MiFID II

Eligible counterparties

January 2017

Key Points

- Clients who are currently treated as elective professional clients in relation to MiFID business will no longer be able to be recategorised as elective eligible counterparties.
- There will be additional formalities for any clients who are recategorised as elective eligible counterparties.

Changes to the eligible counterparty regime in MiFID II

Under Article 50(1) of the MiFID Implementing Directive, it is currently permissible for member states to allow all types of professional client to be recategorised as eligible counterparties, subject to certain requirements being met.

The Technical Advice provided by ESMA in December 2014[1] recommended that under MiFID II, it should no longer be possible for any professional clients who are in the categories listed in Section II of Annex II to the MiFID I Directive to be recategorised as eligible counterparties, even if they wish to do so.[2]

This approach is confirmed by Article 71 of the MiFID II Delegated Regulation,[3] which allows for professional clients to be recategorised as eligible counterparties only where they fall within one of the following categories:

- entities which are required to be authorised or regulated to operate in the financial markets;[4]
- large undertakings which meet certain size requirements;[5] or
- national and regional governments, Central Banks, and other international and supranational institutions such as the World Bank.[6]

This expressly excludes elective professional clients from requesting recategorisation as eligible counterparties.

For clients who are capable of being treated as an eligible counterparty and wish to be treated as such, MiFID II requires additional formalities to be met. These formalities have been clarified in the MiFID II Delegated Regulation.

The firm must provide the client with a clear written warning of the consequences of the recategorisation, including the protections they may lose. In return, the client must respond in writing to confirm their request (whether it is a general request, or only in respect of one or more investment services or transactions) and their understanding of the consequences.[7]

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 relevant sections in the MiFID Implementing Directive will be replaced by provisions in the MiFID II Delegated Regulation which will become effective from 3 January 2018. The MiFID II Delegated Regulation will have direct effect and the member states will not need to implement these changes into national law.

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1 ESMA, Final Report: Technical Advice to the Commission on MiFID II and MiFIR, 19 December 2014 (ESMA/2014/1569) (the "**Technical Advice**"), Chapter 2.23.

2 As applied to the United Kingdom's FCA rules, that would mean that any client who has been categorised as an "elective professional client" within COBS 3.5.3R(2) would not be capable of being treated as an "elective eligible counterparty" under COBS 3.6.

3 Article 71(1) of the 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 investment firms and defined terms for the purposes of that Directive (the "**MiFID II Delegated Regulation**").

4 Paragraph 1, Section 1, Annex II of MiFID II Directive.

5 Paragraph 2, Section 1, Annex II of MiFID II Directive.

6 Paragraph 3, Section 1, Annex II of MiFID II Directive.

7 Article 71(5), MiFID II Delegated Regulation.

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