

MiFID II

Client agreements

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Key Points

- Firms will be requested to provide written agreements in relation to certain services provided to professional clients.
- Firms will be requested to provide written agreements in relation to ongoing advisory services and/or custody services provided to retail clients.
- New minimum content criteria will apply to the existing requirement for an agreement to set out the "essential rights and obligations" of the parties.

Client agreements in MiFID II

Article 19(7) of the MiFID I Directive contains a high-level obligation on firms to establish a written agreement with the client setting out the rights and obligations of the parties and the other terms applying to the services. Under MiFID I, further detailed provisions are set out at Article 39 of the MiFID Implementing Directive.

The high-level requirement under MiFID I will be identical under the MiFID II Directive (Article 25(5)). However, the detailed provisions in the MiFID Implementing Directive will be replaced by requirements in Article 58 of the MiFID II Delegated Regulation.¹

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

Written agreement requirements

The existing requirement to have a written agreement in a durable medium with a retail client will also apply in relation to a professional client, except where the relevant service is one-off investment advice where there is no periodic suitability assessment.

Firms must have a written agreement in place where they provide (i) investment advice (where there is periodic suitability assessment as opposed to one-off advice) and/or (ii)

safeguarding and administration, including custody services to a retail client.²

Essential rights and obligations

The agreement, in setting out the "essential rights and obligations" of the parties, should include:

- a description of the nature and extent of any investment advice to be provided;
- where portfolio management is provided, a statement of the types of financial investments that may be purchased/sold and the types of transactions that may be undertaken and any investments/transactions which are prohibited; and
- a description of the main features of any custody services to be provided, including the role of the firm in relation to corporate actions and the terms on which securities financing transactions will generate a return for the client.³

ESMA has confirmed that these requirements will be minimum harmonisation rules meaning that member states may impose additional requirements on firms in relation to advice and suitability, if they so choose.⁴

Timescales for implementation

The MiFID II Directive and the Markets in Financial Instruments Regulation ("**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 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 MiFID II Delegated Regulation will be directly effective, so the member states will not need to implement it into national law.

¹ Commission Delegated Regulation 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 (the "**MiFID II Delegated Regulation**").

² Article 58, first paragraph, MiFID II Delegated Regulation.

³ Article 58, second paragraph, MiFID II Delegated Regulation.

⁴ ESMA, Final Report: ESMA's Technical Advice to the Commission on MiFID II and MiFIR, 19 December 2014 (ESMA/2014/1569).

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