CREDIT DERIVATIVES DETERMINATIONS COMMITTEE FOR THE AMERICAS

MEETING STATEMENT SEPTEMBER 12, 2024

This Meeting Statement is not binding with respect to any other determination of any Credit Derivatives Determinations Committee, nor does it preclude any other Credit Derivatives Determinations Committee or any member of such committee from making a different determination when resolving a similar question in the future, including any such question that relates to similar facts. Furthermore, the discussion summarized below is not, and does not purport to be, an exhaustive list of factors that each member of the Credit Derivatives Determinations Committee for the Americas considered.

In connection with the publication on September 12, 2024 of the Initial List of Deliverable Obligations for the Avon Products, Inc. (**Avon**) Auction (the **Avon Initial List**), the Credit Derivatives Determinations Committee for the Americas (the **Americas DC**) is publishing this statement regarding its exclusion from the Avon Initial List of the USD 405,000,000 promissory note dated May 17, 2022 and payable by Avon to the order of Natura & Co UK Holdings Plc (**Natura**) (the **Promissory Note**[1]).

For the purposes of this Meeting Statement, the Americas DC refers to:

(a) the 2014 ISDA Credit Derivatives Definitions, as published by the International Swaps and Derivatives Association, Inc. (**ISDA**) (the **2014 Definitions**); and

(b) the Credit Derivatives Determinations Committees Rules, as published by DC Administration Services Inc. on behalf of ISDA (as amended as of the date hereof, the **DC Rules**).

Each capitalized term used and not otherwise defined herein has the meaning given to such term in the 2014 Definitions, the DC Rules or the Promissory Note, as applicable.

For the purposes of this Meeting Statement, the Transaction Type of the relevant Credit Derivative Transaction is North American Corporate / Standard North American Corporate, as defined in the Credit Derivatives Physical Settlement Matrix (the **Relevant Transaction Type**).

1. DETERMINING DELIVERABILITY OF THE REVIEWED OBLIGATIONS

1.1 Under Section 3.2(a) of the 2014 Definitions, the term "Deliverable Obligation" is defined, in relevant part, to include "any obligation of the Reference Entity (either directly or as provider of a Relevant Guarantee) determined pursuant to the method described in Section 3.14 (*Method for Determining Deliverable Obligations*) of the 2014 Definitions".

[1] See Avon Form 8-K dated May 17, 2022 at Exhibit 4.1, available here.

1.2 Section 3.14 of the 2014 Definitions provides, in relevant part, that a "Deliverable Obligation" is defined as "each obligation of the Reference Entity described by the Deliverable Obligation Category […] having each of the Deliverable Obligation Characteristics, if any, specified in the related Confirmation".

2. DELIVERABLE OBLIGATION CATEGORY FOR THE RELEVANT TRANSACTION TYPE

2.1 The relevant Deliverable Obligation Category, as set out in the Credit Derivatives Physical Settlement Matrix for the Relevant Transaction Type, is "Bond or Loan". "Bond or Loan" is a sub-category of "Borrowed Money" and means "any obligation that is either a Bond or Loan". Section 3.13(a)(vi) of the 2014 Definitions.

2.2 Under Section 3.13(a)(ii) of the 2014 Definitions, "Borrowed Money" means "any obligation (excluding an obligation under a revolving credit arrangement for which there are no outstanding, unpaid drawings in respect of principal) for the payment or repayment of borrowed money (which term shall include, without limitation, deposits and reimbursement obligations arising from drawings pursuant to letters of credit)".

2.3 A "Bond" is defined to include "any obligation of a type included in the "Borrowed Money" Obligation Category that is in the form of, or represented by, a bond, note (other than notes delivered pursuant to Loans), certificated debt security or other debt security and shall not include any other type of Borrowed Money". Section 3.13(a)(iv) of the 2014 Definitions.

2.4 A "Loan" is defined to include "any obligation of a type included in the "Borrowed Money" Obligation Category that is documented by a term loan agreement, revolving loan agreement or other similar credit agreement and shall not include any other type of Borrowed Money". Section 3.13(a)(v) of the 2014 Definitions.

3. DELIVERABILITY OF THE PROMISSORY NOTE

As set out in further detail below, the Americas DC considered each of the "Borrowed Money", "Bond" and "Loan" Deliverable Obligation Categories to determine whether the Promissory Note satisfied the Deliverable Obligation Category for the Relevant Transaction Type.

3.1 Deliverable Obligation Category

(a) Borrowed Money

The Americas DC determined on the basis of public disclosures from Avon[2], as well as the terms of the Promissory Note[3], that Avon obtained funds in a borrowing from Natura and that the Promissory Note effectively represents a promise to repay such borrowing. As a result, the definition of "Borrowed Money" was satisfied.

(b) Loan

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[2] See Avon Form 10-Q dated August 12, 2022 at p 13 (describing "[l]oans from affiliates of Natura &Co Holding" including "408.4 outstanding under a Promissory Note with Avon Products, Inc. with a maturity date of May 17, 2029"), available here. See also *id*. at p 27 and 42 (describing inter-affiliate "loans").

[3] Promissory Note at Section 5.1(b) (providing that the "effectiveness" of the Promissory Note is subject to the Issuer [Avon] having received the "Principal Amount" from the Noteholder [Natura]).

With respect to the "Loan" Deliverable Obligation Category, the Americas DC considered whether the Promissory Note is an obligation that is "documented by a term loan agreement, revolving loan agreement or other similar credit agreement"[4].

In considering this definition, the Americas DC noted that the 2014 Definitions expressly require that a "Loan" be "**documented by** a term loan agreement, revolving loan agreement or other similar credit agreement" (emphasis added). This documentation requirement led the Americas DC to consider whether the Promissory Note contains the elements typically present in a "term loan agreement" or "similar credit agreement".[5]

The Promissory Note is not bilaterally executed, and, other than as set out in Section 5 (Conditions Precedent), does not contain any mechanics for effecting a borrowing (e.g., provisions setting out the method pursuant to which Avon drew and Natura disbursed funds). Fundamentally, the Promissory Note presupposes, but does not itself represent, an obligation of Natura to provide an extension of credit, a feature common to standard "term loan" agreements.

Furthermore, certain members of the Americas DC viewed the covenants and other contractual provisions of the Promissory Note as minimal and not in line with what would typically be seen in a credit facility, a factor that such members viewed as weighing against treating the Promissory Note as a "Loan".

The Americas DC took note that when Avon publicly disclosed the Promissory Note in its financial statements, it described the Promissory Note as an inter-affiliate "loan".[6] Further, the Promissory Note itself defines the obligation that Avon is required to pay with respect to principal and interest as a "Loan" and sets the terms and conditions of such "Loan" by defining a "Principal Amount" and "Interest" calculation methodology, as well as a "Maturity Date".[7] These elements favor the view that the intent of the parties in entering into the Promissory Note was to enter into a form of term loan.

The Americas DC, however, did not consider these factors sufficient to satisfy the documentation requirements of the "Loan" definition (as such term is defined in the 2014 Definitions) and the requisite number of members of the Americas DC did not conclude that the Promissory Note was a "Loan".

(c) Bond

The Americas DC noted at the outset that the 2014 Definitions do not describe how the concepts of "a bond, note (other than notes delivered pursuant to Loans), certificated debt security or other debt security" should be interpreted for purposes of the definition of "Bond". The Americas DC interpreted the definition of "Bond" in the 2014 Definitions, by virtue of the use of the phrase "***or other debt security***", to mean that the items listed ahead of that phrase in the definition, namely a "bond, note…certificated debt security", should be read as limited to types of "debt security".[8] As a result, the Americas DC

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4 Section 3.13(a)(v) of the 2014 Definitions

5 The Promissory Note on its face does not contain a commitment or similar concept found in "revolving" credit facilities; the discussion here therefore focuses on the "term loan agreement" concept.

6 See FN 2 above.

7 See Section 2.1 of the Promissory Note.

8 "[A] general description closely connected with an enumeration of property of a more limited type leads to the prima facie inference that the general description is limited by the particular enumeration and that it includes only things of the same general kind." *In re Falvey*, 15 A.D. 2d 415, 420 (1962).

determined that the fact the Promissory Note is a type of "note" is not dispositive as to the determination of whether or not the Promissory Note is a "Bond".

In considering whether the Promissory Note is a type of "debt security", the Americas DC took the view that a New York court would have regard to standard principles of contract interpretation. A New York court would typically apply "the ordinary and usual meaning of the chosen words […] to establish the parties' intent, giving a practical interpretation to the language employed and the parties' reasonable expectations".[9]

In the absence of further definitional guidance within the 2014 Definitions, the Americas DC considered a number of sources of meaning for the term "debt security" or "security", including the U.S. federal securities laws, Article 8 of the Uniform Commercial Code (**UCC**), as adopted by the state New York,[10] and the U.S. federal Bankruptcy Code.

In connection with its review, the Americas DC considered the conceptual framework set out in *Reves vs Ernst & Young*, 494 U.S. 56 (1990) to be appropriate for considering CDS market participants' "reasonable expectations" with respect to the meaning of "debt security" under the 2014 Definitions. [11]

In *Reves*, the Supreme Court provided the following method for determining whether a given instrument was a "security":

> "[I]n determining whether an instrument denominated a "note" is a "security," courts are to apply the version of the "family resemblance" test that we have articulated here: A note is presumed to be a "security," and that presumption may be rebutted only by a showing that the note bears a strong resemblance (in terms of the four factors we have identified) to one of the enumerated categories of instrument. If an instrument is not sufficiently similar to an item on the list, the decision whether another category should be added is to be made by examining the same factors."[12]

The *Reves* Court noted that the phrase "any note" in the Securities Act of 1933 "should not be interpreted to mean literally 'any note'" and that the securities laws should apply only to "notes issued in an investment context".[13] The *Reves* Court therefore proposed a four-part framework for determining whether a given "note" constitutes a "security" under the U.S. securities laws.

Under *Reves*, a court examines the following factors:

(i) Transactional Purpose: the *Reves* test first examines the motivations of the parties entering into the transaction.

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9 *AFBT-II, LLC v. Country Vill. on Mooney Pond, Inc.*, 759 N.Y.S.2d 149, 150-51 (2003).

10 Article 8 of the UCC, as adopted by New York, is substantively equivalent to Article 8 of the uniform UCC insofar as the topics discussed in this Meeting Statement are concerned.

11 The Committee has identified a case in the United States District Court, Northern District of California – *Shaper v Zadek*, 557 F.Supp.3d 969 (2021) – where the Court applied the *Reves* test to a promissory note. Further, the Americas DC notes that certain bankruptcy courts have also considered *Reves* in analyzing whether an instrument is a "security" for purposes of the Bankruptcy Code. *See, e.g., Bakst v. Bank Leumi, USA (In re D.I.T., Inc.),* 561 B.R. 793 (Bankr. S.D. Fla. 2016).

12 Reves at 67.

13 *Reves* at 63.

"First, we examine the transaction to assess the motivations that would prompt a reasonable seller and buyer to enter into it. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a "security." If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose, on the other hand, the note is less sensibly described as a "security""[14].

(ii) Plan of Distribution: the *Reves* test examines the "plan of distribution" of the instrument to determine whether there is "common trading for speculation or investment".[15]

(iii) Reasonable Expectations of the Investing Public: the *Reves* test considers whether "public expectations" are consistent with treatment of the relevant instrument as a security.[16]

(iv) Risk of Instrument / Regulatory Scheme: finally, the *Reves* test examines "whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary".[17]

In considering the *Reves* factors and the definition of "debt security" generally, the Americas DC took into account a variety of facts available in public filings as well as the terms of the Promissory Note itself. Among the factors considered, the Americas DC noted the inter-affiliate nature of the Promissory Note (relevant to the question of "distribution" and "reasonable expectations of the investing public"); the Promissory Note's definition of the obligation that Avon is required to pay with respect to principal and interest as a "Loan" (relevant to the question of "transactional purpose"); Avon's treatment of the Promissory Note in its own regulatory filings as a "loan" (relevant to the question of "transactional purpose" and "reasonable expectations of the investing public"); and the fact that the Promissory Note was not initially marketed or sold to market participants as a security (relevant to the question of "plan of distribution" and "reasonable expectations of the investing public").

Certain DC Members noted facts pointing towards the Promissory Note constituting a "security", including the fact the Promissory Note was labeled as a "note" (relevant to the question of "transactional purpose" and the *Reves* presumption) as well as the lack of transfer restrictions (relevant to the question of "plan of distribution", although other DC Members considered the lack of transfer restrictions to be consistent with treatment as a non-security debt instrument). Certain DC Members took the view that the Promissory Note did not bear a resemblance to one of the enumerated categories in *Reves*.

On balance, having considered the *Reves* factors, the requisite number of members of the Americas DC determined that the information available to it (in the form of the Promissory Note itself, as well as Avon's public filings) was not sufficient to conclude that the Promissory Note was a "debt security" and therefore a "Bond".

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14 *Reves* at 66.

15 *Id*. *See also McNabb v. S.E.C.* 298 F.3d 1126 (9th Cir. 2002) (finding that 6 promissory note buyers do not constitute a "broad segment of the public", before concluding that the fact such buyers were natural persons was relevant to the fourth *Reves* factor); *see also Stoiber v. S.E.C.,* 161 F.3d 745 (10th Cir. 1998).

16 *Compare Zadek*, where the *Zadek* Court found that the relevant promissory notes' securities law legends, which disclaimed registration pursuant to the Securities Act of 1933, supported the notion that a 'reasonable' investor would view the instruments as (unregistered) securities. *Zadek* at 982.

17 *Reves* at 67.

4. CONCLUSION

Section 3.3(c) of the DC Rule provides that "[i]f the Convened DC Resolves by a Majority that an obligation proposed by an Eligible Market Participant pursuant to Section 3.3(b) (Preliminary List of Deliverable Obligations; Solicitation of Proposed Obligations) falls within a set of Deliverable Obligation Terms with respect to the relevant set of Credit Derivatives Auction Settlement Terms, the proposed obligation shall be included on the Initial List".

On the basis of the factors described above, a Majority of the Americas DC did not Resolve to include the Promissory Note on the Initial List of Deliverable Obligations for the Avon Auction.