MiFID II

Fair, clear and not misleading information

March 2017

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Key Points

- Firms will be required to comply with additional obligations in respect of information to retail clients.
- New requirements will apply to information provided to professional clients.
- Indications of future performance must be on performance scenarios in positive and negative market conditions.

Requirement for fair, clear and not misleading information

Article 19(2) of the MiFID I Directive contains high-level obligations requiring firms to ensure that all information addressed to clients or potential clients, including marketing information, is fair, clear and not misleading and to ensure that marketing communications are identifiable as such. Under MiFID I, further detailed provisions are contained in Article 27 of the MiFID implementing Directive.

The high-level obligations of MiFID I remain unchanged by the MiFID II Directive (at Article 24(3)). The existing requirements in Article 27 of the MiFID Implementing Directive will be amended to widen their scope. The new requirements are contained in the MiFID II Delegated Regulation[1] at Article 44.

The main changes being introduced by MiFID II are set out below.

Fair and prominent indication of risks

In relation to information to retail clients, firms must always give a fair and prominent indication of any relevant risks when referencing any potential benefits of a service or financial instrument.[2] This is broader than the existing Article 27 wording, which requires an indication of risks only where potential benefits are emphasised.

In addition, there will be a requirement to ensure that font size of risk warnings is at least as prominent as the predominant font in the communication, and that the layout ensures prominence. The information shall be presented in the same language as all other information to that client, unless the client has requested otherwise. There is now an express requirement to keep information up to date.[3]

Information on future performance

Article 27(6) already specifies certain standards in respect of indications of future performance (that they must not be based on or refer to simulated past performance, that they should be based on reasonable assumptions, that the effect of fees and charges is disclosed and that they must contain a warning that it is not a reliable indication of future performance).

MiFID II introduces a new provision which will require firms to ensure that the information is based on performance scenarios in different market conditions (both positive and negative) and should reflect the nature and risks of the specific types of instruments included in the analysis.[4]

Requirements in relation to professional clients

Article 27 (which currently applies to retail client communications only) will be extended so the requirements apply to both retail or professional clients (or potential retail or professional clients).[5]

[1] Commission Delegated Regulation (EU) of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (the "**MiFID II Delegated Regulation**").

[2] Article 44(2)(b), MiFID II Delegated Regulation.

[3] Article 44(2), MiFID II Delegated Regulation

[4] Article 44(6)(d), MiFID II Delegated Regulation.

[5] Article 44(1), MiFID II Delegated Regulation.

Timescales for implementation

The MiFID II Directive and MiFIR came into force on 3 July 2014, and most of their provisions will come into effect in member states from 3 January 2018. Member states have until 3 July 2017 to transpose the MiFID II Directive into national law.

The changes made to the MiFID Implementing Directive will be made by the Commission by way of the MiFID II Delegated Regulation, which will become effective by 3 January 2018. The Delegated Regulation will have direct effect in Member States, and so the Member States will not need to implement these changes into national law.

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