on MiFID II Product Governance Requirements (#46 on p.64): *"When refining the manufacturer's target market, the distributor should not deviate from the fundamental decisions made therein. […] If, as a result of the process, the distributor comes to the conclusion that the target market of the manufacturer does not need to be refined, the distributor may use the manufacturer's target market as it is."*

[7] See MiFID II Delegated Directive, Recital 18 and Art.9.1 and Art.10.1

[8] It is not clear what the effect of this is. For PRIIPs purposes, it seems to mean that packaged products for which there is no KID cannot be sold to retail from 1 January 2018 and, for PG purposes, that distributors must apply the MiFID II product governance regime for distributions of all bonds from 3 January 2018, even though they were issued before PRIIPs/MiFID II came into force. But it also probably does not retrospectively impose PRIIPs duties on manufacturers of products issued prior to that date unless they do something after that date to make the product available to retail for the purposes of PRIIPs, given the presumption against retrospective intent of EU law without express provision to that effect. The same presumption, together with the repeated assertions that the PG regime is to be applied proportionately, equally lead to the probable conclusion that those who advised on deals before MiFID II comes into effect are not retrospectively made responsible for those issues as manufacturers under the PG regime.

to widen the range of what might otherwise have been perceived as 'packaged'.[9] Under Article 4(1) of the PRIIPs Regulation a "packaged" product is, broadly, one where the amount repayable to the investor is subject to fluctuation because of exposure to the performance of one or more assets which are not directly purchased by the investor. However, given the embedded derivative within convertible and exchangeable bonds the market has taken the view that convertible and exchangeable bonds (including mandatory convertible and exchangeable bonds) are within the scope of the regime and this is supported by statements made by ESMA in a 2014 discussion paper and subsequently in the Joint ESAs Supervisory Statement – Application of the Scope of the PRIIPs Regulation to Bonds of October 2019[10]. Practically in the context of syndicated bond issuance, issuers are understood to be manufacturers for both (i) EU PRIIPs and (ii) EU PG purposes (together with, as manufacturers for EU PG purposes only, any underwriters that satisfy the characteristics outlined under 3(a) above).

In an equity-linked context the "financial instrument" concerned for EU PG purposes will generally be the convertible or exchangeable bond, rather than the underlying equity. Transaction participants are manufacturers or distributors (for EU PG and/or PRIIPs purposes) of the equity-linked bond rather than the shares. Separate consideration should though be given in the case of any related transaction in respect of the underlying equity, such as a delta placement.

5. The EU PG and PRIIPs regimes pose significant practical/logistical challenges, including:
   (a) issuer liability risk in producing a KID in the context of high value bonds (let alone keeping it up to date); and
   (b) underwriters' scope to execute extensive target market review procedures, particularly given (i) traditional market practice whereby issuers engage underwriters for the initial issuance procedure only and (ii) bonds are traded in the secondary market by entities with no connection to the manufacturer.

6. The approaches in this paper seek to account for the issues highlighted in 5 above – by focusing on manufacturers (for EU PRIIPs and PG purposes):
   (a) being clear that they are not facilitating availability to retail investors in the EEA of equity-linked products that may fall within the scope of PRIIPs' "packaged" concept; and
   (b) defining 'robust' target markets for EU PG purposes – i.e. that are likely to endure for the life of a bond and so substantially enhance the proportionality of the ongoing review process obligation, this seemingly being simplest[11] in the first instance to outline in a wholesale context of professional investors (including eligible counterparties)[12].

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[9] Notably: (i) *"**Convertible** bonds […] In scope"* (ESMA 2014 DP, p.13); (ii) *"if […] performance **caps** and/or their return is linked in a **non-linear** way with the underlying interest rate, then they are in scope"* (ESMA 2014 DP, p.14); (iii) PRIIPs rules *"are a response to a myriad of problems that retail investors faced in the past. For example, a consumer Ombudsman in one Member State recently found 12-year **subordinated** notes […]"* (EC 2014 press release); (iv) *"**SPVs** (instruments issued by) […] In scope"* (albeit AIFMD/Solvency II context) (ESMA 2014 DP, p.14); (v) potential KID risk indicator classification options including *"**perpetual**"* notes/instruments (ESMA 2015 DP, pp.35/36) (though query causality).

[10] Which states that: *"Where the investor or issuer may convert the bond into shares of the bond issuer (or shares of another company) the amount repayable is considered to fluctuate based on the performance of an asset that is not directly purchased.*
Convertible bonds would therefore be considered to fall in the scope of the PRIIPs Regulation."

[11] Given the commoditised context outlined in #1 and also noting ESMA's 2017 Final Report: Guidelines on MiFID II Product Governance Requirements (#20 on p.18): *"ESMA therefore agrees, as set out in its guidelines, that for products designed for the wholesale market (professional clients and eligible counterparties as end clients) the overall assessment of the target market will likely be less comprehensive and detailed."*

[12] All references in this paper to "professional investors" include eligible counterparties and professional clients as defined in MiFID II.

In accordance with the MiFID II Delegated Directive and ESMA Guidelines on MiFID II Product Governance Requirements[13], product governance requirements apply in a way that is appropriate and proportionate taking into account, among others, the target market for the product. For example, in a wholesale market context (which includes professional clients and eligible counterparties only) MiFID allows conclusions to be drawn about professional clients' knowledge and experience with respect to understanding investment risks.

PG: Professional investors intended target market

7. In the EEA, the equity-linked market is viewed by market participants as predominantly a professional investor only market, with sales in the EEA (in the primary distribution) to retail investors of convertible and exchangeable bonds being unusual. On the basis that professional investors (defined as professional clients in MiFID II, including MiFID II elective professional clients and discretionary managers)[14] possess the experience, knowledge and expertise to define their needs and objectives, make their own investment decisions and properly assess and manage the risks and returns that they incur[15], they should be able to buy and hold any bond investment, including equity-linked bonds and regardless of specific product type (the detailed target market identification for the purposes of manufacturers' internal product governance procedures is set out in Schedule 1). Therefore, the manufacturer of a convertible or exchangeable bond will have then complied with the EU PG regime if it ensures that measures are put in place on issue[16] that are reasonably expected[17] to result in sales only being made to such investors (and see further #8 below).

8. Because professional investors are appropriate target investors for all convertible and exchangeable bond types, this will continue regardless of any changes over time which may impact individual equity-linked bonds (including to the point of trading as distressed debt). In this respect, manufacturer target market reviews of the convertible and exchangeable bond markets would most likely (if not inevitably) conclude that no target market changes are warranted – at least whilst the MiFID definition of professional clients endures. In this respect, feedback from third party 'distributors' (in the specific PG sense) would be expected to be without impact on the target market assessment.

9. A negative target market is unlikely for most convertible and exchangeable bonds given diversification/portfolio considerations and absent the exercise of regulatory intervention powers. However, any such negative target market will be subject to consideration in the specific circumstances.

[13] The ESMA Guidelines on MiFID II Product Governance Requirements are set out in the ESMA Final Report of 2 June 2017 (ESMA 35-43-620), as finalised on 5 February 2018 (ESMA35-43-620), and as amended by the ESMA Final Report dated 27 March 2023 (ESMA35-43-3448).

[14] Discretionary Managers are considered the end investor for the purposes of the target market analysis on the basis that they are the entity that makes the investment decision. At a European Commission PRIIPs Implementation Workshop on 11 July 2016, staff from the European Supervisory Authorities (EBA, EIOPA and ESMA) confirmed that discretionary managers are not retail clients. The workshop's slide presentation on *Cross-cutting PRIIPs KID RTS Questions*, in response to Question 1 *"What are typical examples where there is no KID obligation?"*, includes *"portfolio manager, [...] in the name and for the account of a retail investor"*, which seems at least consistent with both a plain reading of the professional client concept under MiFID II and PRIIPs' policy focus on retail investor decision-making.

[15] The lead-in to Annex II to MiFID II states *"Professional client is a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs"*.

[16] This relates to the 'robustness' aim noted in #6(b) and further detailed in #8.

[17] The implemented measures need not be impregnable - i.e. that one or even several determined and persistent retail investors succeed in deliberately burrowing under them (without manufacturer acquiescence) should not call into question the reasonableness of the expectation that sales will only be made to professional investors.

10. A written agreement between co-manufacturers seems likely to be included in subscription agreements.[18] Such agreement seems likely to acknowledge the EU PG regime and to cover the product approval process (and notably the professional investors target market approach) and distribution channels. Schedule 5 sets out some example wording in this respect.

Options for measures reasonably expected to result in a target market encompassing sales to professional investors only

11. Various options are available for consideration in terms of measures that might be put in place on issue that could, in varying combinations according to the circumstances, be reasonably expected to result in a target market encompassing sales being made to professional investors only. Furthermore in this respect, manufacturers should not then be characterised as 'making available' to retail investors in the EEA any 'packaged' securities for PRIIPs purposes. Schedule 2 lists some of the more salient options.

12. In the event that, on a case by case basis, issuers and underwriters agree that contractual selling restrictions should be put in place in relation to the EU PRIIPs regime in the subscription agreement, the language set out in Schedule 3 may be used.

Retail investors intended target market

13. Since the EEA equity-linked market is predominantly a professional investor market, this paper does not purport to consider appropriate target market approaches for retail investors. It is noted that a KID is likely to be required where a convertible or exchangeable bond is made available to a retail investor in the EEA, given the likelihood that equity-linked bonds will be regarded as "packaged" for the purposes of the EU PRIIPs regime. Practice in other markets may vary.

Scenario analysis

14. In relation to a manufacturer's obligation to undertake scenario analysis and assess the risks of poor outcomes for end investor clients posed by equity-linked bond instruments pursuant to MiFID II Delegated Directive Art.9.10, manufacturers may note that equity-linked bonds are subject to a number of risks. These may include, among others, liquidity risk, interest rate risk, foreign exchange risk, equity price risk, volatility risk, macroeconomic or geopolitical risk, regulatory risk, market risk and risk of loss of capital. All of the foregoing risks are risks that a professional investor, given its knowledge, experience and expertise, will be familiar with and will take into account when making its investment decision or choosing how to manage or hedge its exposure to such risk.

15. Manufacturers may wish to consider setting out as part of their internal scenario analysis more detail on the nature of the above risks, and any other risks that they identify that might impact investor outcomes, when undertaking scenario analysis.

[18] See MiFID II Delegated Directive, Art9.8: *"[MiFID] firms, where they collaborate, including with entities which are not authorised and supervised in accordance with [MiFID II] or third-country firms, […] [are] to outline their mutual responsibilities in a written agreement."* Although this should include all entities deemed to be Manufacturers in the relevant offering, it is acknowledged that, particularly when collaborating with firms that are not subject to EU product governance requirements, this may not be possible. In those circumstances, in line with the principle of proportionality, it is the view of the AFME Working Group that it is acceptable for those Manufacturers who are MiFID firms to fulfil the requirements on manufacturers themselves without the need for non-EU Manufacturers to sign an agreement confirming the allocation of responsibilities).

Schedule 1

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Professional investors target market assessment[19]

Professional investors are appropriate target investors for all equity-linked bond types. This is because they are knowledgeable and experienced with sophisticated (and often confidential) investment strategies, consequently seeking unhindered access to the full range of bond market products, including equity-linked bonds, and more specifically because of the factors set out below.

Target market assessment using ESMA categories[20]

Category	***Rationale***
The type of clients to whom the product is targeted:	Professional investors form a single category of investors that should (because of compliance with the other factors below) be able to invest freely in the full range of bond investments, including equity-linked bonds.
Knowledge and experience:	Professional investors have sufficient knowledge and experience of equity-linked bonds to understand their nature, including any of the following key factors: risk factors; charging structures; optionality elements; financial leverage; eligibility to bail-in; subordination; observability of the underlying; guarantees of principal repayment or capital protection; liquidity; and the currency denomination.
Financial situation with a focus on the ability to bear losses:	Professional investors possess the experience, knowledge and expertise to properly assess the risks that they incur, including the risk of loss associated with equity-linked bonds (they do not, as transferable securities, involve additional payment obligations that might exceed the amount invested - though such amount itself might be subject to loss in its entirety). Because of their experience, knowledge and expertise, they are also better able to avoid, manage or bear, the risk of total or partial loss of capital invested.
Risk tolerance and compatibility of the risk/reward profile:	Professional investors have a sufficient understanding of the risk/reward profile associated with equity-linked bonds and sufficient ability to make an appropriate assessment of the associated risks in investing in them (generally and specifically).
Clients' objectives and needs:	Professional investors have carefully considered and developed investment objectives (which may have multiple elements and strands (including sustainability related objectives, if relevant) and which may vary from time to time) as well as a sufficient ability to determine their own equity-linked bond investment objectives and the role of individual equity-linked bonds within them; they also have a sufficient understanding of all specifications of an investment in such bonds, including the expected investment

[19] Manufacturers may wish to consider this target market assessment for use in their internal product governance procedures.

[20] See ESMA's 2023 Final Report: Guidelines on MiFID II Product Governance Requirements (#19 and #20 on p.56ff.)

	horizon/recommended holding period and how such an investment would fit within their needs and expectations. Professional investors can review the information available through mandatory and market-standard disclosures and otherwise generally available information which, if relevant, will contain information on environmental, social and governance criteria.

In light of the above, all channels for distribution of equity-linked bonds to eligible counterparties and professional clients are appropriate.

Schedule 2

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Options for measures reasonably expected to result in a target market encompassing sales to professional investors only

Various options are available for consideration in terms of measures that might be put in place on issue that could, in varying combinations according to the circumstances, be reasonably expected to result in a target market encompassing sales being made to professional investors only.

It is important, when considering these options, to distinguish between those that have a relatively short effect during the life of an issue and those that will remain effective from issue date to maturity. Accordingly, a good "mix" will include both shorter term elements, that relate to primary market (and immediate after-market) distribution (e.g. legends and in some cases selling restrictions) and those that have a long-term effect (e.g. legends, market segmentation, high denominations). It is also important to bear in mind that some market segments (likely to be of particular interest where there is a high proportion of non-MiFID participants) may involve other relevant dynamics or be *de facto* professional.

For practical purposes, the table below sets out a range of options in this respect.

#	***Measure***	***Comments***
1.	Legends in documents / communications - e.g. any new issue/screen announcement, prospectus, or final terms or pricing supplement	Addresses EU product governance requirement to provide distributors with information on (i) the product approval process, (ii) the target market assessment and (iii) appropriate channels for distribution. Also useful, for issuers, investors and potential traders in secondary markets, as a signpost of the intended TM and any identified negative TM. See further Schedule 4. In the context of "undocumented" issuance, where no prospectus or similar document is produced that might reasonably be expected to be available to potential secondary market investors post the initial distribution, it would be prudent for issuers to be required to maintain documentation in relation to the relevant securities, which includes legends denoting that the securities are not intended to be made

#	Measure	Comments
		available to retail, on their website. Suggested text for such an undertaking is included in Schedule 4.
2.	High denomination	Useful as it is universal in application and "intrinsic" to the securities themselves (unlike many of the other ongoing elements), particularly where none of the other ongoing elements is available. In the professionals equity-linked market, the significant majority of issues feature a denomination of Euro 100,000 or more in order to ensure that any offering is exempt for Prospectus Regulation purposes. In certain bespoke situations, thought might be given to whether a higher minimum denomination is appropriate. Conversely, the fact that certain markets (such as the French convertible bond market) conventionally employ lower denominations for local law or local practice reasons should not *per se* be taken to indicate a retail target market, particularly if there are other indicators suggesting a professionals only target market.
3.	Reference to selling restrictions on deal documentation (e.g. prospectus or term sheet)	Technically relevant only for general information purposes (being an operative arrangement for contractually transmitting any issuer limitations to the underwriters). In the context of "undocumented" issuance there is no prospectus type document in which selling restrictions are summarised, though short form reference is often made in term sheets made available on launch and pricing. For investors and potential traders in secondary markets, this will not add further to the signposting provided by the legends cited in #1 (and the selling restrictions will only address PRIIPs availability and not intended TM or negative TM).
4.	Absence of a retail prospectus	Useful initial signpost to extent this limits public offers (including in non-EEA jurisdictions under local law), though subject to a 'limited circle' (150 person) exemption under the EU's Prospectus Regulation. However, a low denomination prospectus approved under the Prospectus Regulation should not be equated *per se* to a retail prospectus in this respect.
5.	Absence of a KID	Useful/relevant to the extent a bond is 'packaged', which is likely to be the case for a convertible or exchangeable bond – it being then illegal to advise on, or sell, such a bond to retail investors in the EEA. And otherwise potentially a useful signpost of the

#	Measure	Comments
		intended TM to the extent such absence referenced in the various other line items / legends referenced in this Schedule.
6.	Admission to "qualified investor" segment on an EEA regulated market (RM) or admission to a *de facto* professionals only market that is not an EEA regulated market.	Admission to a qualified investor segment on an EEA regulated market is useful as it is illegal to sell a bond admitted to such a segment to retail investors absent a retail prospectus.[21] And otherwise useful as an initial and ongoing signpost of the intended TM.[22] Many convertible and exchangeable bonds are admitted to trading only on markets which might reasonably be considered to be *de facto* professionals only markets, such as the Frankfurt Freiverkehr or the Vienna Dritter Markt. Although it may be theoretically possible for retail investors to access securities admitted to these markets, the *de facto* professionals only nature of these markets is potentially a useful initial and ongoing signpost of the intended TM. In such circumstances this option should generally be used in conjunction with other, more robust, options.
7.	Counterparty procedures (including in terms of any secondary trading involvement)	Any relevant references in convenient bilateral communications or documentation (such as terms of business, investor letters) and any relevant counterparty diligence, including in a relationship / non-transactional context, may assist in providing communication around the identified target market and onward distribution.

[21] Prospectus Regulation, Art.5.2: *"where a prospectus relates to the admission to trading on a regulated market of non-equity securities that are to be traded only on a regulated market […] to which only qualified investors can have access for the purposes of trading in such securities, the securities shall not be resold to non-qualified investors, unless a prospectus is drawn up in accordance with this Regulation that is appropriate for non-qualified investors"*.

[22] However, the admission to other, generic, segments of EEA RMs should not be equated per se to retail targeting/availability. To suggest otherwise would be inconsistent with: (a) ESAs' Q&A on the PRIIPs KID, General topics, Q.2 which states that a PRIIP manufacturer is not required to draw up a KID for a product listed on a RM when they have defined the product as meant only for non-retail investors; (b) public policy/CMU objectives: RMs have historically operated (and this continues in the goals of CMU) on the basis that they should include a wide and deep spectrum of investment choice; such variety is enabled, and users and suppliers of capital are encouraged to participate, because RMs bring the highest levels of initial (Prospectus Regulation), ongoing periodic (Transparency Directive) and ad hoc (Market Abuse Regulation) disclosure, and so consequent investor protection; attaching PG/PRIIPs retail consequences would involve a significant risk that RMs (and their related protections) reduce in terms of size/range; (c) investor protection objectives: notably, ESMA has stated that only professional investors have the skill and resource set to analyse contingent convertibles instruments (CoCos), whilst producing KIDs would seem to facilitate their sale to retail investors; (d) other legislation: the Prospectus Regulation expressly contemplates a wholesale alleviated disclosure regime for RM admissions.

Schedule 3

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EU PRIIPs Regulation: suggested standalone selling restriction for inclusion in a subscription agreement

Prohibition of Sales to EEA Retail Investors

Each [Manager] severally represents and warrants that it has not offered, sold or otherwise made available and will not offer, sell or otherwise make available any Notes to any retail investor in the European Economic Area. For the purposes of this provision:

(a) the expression "retail investor" means a person who is one (or more) of the following:

(i) a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU (as amended, "MiFID II"); or

(ii) a customer within the meaning of Directive (EU) 2016/97 (as amended, the "Insurance Distribution Directive"), where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of MiFID II; or

(iii) [not a qualified investor as defined in Regulation (EU) 2017/1129 (as amended, the "Prospectus Regulation ");[23] and

(b) the expression “offer" includes the communication in any form and by any means of sufficient information on the terms of the offer and the [Notes] to be offered so as to enable an investor to decide to purchase or subscribe the [Notes].[24]

[23] The three limbs and paragraph (b) have been included to ensure it is clear how both the Prospectus Regulation public offer regime (for securities with a denomination of less than EUR 100,000 or equivalent) and the PRIIPs Regulation are being addressed.

[24] Because a Prospectus Regulation selling restriction is not required for issues of bonds with a denomination of EUR 100,000 (or equivalent) or more, paragraphs (a)(iii) and (b) (which relate to the Prospectus Regulation public offer regime) do not need to be included for issues of bonds with a denomination of EUR 100,000 (or equivalent) or more. However, many market participants may elect to use on a blanket basis to minimise the risk of inadvertent omission on those occasions where an equity-linked bond does not feature high denominations.

Schedule 4

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EU PG/PRIIPs Regulation legends

Long-form – For term sheets, prospectuses and other similar documents (including terms and conditions)

MIFID II product governance / Professional investors and ECPs only target market[25] – Solely for the purposes of the product governance requirements contained within: (a) EU Directive 2014/65/EU on markets in financial instruments, as amended ("MiFID II"); (b) Articles 9 and 10 of Commission Delegated Directive (EU) 2017/593 supplementing MiFID II; and (c) local implementing measures (together, the "MiFID II Product Governance Requirements"); and/or any equivalent requirements elsewhere to the extent determined to be applicable, and disclaiming all and any liability, whether arising in tort, contract or otherwise, which any "manufacturer" (for the purposes of the MIFID II Product Governance Requirements and/or any equivalent requirements elsewhere to the extent determined to be applicable) may otherwise have with respect thereto, the [Notes] have been subject to a product approval process, which has determined that: (i) the target market for the [Notes] is eligible counterparties and professional clients only, each as defined in [Directive 2014/65/EU (as amended, "MiFID II")][MiFID II]; and (ii) all channels for distribution of the [Notes] to eligible counterparties and professional clients are appropriate. Any person subsequently offering, selling or recommending the [Notes] (a "distributor") should take into consideration the manufacturer['s/s'] target market assessment; however, a distributor subject to MiFID II is responsible for undertaking its own target market assessment in respect of the [Notes] (by either adopting or refining the manufacturer['s/s'] target market assessment) and determining appropriate distribution channels.

The target market assessment is without prejudice to the requirements of any contractual or legal selling restrictions in relation to [any offering] of the [Notes].

For the avoidance of doubt, the target market assessment does not constitute: (a) an assessment of suitability or appropriateness for the purposes of MiFID II; or (b) a recommendation to any investor or group of investors to invest in, or purchase, or take any other action whatsoever with respect to the [Notes].

[**PRIIPs Regulation [/ Prospectus Regulation]**[26]**/ Prohibition of sales to EEA retail investors –** The [Notes] are not intended to be offered, sold or otherwise made available to and should not be offered, sold or otherwise made available to any retail investor in the European Economic Area ("EEA"). For these purposes, a retail investor means a person who is one (or more) of: (i) a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU (as amended, "MiFID II"); or (ii) a customer within the meaning of Directive (EU) 2016/97 (as amended, the "Insurance Distribution Directive"), where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of MiFID II; or (iii) not a qualified investor as defined in Regulation EU 2017/1129 (as amended, the "Prospectus

[25] This covers the EU product governance regime only. If other regimes apply additional wording may be needed.

[26] Because a Prospectus Regulation selling restriction is not required for issues of bonds with a denomination of EUR 100,000 (or equivalent) or more, this reference to the Prospectus Regulation does not need to be included for issues of bonds with a denomination of EUR 100,000 (or equivalent) or more. However, many market participants may elect to use on a blanket basis to minimise the risk of inadvertent omission on those occasions where an equity-linked bond does not feature high denominations.

Regulation")[27]. Consequently no key information document required by Regulation (EU) No 1286/2014 (as amended, the "PRIIPs Regulation") for offering or selling the [Notes] or otherwise making them available to retail investors in the EEA has been prepared and therefore offering or selling the [Notes] or otherwise making them available to any retail investor in the EEA may be unlawful under the PRIIPS Regulation.

Short-form – For new issue announcements

MiFID II professionals/ECPs-only / No PRIIPs KID – Manufacturer target market (MIFID II product governance) is eligible counterparties and professional clients only (all distribution channels). [No PRIIPs key information document (KID) has been prepared as not available to retail in EEA.]

Very short-form – If needed by any third party market/trading screens

MiFID II professionals/ECPs-only / No PRIIPs KID

Issuer undertaking to post Terms and Conditions on website[28]

On the [Closing Date] the [Issuer] will publish the [Conditions] (including a legend regarding the intended professionals target market for the [Notes]) on the website of the [Issuer] and will thereafter maintain the availability of such Conditions, as amended from time to time, on such website until such time as none of the [Notes] remain outstanding (as defined in the [Trust Deed]/[Conditions]).

[27] Because a Prospectus Regulation selling restriction is not required for issues of bonds with a denomination of EUR 100,000 (or equivalent) or more, the third limb of the definition of retail investor (which relates to the Prospectus Regulation public offer regime) does not need to be included for issues of bonds with a denomination of EUR 100,000 (or equivalent) or more. However, many market participants may elect to use on a blanket basis to minimise the risk of inadvertent omission on those occasions where an equity-linked bond does not feature high denominations.

[28] Depending on the preference of the parties, this may be included in the Subscription Agreement or similar contract or in the Trust Deed or Conditions themselves. It is expected that the long-form of the legend referred to above will be used.

Schedule 5

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Co-manufacturer agreement
Sample language for inclusion in a Subscription Agreement/written agreement

Set out below is a form of language to be considered for inclusion in subscription agreements or other appropriate written agreements to address the obligation in MiFID II Delegated Directive Art 9.8.[29] This language may need to be amended depending on the facts of the relevant offering and/or the specific product governance functions being carried out:

"Solely for the purposes of Article 9(8) of Commission Delegated Directive 2017/593 (the "**Delegated Directive**") regarding the responsibilities of Manufacturers under the Product Governance requirements contained within: (a) Directive 2014/65/EU on markets in financial instruments, as amended ("**MiFID II**"); (b) Articles 9 and 10 of the Delegated Directive; and (c) local implementing measures (the "**MiFID II Product Governance Requirements**").

a. each of [the Issuer [, the Guarantor[s]][30] and][31] the [Joint Lead Managers/[*identify Managers who are deemed to be MiFID manufacturers*][32] (each a "Manufacturer" and together "the Manufacturers") acknowledges to each other Manufacturer that it understands the responsibilities conferred upon it under the MiFID II Product Governance Requirements relating to each of the product approval process, the target market and the proposed distribution channels as applying to the [Notes] and the related information set out in the [announcements] in connection with the [Notes]; and

b. the Managers [and the Issuer/, the Issuer and the Guarantor[s]][33] note the application of the MiFID II Product Governance Requirements and acknowledge the target market and distribution channels identified as applying to the [Notes] by the Manufacturers and the related information set out in the announcements in connection with the [Notes]."

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[29] MiFID II Delegated Directive, Art.9.8: *"[MiFID] firms, where they collaborate, including with entities which are not authorised and supervised in accordance with [MiFID II] or third-country firms, […] [are] to outline their mutual responsibilities in a written agreement."* Although this should include all entities deemed to be Manufacturers in the relevant offering, it is acknowledged that, particularly when collaborating with firms that are not subject to EU product governance requirements, this may not be possible. In those circumstances, in line with the principle of proportionality, it is the view of the AFME Working Group that it is acceptable for those Manufacturers who are MiFID firms to fulfil the requirements on manufacturers themselves without the need for non-EU Manufacturers to sign an agreement confirming the allocation of responsibilities).

[30] Include a reference to any guarantor that is a MiFID regulated entity and that has collaborated on the creation, development, issue and/or design of the bonds.

[31] Include a reference to the issuer where the issuer is a MiFID regulated entity.

[32] This should include all entities deemed to be manufacturers in the relevant note offering. This should be considered on a case by case basis and will vary depending on the facts of the relevant offering/which entities are collaborating with the issuer in the creation, development, issue and/or design of the bonds which (as described in the ESMA Technical Advice of 19 December 2014) includes entities "*advising corporate issuers on the launch of the new securities*". In some cases (for example where the Joint Lead Managers are the entities substantively collaborating with the Issuer), it may be appropriate for the Joint Lead Managers to be considered the co-manufacturers.

[33] Include a reference to the issuer and/or any guarantor(s) here where such references are not included in the first sentence (e.g. because the issuer and/or any guarantor(s) are not MiFID regulated entities and do not recognise themselves as manufacturers and therefore falling within the scope of the first sentence).