

FINANCIAL INSTITUTIONS ADVISORY & FINANCIAL REGULATORY | 21 June 2016

MiFID II Implementation Delayed to 2018

The Council of the European Union has adopted legislation to delay the application of the Markets in Financial Instruments Directive and Markets in Financial Instruments Regulation by one year. This extension is due to concerns about the technical implementation challenges faced by financial market participants, national regulators and the European authorities. The extension should avoid much of the anticipated legal uncertainty which might otherwise have arisen.

Delay Due to Extraordinary Implementation Challenges

The adopted legislation¹ will grant national regulators and market participants a one-year extension for complying with the new regulatory framework set out in the revised Markets in Financial Instruments Directive (the “MiFID II Directive”) and the Markets in Financial Instruments Regulation (“MiFIR”), collectively known as MiFID II. The entire MiFID II package will now apply from 3 January 2018. This includes all delegated and implementing acts adopted under MiFID II, although it is expected that the outstanding technical standards will be adopted expeditiously by the European Commission to ensure legal certainty as to the final requirements. Provided that the technical standards are adopted timeously, market participants should be able to prepare for complying with the requirements by January 2018. In addition, Member States should be able to transpose the legislation based on the final texts as the transposition deadline has been changed to 3 July 2017. This should alleviate or at least minimise the likelihood of any national laws being subject to change.

As part of the MiFID II implementation process, the European Securities and Markets Authority (“ESMA”) must collect data on about 15 million financial instruments from around 300 trading venues. To do so, data exchange systems must be developed and close cooperation with national regulators and market participants is needed. ESMA is developing a new data collection infrastructure, known as the Financial Instruments Reference Data System (“FIRDS”), which will link data feeds between ESMA, national regulators and trading venues across the EU. Without the relevant data it would be difficult to implement properly or enforce many aspects of the new regulatory framework, in particular the trade transparency obligations, the reporting of commodity derivatives positions and the best execution rules.

Market Abuse Regulation

The amending legislation also includes a delay to the application of certain provisions of the Market Abuse Regulation (“MAR”). MAR refers to definitions and concepts in MiFID II. Accordingly, references in MAR relating to organised trading facilities (a new type of trading venue introduced by MiFID II), small and medium-sized enterprise (“SME”) growth markets and emission allowances will not apply until MiFID II enters into application on 3 January 2018. MAR will otherwise apply from 3 July 2016.

¹ The adopted legislation will enter into force once it has been published in the Official Journal of the European Union.

MAR requires market operators of regulated markets and investment firms and market operators of a multilateral trading facility (“MTF”) or OTF to notify their national regulator of any financial instrument for which a request for admission to trading has been made or which are admitted to trading as well as when a financial instrument ceases to be traded or admitted to trading. National regulators must send those notifications to ESMA and ESMA must publish the notifications in the form of a list. The obligation on national regulators and ESMA in this regard will be delayed until January 2018 to allow time for FIRDS to be set up. FIRDS will also be used for the purpose of defining the scope of financial instruments under MAR.

Central Securities Depositories Regulation

Similarly, the application of certain provisions of the Central Securities Depositories Regulation (“CSDR”) will also be delayed. CSDR has rules on settlement discipline which refer to eligibility criteria for SME growth markets found in MiFID II. To ensure legal certainty, the current MiFID provisions will remain effective in relation to the CSDR until MiFID II enters into force.

Substantive Amendments

The EU legislators have also taken the opportunity to make certain substantive amendments to the provisions of MiFID II.

Dealing on Own Account Exemption

The exemption in the MiFID II Directive for firms “dealing on own account” in financial instruments other than commodity derivatives or emission allowances will be extended to non-financial entities who are members of or participants in a regulated market or MTF or which have direct electronic access to a trading venue when executing transactions on a trading venue for hedging purposes or treasury financing activities.

Securities Financing Transactions

Securities Financing Transactions (“SFTs”), as defined in the new Securities Financing Transactions Regulation, will be excluded from the pre- and post-trade transparency obligations under MiFID II. SFTs are repurchase transactions, securities or commodities lending and securities or commodities borrowing transactions, buy-sell back transactions or sell-buy back transactions and margin lending transactions. This change is to avoid a duplication of reporting under MiFID II with that under the new SFTR regime.

Package Transactions

Package transactions are transactions executed by investment firms on their own account or on behalf of clients which are made up of a number of interlinked, contingent components which aim to reduce transaction costs and assist in risk management. MiFIR will be revised to specifically require the public disclosure of bid and offer prices for package orders. However, national regulators will be able to waive the obligation for package orders which meet certain conditions, such as including a financial instrument for which there is not a liquid market (unless there is a liquid market for the package order as a whole). ESMA had included the waiver in its regulatory technical standards (“RTS”) on transparency requirements for debt instruments. However, the European legislators noted that ESMA did not have the power to add a waiver for the transparency obligations because that would be a policy decision which is beyond ESMA's remit. During the deliberations on the text to delay MiFID II, the inclusion of the waiver in the Level 1 text was considered and ESMA noted this in its Opinion on the relevant RTS following a request from the European Commission to amend certain provisions of the RTS. It is expected that the waiver text will now be deleted from the relevant RTS.

ESMA will be required to prepare draft technical standards by 28 February 2017 which set out the methodology for determining the package orders for which there is a liquid market. To accommodate these changes, definitions for package orders and package transactions will also be added to the text of MiFIR.

Third-Country Market Equivalence

The MiFID II Directive will be amended to change the parameters for a third-country market to be considered as equivalent to an EU regulated market. The provisions are relevant to the exemption from the obligation on an investment firm to obtain information from a client to assess the appropriateness of a service or product which will be available when an investment firm is only providing execution services or reception and transmission of client orders services. For a third-country's legal and supervisory framework for markets to be considered as equivalent it must have requirements that result in the same outcomes as those provided for under MAR, the EU Prospectus Directive, certain of the transparency obligations under MiFIR and the authorisation and organisational requirements applicable to regulated markets under the MiFID II Directive. These criteria are similar to those already contained in MiFIR that will be applied for the trading obligation for shares and derivatives. However, the criteria for the trading obligation are wider, encompassing all of MiFIR and the MiFID II Directive as well as MAR, although not the Prospectus Directive.

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