



Financial Services Authority

MiFID Permissions and Notifications Guide – Update

(including consultation on measures
applicable to incoming firms from
late-implementing EEA states)

September 2007

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Annex 1: Market failure and cost benefit analysis

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Annex 3: Draft Precautionary Measures (MiFID) Instrument 2007

We ask you to send responses to our consultation in Part I to reach us no later than 1 October 2007.

You can send your comments on our consultation electronically by email to Lateimplementation@fsa.gov.uk

Alternatively, please send comments in writing to:

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Copies of this Consultation Paper are available to download from our website – www.fsa.gov.uk. Alternatively, paper copies can be obtained by calling the FSA order line: 0845 608 2372.

1 Overview

In May 2007 we published our MiFID Permissions and Notifications Guide (May PNG)¹. This explained several important administrative consequences for us and for firms arising from the implementation of the Markets in Financial Instruments Directive (MiFID). The purpose of this publication is to:

- update you on issues which we committed to come back to you on in our May PNG;
- update you on some emerging issues; and
- consult you on proposals to address matters arising from the late implementation of MiFID by other Member States, including the impact this may have on UK branches of EEA firms.

The first part of this publication sets out proposals for consultation that are designed to ensure that cross-border business can continue after 1 November 2007 with as little disruption as possible. This includes ensuring we are able to take action, including where and if appropriate enforcement action, against incoming firms from late-implementing EEA States. We ask that you respond to our proposals no later than 1 October 2007.

The second part of this publication provides updates on the following issues: the position of financial advisers wishing to opt-out of the article 3 MiFID exemption in order to acquire passport rights; the conclusion of the Treasury's consultation on transitional provisions on client categorisation and passport notifications relating to incoming EEA firms; additional material on tied agents; client categorisation issues relating to Multilateral Trading Facilities (MTFs); and further developments on approved persons.

This update to the May PNG is intended as a guide to help firms determine what MiFID-related notifications and applications they should make. But it does not purport to be an exhaustive statement of these or any other regulatory responsibilities which may apply. It is the responsibility of firms to take the necessary action to ensure that their authorisation is appropriate for the business they plan to carry on in the UK and other Member States, where applicable, from 1 November 2007.

¹ http://www.fsa.gov.uk/pubs/international/mifid_guide.pdf

Who should read this guide?

This guide will be relevant to all MiFID firms, including firms with a Banking Consolidation Directive (BCD) passport. This publication is of particular relevance to those EEA incoming firms, regulated markets and MTFs from late implementing states providing investment business in the UK, whether through a branch passport or a passport for services. It is also of particular importance to financial advisers who wish to continue to provide investment services to their clients based in other EEA States. And some chapters of this publication will be relevant to non-MiFID firms.

What are the deadlines?

Where appropriate we have set out in each chapter the suggested date by which firms should submit notifications. In many cases the date given in the May PNG has passed and we can no longer guarantee that notifications received will be processed in time for 1 November 2007. Firms are asked to submit any notification as soon as possible.

Part I

2 Consultation on the late implementation of MiFID

Introduction

In the May PNG, we said that we would in due course provide additional materials for EEA firms currently doing business in the UK under directive passports and top-up permissions².

Firms from other EEA states currently generally provide investment services in the UK, on either a branch or services basis, under the passport provisions of the Investment Services Directive (ISD), the Banking Consolidation Directive (BCD) or the Undertakings for Collective Investment in Transferable Securities Directive (UCITS). Market operators based in other EEA states may also provide access to Regulated Markets (RMs) or trading systems by placing screens in the UK under rights conferred by the ISD.

Some EEA firms also have ‘top-up’ permissions to carry on business in the UK that is not currently included in the services that can be passported under the ISD, BCD or UCITS. These permissions mostly relate to commodity derivatives business. After 1 November 2007, that business generally will be passportable under MiFID.

MiFID comes into effect on 1 November, and the ISD will be repealed and replaced by MiFID. However, it is possible that some EEA states will not have implemented MiFID fully by that date. This section sets out proposals that are designed to enable firms and market operators from late-implementing states to continue to provide investment services in the UK, either under directive passports or ‘top-up’ permissions, for a limited period after 1 November 2007, and to enable us to take action against such entities where it would be appropriate to do so.

Status of EEA firms’ passports

Credit institutions and UCITS management companies have independent passporting rights under the BCD and UCITS directive that will not be affected by late implementation of MiFID. However, credit institutions and UCITS management companies from late implementing states will not be able expand their passports to

2 MiFID Permissions and Notifications Guide, Chapter 4, Passporting, page 12.

include the additional services that are now within MiFID's scope until their home state has implemented MiFID (for example, in relation to commodity derivatives), although they may be able to continue providing these services under current arrangements.

For investment firms, MiFID provides that existing authorisations will continue to be valid, provided that the authorisation granted by a firm's home state required compliance with conditions comparable to those in MiFID Articles 9 to 14. On similar lines, existing ISD passport notifications can also continue to be valid³. We believe that the ISD conditions are based on the same high-level principles as those in MiFID, and are therefore generally of a comparable standard. As such, we will continue to regard EEA firms' ISD authorisations and passport notifications as valid after 1 November, even if a firm's home state has not (fully) implemented MiFID.

This is consistent with the approach taken in the Treasury transitional provisions which, in broad terms, give effect to pre-existing notifications under the ISD by incoming EEA firms and host state competent authorities⁴. Accordingly, we plan to convert firms' existing ISD passports to MiFID passports with effect from 1 November 2007, and to show this on the FSA Register.

However, the MiFID Article 71 provisions are based on the premise that all member states would have transposed the Directive by 1 November 2007. Where a firm's home state has not done so, a firm may not be in a position to comply with all of the relevant MiFID requirements. In these circumstances, we need to consider whether we have the power to intervene under MiFID Article 62, when and if required to do so.

Exercise of precautionary powers

Article 62(1) requires that where the host state has 'clear and demonstrable grounds' for believing that an investment firm acting within its territory is in breach of the obligations arising under MiFID that do not confer powers on the host state, it must refer those findings to the home state. If, despite any measures taken by the home state, the investment firm 'persists in acting in a manner that is clearly prejudicial to the interests of host member state investors or the orderly functioning of markets' the host state must then take all appropriate measures necessary. This can include preventing firms from initiating any further transactions within the territory of the host state.

Broadly speaking, the UK's implementation of MiFID Article 62 is premised on other member states having transposed the relevant MiFID home state requirements in their own legislation. For example, we are obliged to notify the home state of breaches by its firms of provisions adopted in that state for the purposes of implementing MiFID⁵. This leaves a potential gap in exercising our powers against incoming firms under Article 62 in those cases where a member state is late in implementing the directive.

3 Articles 71(1) and (4).

4 See regulation 6A of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007 (SI 2007/126), as inserted by the Financial Services and Markets Act 2000 (Markets in Financial Instruments) (Amendment No.2) Regulations 2007 (SI 2007/2160).

5 See section 195A FSMA.

We therefore propose to take precautionary measures under Article 62 to fill the gap created by non-implementation by incoming EEA firms' home states, and to ensure that the FSA can discharge its responsibilities as required.

Proposed precautionary rule-making

We propose to make a temporary rule the effect of which would be to require all incoming firms from late-implementing EEA states to comply with certain MiFID standards after 1 November 2007. It would apply only to the extent that the firm's home state had not implemented the relevant MiFID provisions, or did not already impose measures of comparable effect. The rule would take effect on 1 November 2007, and would run until 31 October 2008.

The purpose of the rule is twofold. First, it would ensure that firms from late-implementing states doing business in the UK after 1 November were subject to regulatory requirements comparable to those applying to UK firms and other EEA passported firms, absent implementation of the relevant MiFID requirements by the home states concerned.

Secondly, it would enable the FSA to use its range of supervisory and enforcement powers under FSMA to take action, where necessary, against passporting firms for breaches of relevant requirements in order to protect UK consumers and to ensure the proper functioning of the markets.

In making this proposal, we have sought to provide a proportionate and pragmatic solution to a temporary situation, which takes account of the role and responsibilities of other member state regulators. We have not adopted a blanket approach to imposing MiFID requirements on incoming EEA firms, but have sought to be more selective, focussing generally on those areas where risks to consumers and to our objectives are likely to be greater.

In designing the rule, we have therefore carefully considered the following two policy issues:

- what business the rule should apply to; and
- what MiFID requirements it should impose on inward passporting firms from late-implementing states.

Different considerations apply depending on the type of business conducted, and as between conduct of business, systems and controls, prudential and transaction reporting requirements. Different considerations also apply to the status of RMs and operators of Multilateral Trading Facilities (MTFs). These issues are discussed below.

What business?

Here the issue is whether the rule should apply to (i) all business that could fall within the scope of MiFID and current domestic regulation, including that done by EEA firms in the UK under top-up permissions; or (ii) all MiFID business including unregulated business which is done by incoming passporting firms under RAO exclusions (principally the overseas persons exclusion).

We propose that the rule should cover scenario (i). A small number of EEA firms currently have top-up permissions for – mostly – commodity derivatives business (the vast majority of these firms are EEA credit institutions that carry on this business through their UK branches). Most of this business is likely to fall within the scope of MiFID. Where a firm’s home state has implemented MiFID, this business can be brought within firms’ MiFID passports from 1 November. Where a firm’s home state has not implemented MiFID, we will regard its top-up permission as valid after 1 November (where a firm continues to act in accordance with its permission). All UK branches of passported EEA firms will be subject to MiFID conduct of business requirements (through the FSA’s implementing rules) in relation to their passported business conducted within the UK, so applying these requirements also to MiFID business conducted under top-up permissions should not amount to a significant extra burden.

We do not think the rule should cover scenario (ii). Cross-border business done under RAO exclusions is largely wholesale in nature, including, for example, firms active in the London commodity derivatives markets. Some of this business may be within MiFID scope after 1 November, triggering home state passporting notifications, but some of it may fall within the MiFID commodities exemptions. Overall, the risks to UK consumers and markets do not appear significant enough to warrant the imposition of temporary requirements on this business. This would also help maintain parity of treatment for all firms that currently operate under RAO exclusions, whether or not they also do business under a directive passport.

What MiFID requirements?

The second issue is which requirements should be imposed on incoming firms from late-implementing states. Generally, we propose that this be limited to ‘MiFID minimum’ Level 1 and Level 2 requirements to ‘fill the gap’ created by non-implementation of those requirements by a firm’s home state, principally to enable us to meet our consumer protection and market confidence objectives. This encompasses requirements in MiFID Articles 12-14, 18 to 22, 24, and 26 to 30, and the associated provisions of the Implementing Directive⁶.

Conduct of business and market transparency

So as to deliver comparable standards of consumer protection, we propose that the rule should cover the MiFID conduct of business requirements in Articles 19 to 22(1), and 24, and the associated provisions of the Level 2 Implementing Directive, together with the client categorisation requirements in MiFID Annex II. This would have most impact on firms passporting on a cross-border services basis, as the FSA rules implementing these requirements will apply to the services provided by branches within the UK in any event, as indicated above.

Firms and MTF operators would also be required, where relevant, to meet the transparency requirements in Articles 22(2) and 27 to 30.

⁶ The Level 2 Implementing Regulation is directly applicable without the need for any national implementing measures.

Systems and controls and client assets

Systems and controls and client asset requirements are relevant to firms passporting on both a branch and service basis, as they are a home state responsibility. In these cases, our view is that firms' compliance with the comparable high-level requirements of the ISD and, in the case of banks, the CRD should mostly be sufficient. However, we propose that the rule should specifically require compliance with MiFID Articles 13(3) and 18 on conflicts of interest, and Article 13(6) on record-keeping, together with the associated requirements of the Implementing Directive.

Prudential requirements

We do not propose that the temporary rule should cover other prudential or capital requirements. Credit institutions operating under BCD passports will already be subject to the Capital Requirements Directive (CRD), and MiFID imposes no additional requirements of this type.

For investment firms, their authorisation under ISD is grandfathered if they can meet 'comparable conditions' to those set out in MiFID Articles 9 to 14. We would expect investment firms to meet the relevant prudential requirements involved. This is both an issue of home state authorisation and implementation of another directive (the recast Capital Adequacy Directive (CAD)). We do not therefore propose to impose any further domestic capital requirements, by way of rule. This is subject to one exception in the case of MTF operators. Given that the recast CAD imposes a new and material initial capital requirement of €730,000, we propose to incorporate this element into our temporary rule⁷.

Transaction reporting

We do not believe that the rule should apply the transaction reporting requirements in MiFID Article 25. UK branches of EEA firms will in any event be subject to our transaction reporting requirements after 1 November 2007. For firms providing cross-border services, we will be able to obtain details of transactions they carry out in which we have an interest through the information exchange mechanism that is being developed by CESR. In our view, it would be disproportionate to require these firms to establish systems to report these transactions directly to us for a limited period only. They do not transaction report directly to us now and will not do so in the future.

Position of Regulated Markets (RMs) and MTFs

As in the case of firms, MiFID Article 62 imposes a procedure for the exercise by host states of precautionary measures in relation to RMs and MTFs. In general, where the home state has implemented the Level 1 Directive, we would regard this, together with the existence of the Level 2 Implementing Regulation, as delivering full implementation of the MiFID requirements for RMs. Implementation issues therefore arise only where the home state has not implemented Level 1.

⁷ See Annex 3 below.

Where a regulated market provides screen access in the UK using its rights under the ISD, it will continue to be able to do so after 1 November 2007 by virtue of Treasury transitional legislation. This is the case whether or not it is from a late-implementing EEA State, provided that it operates in accordance with the provisions of Title III of MiFID. However, regulated markets from late implementing states which have not exercised their passporting rights under the ISD will not be able to rely on the Treasury transitional provision.

Incoming EEA firms that operate an MTF will be subject to the proposed rule described above, which will require them additionally to meet the MiFID requirements that apply specifically to MTF operations and the capital requirements that will apply to MTF operators for the first time from 1 November 2007.

- Q1. Do you agree with our proposed rule applying certain MiFID standards to firms passporting into the UK from late implementing EEA states?

We invite comments on these proposals, which should reach us no later than 1 October 2007.

CBA, compatibility statement and draft rules

Market failure and cost benefit analysis is set out at Annex 1. Compatibility of the proposals with our objectives and the principles of good regulation is analysed in Annex 2. The Precautionary Measures (MiFID) Instrument 2007, setting out draft rules and guidance, is at Annex 3.

Part II

3 Financial Advisers and the giving of investment advice to EEA Clients

Introduction

In our May PNG we outlined the UK implementation of the article 3 MiFID exemption, and how it may affect firms and the choices available to them. We recently explained the action required by financial advisers who are Personal Investment Firms and meet the criteria of the article 3 MiFID exemption but who wish to carry on business post 1 November 2007 with clients based in other EEA States.

Overview

The article 3 MiFID exemption applies to those firms undertaking a limited range of investment activities as set out in chapter 13 of our Perimeter Guidance (Q48, 49, 50, 52 and 53)⁸. Firms meeting the relevant conditions will automatically be exempt from MiFID as of 1 November 2007. We outlined in our May PNG the broad assumptions we will make in updating our register to reflect which firms fall within the article 3 MiFID exemption⁹. We also indicated the process to be followed for those firms which wished to opt out of this exemption, in order to acquire passport rights¹⁰.

We have recently published a factsheet – ‘Financial Advisers & Passporting’ – which explains the steps that Personal Investment Firms need to take in considering whether they may need a passport and how to go about getting one. You can find our factsheet at: http://www.fsa.gov.uk/pubs/forms/passporting_factsheet.pdf

8 http://www.fsa.gov.uk/pubs/policy/ps07_05.pdf

9 See Annex 1 May PNG.

10 See Chapter 3 May PNG.

4 Article 3 MiFID exemption and the marketing and selling of unregulated collective investment schemes

Introduction

Since our May PNG, we have received queries about the application of the article 3 MiFID exemption to the marketing and selling of unregulated collective investment schemes.

Overview

If you carry out the marketing and selling of unregulated investment schemes you may wish to note the following¹¹:

- The ISD contains a similar exemption (see article 2.2(g)) to the article 3 MiFID exemption.
- It is a condition of the ISD and MiFID exemptions that firms carrying on the activity of receiving and transmitting financial instruments, to which the directive applies, do not transmit orders directly to operators of unregulated schemes unless they are fund managers to which ISD or MiFID applies.
- In our view, where a financial adviser transmits orders to an authorised broker (or another authorised firm to which MiFID applies), this should fall within the scope of the exemption.
- PERG 13 Q49 and 50¹² provides guidance on applying the article 3 MiFID exemption, including a list of permitted persons to whom orders in relation to units in collective investment undertakings (including unregulated collective investment schemes) can be transmitted, for the purposes of the exemption.

11 We propose to update our Perimeter Guidance as appropriate, in due course, to reflect these preliminary views.

12 www.fsa.gov.uk/pubs/policy/ps07_05.pdf

- Where a scheme is a recognised overseas scheme, including a non-EEA scheme, for the purposes of Part XVII Chapter V FSMA, and orders are transmitted directly to it or the operator of the scheme, in our view this could (depending upon the nature of the scheme) amount to an order to a collective investment undertaking authorised under the law of a member state to market units to the public and to the managers of such undertakings (see article 3.1(iv) MiFID). So orders to certain offshore schemes may fall within the scope of the exemption.
- Where a person only provides investment advice in relation to unregulated collective investment schemes, it is not prevented from relying upon the exemption simply because it provides investment advice in relation to unregulated collective investment schemes, although as explained above it may fall outside the exemption if it receives and transmits orders to persons other than permitted persons.
- In addition to the conditions of the article 3 MiFID exemption, section 238 FSMA restricts the marketing of unregulated collective investment schemes to the public.

5 Client categories in limitations and/or requirements

Introduction

In this chapter we provide you with an update on the Treasury's proposals to allow us to map automatically existing customer types to the new MiFID-based client categories as set out in our May PNG.

Overview

The Treasury have now made transitional legislation¹³ which broadly gives effect to the map below (from page 6 of the May PNG). In other words, where a firm has a customer type limitation on its permission as shown in the left hand column of the table, this will be mapped across automatically to the MiFID-based category in the right hand column¹⁴. If, for any reason, you object to the mapping of your permission in relation to your MiFID business, you should notify us as soon as possible and no later than 1 October 2007. We would expect that notification to take the form of an application for variation of permission, indicating which, if any, client type limitations you need to appear on your permission.

Current customer type applied to Activity on a firm's permission	Proposed mapping to new MiFID-based client categories
Private Customers Only	Retail Clients Only
Intermediate Customers Only	Professional Clients Only
Private and Intermediate Customers	Retail and Professional Clients
Intermediate Customers and Market Counterparties	Professional Clients and Eligible Counterparties

13 See the Financial Services and Markets Act 2000 (Markets in Financial Instruments) (Amendment No.2) Regulations 2007 (SI 2007 No 2160) <http://www.opsi.gov.uk/si/si2007/20072160.htm>.

14 The mapping does not apply to insurance mediation activities other than in relation to life policies. For the scope of 'retail', 'intermediate' and 'eligible counterparty', see COBS chapter 3.6. The aspects of these definitions in relation to non-MiFID business will be finalised in our October rule-making instrument.

We will process your application as quickly as we can but cannot guarantee we will have done so before 1 November 2007. If a VOP application has not been processed, a firm's customer type limitation will be automatically mapped according to the table above as at 1 November 2007 until a decision has been made on the VOP application.

In the May PNG we said we proposed to run a transitional regime for a limited period between 1 November 2007 and 1 July 2008 for the new client categories in relation to non-MiFID business. Broadly, we proposed that firms will be able to continue to use the existing tests for classifying customers (e.g. the criteria relating to 'private customers' and 'intermediate customers') during this period.

We will be commenting on these proposals in our feedback on CP07/9, to be published in October. However, on the basis that those proposals are likely to go ahead, firms taking advantage of the transitional regime for non-MiFID business, and that wish to do business on a different basis to the automatic provisions set out here in the mapping table after the transitional period ends, must apply for a VOP no later than 1 January 2008 to ensure the application is determined before 1 July 2008.

In summary

- Treasury legislation will automatically map customer type limitations on firms' permissions to the new MiFID-based categories from 1 November 2007.
- If you wish to provide investment services, as part of your MiFID business, to a category of clients and this is not provided for in the map, you should apply for a variation of permission as soon as possible if you have not done so already.
- If you wish to carry on non-MiFID business after 1 July 2008 in relation to a category of clients not included in your mapped permission, you should apply for a variation of permission by 1 January 2008.

6 Passporting

Introduction

The main legislative development since the publication of the May PNG relates to the transitional provisions on incoming EEA investment firms' ISD notifications. In essence, the effect of these provisions is to treat the ISD notifications as having been made in relation to the corresponding MiFID investment services, activities, financial instruments etc. without firms needing to notify us again.

Overview

The Treasury has now made transitional legislation¹⁵ which broadly enables an EEA investment firm to continue to provide the same investment services in the UK on and after 1 November 2007, without the need for the firm or its home state regulator to notify us¹⁶.

Under Treasury legislation, we will treat any ISD passport notification as relating to the corresponding MiFID equivalent, as set out in Tables 1 to 4 of Annex 2 to the May PNG. This is subject to one exception – where we have received a notification in relation to the non-core service of investment advice, this is treated as corresponding to the new investment service of investment advice but not the ancillary service of investment research. The mapping will not apply where it conflicts with any law in your home member state.

If you wish to widen your existing passports to cover new areas of MiFID scope, you should ensure your home state competent authority notifies us accordingly. More generally, your ability to do this and the ability of your home state regulator to make the relevant notifications to us may depend upon whether your member state has completed transposition of MiFID. The new elements of the MiFID passport for investment firms were indicated in the May PNG at Annex 2 Table 4 and include:

- operating a multilateral trading facility (A8);

15 See the Financial Services and Markets Act 2000 (Markets in Financial Instruments) (Amendment No.2) Regulations 2007 (SI 2007 No 2160).

16 For a draft list of the proposed changes to the application of FSA rules to incoming firms, see CP 07/16 Appendix 1 Annex R, SUP 13A, Annex 1G http://www.fsa.gov.uk/pubs/cp/cp07_16.pdf.

- commodity derivatives, credit derivatives and other miscellaneous derivatives (C5-10);
- ancillary service B5 – investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments. This was not indicated in Annex 2 Table 4 because of the different transitional arrangements for UK investment firms in relation to making notifications in respect of ancillary service B5; and
- ancillary service B7 relating to commodity derivatives and C10 derivatives.

As for credit institutions, the new elements of the BCD passport contain these same elements and are set out in Annex 3 Table 7 of the May PNG. If you wish to change the scope of your existing ISD or BCD services or branch passport to include new MiFID investment services, ancillary services or financial instruments, to take effect from 1 November 2007, you should notify your home state regulator so that it can notify us. If you are doing business in the UK using tied agents, you should also consider whether this triggers the need to make a passport notification (see chapter 7).

In summary

- You should consider whether your existing passports are sufficient to meet your ongoing business needs following MiFID implementation (taking into account the maps in May PNG Annexes 2 and 3 and the law of your home member state) and, if they are not, make the appropriate notifications to your home state regulator.
- If you are doing business in the UK using tied agents, you should also consider chapter 7 and decide whether this requires you to make a notification to your home state or others.

7 Tied Agents

Introduction

In our May PNG we explained that MiFID would introduce a regime broadly similar to our existing appointed representative regime, and we set out the actions that UK firms wishing to operate under the MiFID tied agent regime would need to take. We said that we would provide additional material aimed at EEA firms in due course dealing with the use of tied agents for MiFID business.

Overview

We outline below, in high level terms, points you may wish to consider if you are an EEA firm appointing (i) a new UK tied agent or a (ii) a non-UK tied agent doing cross-border services in the UK. There may be other scenarios but they are outside the scope of this guide. More generally, your ability to appoint tied agents and the ability of your home state regulator to make the relevant notifications to us may depend upon whether, and to what extent, your member state has completed transposition of MiFID and likewise the member state in which any relevant tied agent is established.

We also include an update below for UK firms thinking about using tied agents established in other member states.

(i) EEA firm appointing a UK tied agent

If you intend to appoint a UK tied agent, you should consider the following:

- the tied agent needs to be registered on the FSA Register before it starts business on your behalf;
- if you are proposing to use a newly appointed tied agent, you should notify us prior to appointment. Firms should use the appointed representative form for notification of tied agents, which will be available from 1 October 2007¹⁷;
- if you are appointing a tied agent established in the UK, we would consider that this amounts to doing branch business in the UK;
- if you do not currently have a branch in the UK, your home state regulator will need to send us a notice of intention to establish a branch;

17 <http://www.fsa.gov.uk/Pages/doing/regulated/notify/reps/index.shtm1>

- if you already have a branch in the UK and are appointing a tied agent for the first time, your home state regulator will need to inform us of this change in details of your branch and the tied agent can only start business one month after this notice has been given to your home state regulator;
- you will therefore need to liaise with your home state regulator and also comply with any requirements under the law of your home state.

(ii) EEA firm appointing a tied agent to provide cross-border services into the UK

If you intend to appoint a tied agent providing investment services from another member state (including your own) into the UK, for example providing investment advice in relation to MiFID financial instruments from an office located in another EEA state to clients in the UK, you should consider the following:

- the tied agent needs to be registered on the appropriate national register before it starts business on your behalf;
- what is the appropriate register will depend upon where the tied agent is established and whether it is from a member state which allows the appointment of tied agents by its firms;
- where the tied agent is from your own member state, it will need to be registered on your home state's register, and you should contact them directly for the procedure;
- where the tied agent is from another member state and that member state allows tied agents, it will need to be registered on that member state's register, and you should follow that member state's registration procedures, contacting the competent authority directly for the procedure to register tied agents¹⁸;
- if that state does not operate a tied agent regime, then the tied agent will need to be registered on your home member state's register;
- if you have a tied agent providing investment services¹⁹ from another member state into the UK, you will require a cross-border services passport;
- if you do not have a cross-border services passport, you need to give your home state regulator notice of your intention to provide services in the UK and it needs to send a regulator's notice to us before the tied agent can commence business here;
- if you already have a cross-border services passport and intend to use, for the first time, any tied agent to provide services in the UK, you need to notify your home state regulator of this one month before the tied agent provides services in the UK;
- you will therefore need to liaise with your home state regulator and comply with any relevant requirements under the law of your home member state.

¹⁸ A list of EEA competent authorities can be found on the CESR website at <http://www.cesr.eu/index.php?docid+4604>

¹⁹ For these purposes, investment advice (in the form of personal recommendations) and reception and transmission of orders in relation to one or more MiFID financial instruments.

(iii) UK firms using EEA tied agents

In our May PNG we said we would aim to provide further material in due course on which member states will register tied agents. At that time, we thought the majority of member states would by now be sufficiently progressed in implementing the directive for us to provide some certainty on which member states are implementing a tied agent regime, but unfortunately this is not the case.

We recommend therefore that firms wishing to use tied agents established in other EEA member states contact that member state's authorities directly for guidance on whether they have or intend to implement a tied agent regime and, if so, the procedure for registration of tied agents. As noted above, a list of EEA competent authorities can be found on the CESR website.

8 Multilateral trading facilities

Introduction

We explained the implications of the new MiFID activity of operating a multilateral trading facility in the May PNG²⁰. In this chapter we set out further matters to be considered.

Overview

As indicated previously, if you are currently an authorised ATS operator and wish to have permission to carry on the new regulated activity of operating a multilateral trading facility, you need take no action as your permission will be updated automatically to include the new activity. However, we would draw two further points to the attention of currently authorised ATS operators.

First, if your ATS activity is currently subject to a customer type limitation (that is private, intermediate or market counterparty), the new activity of operating a multilateral trading facility in your permission will not contain any corresponding client type limitations. However, you will be subject to the trading process requirement in MAR 5.3.1R (implementing articles 14 and 42(3) MiFID) which requires you to have transparent rules which impose criteria for membership of your MTF.

Secondly, you should consider whether the creation of the new activity of operating a multilateral trading facility will mean that your firm's permission will continue to match your business needs after 1 November 2007. As the new MTF activity will mean that activities which may currently correspond to ATS operations (for example, dealing in investments as agent or principal and arranging deals in investments) will cease to apply in relation to MTF activity, you may need to take action to remove these other activities from your permission if you do not require them for other business activities. To remove activities from your permission, you will need to submit a VOP application.

If you engage in marketing and other activities with the aim of bringing new members into membership of the MTF, you may though wish to consider retaining that part of your permission which relates to making arrangements with a view to transactions in investments (article 25(2) RAO).

20 See May PNG, Chapter 7.

9 Approved Persons

Introduction

We indicated in our May PNG that we would be communicating to firms any action that may be necessary before 1 November 2007 in relation to Approved Persons. In this chapter we provide UK and incoming EEA firms with an update on issues relating to approved persons that arise principally from changes to the controlled functions of apportionment and oversight (CF8), EEA business oversight (CF9) and compliance oversight (CF10) as described below.

Overview

UK firms

From 1 November 2007, the responsibility for apportionment and oversight (CF8) will become the collective responsibility of management through the governing functions under the requirements in SYSC 4. As a result of this change, we are consulting in CP 07/16: Consequential Handbook Amendments (arising from implementation of MiFID and creation of NEWCOB) on a proposal to delete the requirement for firms doing MiFID business to have CF8 approved individuals after 1 November 2007. We propose in the CP to remove all such CF8s from the FSA Register shortly after 1 November 2007. Our Policy Statement on the outcome of this consultation will be published in October 2007.

Firms are reminded that from 1 November 2007 a common platform firm must maintain a compliance function (CF10) that enables compliance with its obligations under the regulatory system as per SYSC 6.1.2R. The requirements of the *regulatory system* are those that are derived from legislation – which in broad terms means FSMA, EU Directives and Regulations.

Incoming EEA firms

As we indicated in the May PNG, EEA investment firms that do non-MiFID business may need to continue to apply for controlled functions CF9 (EEA business oversight) and CF10 (Compliance oversight) for individuals undertaking these roles. We will be writing to those existing EEA incoming firms affected with further guidance to assist them to determine whether CF9 and CF10 will still apply to them.

Approved Persons Form A

As a consequence of MiFID and changes to the approved persons regime set out in PS07/3, a new Approved Persons Form A will be available for completion from October 2007. Firms must submit a completed form for all applications requiring approval on or after 1 November 2007. To take account of the different requirements of firms, two versions of Form A will be made available: Form A: UK incorporated & Non-EEA Incoming firms; and Form A: Incoming EEA firms.

These forms will be available from the FSA website at the following link:
<http://www.fsa.gov.uk/Pages/Doing/Regulated/Approved/index.shtml>

Changes to Firms On-Line

As a consequence of the changes to our processes required by MiFID, from 1 November 2007 regulatory transactions forms related to Approved Persons, Waivers and Variations of Permission will no longer be available through Firms On-Line.

We have taken the decision, reluctantly, to 'switch off' these forms and revert to manual submission. The systems concerned are ageing. We are building a new system to permit web-based completion and submission of applications and we expect this to be rolled out in the second half of 2008. It would not therefore be an efficient use of our resources to invest further in existing systems that have a limited life-span.

We do not expect to take any longer to process applications than we do now, and we are determined to meet our published service standards in this respect. The majority of applications we receive at present are completed and submitted manually.

The updated forms will be available for download from our website for manual submission from October 2007.

E.submission of financial returns, such as the RMAR, through Firms On-Line is not affected.

Market failure and cost-benefit analysis

Market failure analysis

The proposal in part I of this paper is to require firms passporting inwards from late-implementing EEA states (including firms with top-up permissions but excluding cross-border business done under RAO exclusions) to comply with certain MiFID requirements. These focus primarily on MiFID conduct of business provisions, closely associated organisational requirements in relation to conflicts of interest and record-keeping, transparency requirements, and requirements that apply specifically to MTFs.

Generally, the main market failure arguments made to support regulation in these areas relate to information asymmetry problems and negative externalities. In this particular case, regulation in these areas will already exist to some extent in late-implementing states, and this will limit the potential for market failures, though the current standards applied may be different to those imposed by MiFID.

Cost benefit analysis

The economic costs and benefits of the proposed temporary rule are likely to be low. The number of inward passporting firms affected by late implementation will vary, depending on how many member states are late implementing, and how late they are. Many firms are located in states which may still meet the 1 November deadline or will miss it by only a few weeks. We expect relatively few states will be significantly late.

The economic benefits of addressing the market failures described above depend on the difference between the regulatory standards imposed by the home state and MiFID standards. We lack information on the level of regulation in late-implementing home states relative to the relevant MiFID provisions.

Incremental costs will not be the overall costs of complying with MiFID which firms will have to incur in any case in due course, but any additional time-pressure related costs. These will depend on the difference between firms' home state and the UK, their preparation for compliance with MiFID provisions and their anticipation of UK regulatory intervention in case of MiFID late-implementation by their home state.

Compatibility with our objectives and the principles of good regulation

Introduction

This Annex sets out our assessment of the compatibility of the consultation proposals in Part I with our general duties under section 2 of FSMA and with the regulatory objectives set out in sections 3 to 6.

Compatibility with our statutory objectives

Our four statutory objectives are set out below, with a description of how we have taken account of them in drawing up our proposals and the accompanying draft Handbook text.

Consumer protection

Our proposals are designed to deliver broadly similar outcomes for consumers, as would have been delivered had all Member States implemented the relevant MiFID requirements on time.

Market confidence

We believe that our proportionate and pragmatic approach to a one-off and temporary problem will assist market confidence by ensuring that cross-border business can continue after 1 November 2007, subject to appropriate safeguards.

Promoting public awareness

We do not believe there is a need for specific measures to promote wider public awareness of our proposals.

Reducing financial crime

We do believe our proposals will give rise to any material increase in the risk of financial crime.

Principles of good regulation

Section 2(3) of FSMA requires that, in carrying out our general functions, we have regard to the specific matters set out below.

The need to use our resources in the most efficient and economic way

The proposed precautionary rule represents the most efficient use of our resources from the options available to us for discharging our regulatory responsibilities. The only viable alternative – imposing restrictions on the permissions of individual firms passporting in from late implementing states – would have been administratively cumbersome and costly.

The responsibilities of those who manage the affairs of authorised persons

Our proposals place responsibility on Boards, Chief Executives and firms' senior management teams for determining how best to ensure compliance with appropriate and relevant standards when conducting cross-border business after 1 November 2007.

The principle that a burden or restriction which is imposed on a person, or on the carrying out of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction

We have conducted a high-level CBA to help develop our proposals and inform this consultation, and do not believe the costs are disproportionate to the benefits.

The desirability of facilitating innovation in connection with regulated activities

Our proposals are unlikely to affect innovation in connection with regulated activities.

The international character of financial services and markets and the desirability of maintaining the competitive position of the United Kingdom

The proposals facilitate continuity of business by requiring passporting firms from late implementing member states to comply with broadly comparable standards as apply to other passporting, and UK, firms. They are likely to affect, temporarily, a small number of inward passporting firms. Incremental costs for these firms will be limited to those arising from earlier compliance with MiFID provisions than would otherwise be the case. Hence, it is unlikely that the proposals will have a material adverse effect on the competitive position of the UK.

The need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions

We do not expect the proposals to have material adverse effects on competition.

The desirability of facilitating competition between those who are subject to any form of regulation by the FSA

We have had regard to the possible impacts on competition and believe the proposals should help maintain parity of treatment for firms that currently carry on cross-border business lawfully in the UK.

Acting in a way which we consider most appropriate for the purpose of meeting our statutory objectives

We believe that the proposals are the most appropriate for discharging our regulatory responsibilities in light of the potential delay in implementation of MiFID by some member states. They are proportionate in their focus on the most significant risks to consumer protection and in their application only where comparable consumer protection standards do not already exist in those states.

PRECAUTIONARY MEASURES (MiFID) INSTRUMENT 2007

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 ("the Act"):
- (1) section 138 (General rule-making power);
 - (2) section 156 (General supplementary powers);
 - (3) section 157(1) (Guidance); and
 - (4) the other powers and related provisions listed in Schedule 4 (Powers exercised) to the General Provisions of the Handbook.
- B. The rule-making powers referred to above are specified for the purpose of section 153(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 1 November 2007.

Amendments to the Handbook

- D. The Supervision manual (SUP) is amended in accordance with the Annex to this instrument.

Citation

- E. This instrument may be cited as the Precautionary Measures (MiFID) Instrument 2007.

By order of the Board
[25 October 2007]

Annex

Amendments to the Supervision manual (SUP)

In this Annex, the entire text is new and is not underlined.

After SUP 13A.8, insert the following new section.

13A.9 The precautionary measure rule for incoming EEA firms

Application

- 13A.9.1 R (1) The precautionary measure rule (SUP 13A.9.2R) applies to an *incoming EEA firm* which:
- (a) is authorised by a *home state regulator* with respect to its *MiFID business*; or
 - (b) has a *top-up permission* which covers *MiFID business*;
- but which is not subject to provisions adopted by the *Home State* which transpose, in full, *MiFID* or the *MiFID implementing Directive*.
- (2) The precautionary measure rule applies:
- (a) with respect to the *regulated activities* carried on by the *firm* in the *United Kingdom*; and
 - (b) to the extent that the *firm* is not subject to provisions which are comparable to provisions transposing *MiFID* or the *MiFID implementing Directive*.
- (3) This section (SUP 13A.9) is effective from 1 November 2007 until 31 October 2008.

The precautionary measure rule

- 13A.9.2 R (1) A *firm* must comply with standards which are comparable to those required by the provisions of *MiFID* and the *MiFID implementing Directive* specified in rows (1) and (4) of the table in SUP 13A.9.3R.
- (2) An *MTF* must also comply with standards in row (2).
- (3) The following *firms* must also comply with standards in row (3):
- (a) a *systematic internaliser*;
 - (b) a *firm*, which, either on its own account or on behalf of *clients*, concludes *transactions* in shares *admitted to trading* on a *regulated market* outside a *regulated market* or *MTF* (see MAR 7.1.2R).

13A.9.3 R Table: MiFID provisions for incoming EEA firms

	Articles of MiFID or the MiFID implementing directive
1	Articles 13(3) and (6), 18 to 22 and 24 and Annex II of <i>MiFID</i>
2	Articles 12, 14, 26, 29 and 30 of <i>MiFID</i>
3	Articles 27 and 28 of <i>MiFID</i>
4	All related Articles of <i>MiFID</i> and the <i>MiFID implementing Directive</i>

13A.9.4 E (1) A *firm* should comply with the provisions of the *Handbook* which transpose the provisions of *MiFID* and the *MiFID implementing Directive* referred to in SUP 13A.9.3R (even if they are expressed not to apply to an *incoming EEA firm*).

(2) Compliance with (1) may be relied upon as tending to establish compliance with the precautionary measure rule.

13A.9.5 G (1) The purpose of the precautionary measure rule is to ensure that an *incoming EEA firm* is subject to the standards of *MiFID* and the *MiFID implementing Directive* to the extent that the *Home State* has not transposed *MiFID* or the *MiFID implementing Directive* by 1 November 2007. It is to ‘fill a gap’.

(2) The *rule* is made in the light of the duty of the *United Kingdom* under Article 62 of *MiFID* to adopt precautionary measures to protect investors.

(3) The *rule* will be effective for 12 months only; it reflects the scope of the *Regulated Activities Order* (including, for example, the overseas persons exclusion); and it allows for the possibility of a partial transposition by the *Home State*.

(4) An indication of the *Handbook* provisions which transpose *MiFID* and the *MiFID implementing Directive* can be found in the websites [Treasury transposition table \(MiFID\)](#) and the [Treasury transposition table \(MiFID implementing directive\)](#). For the purposes of the precautionary measure rule, the principal provisions are the *rules* in *COBS* (including in particular those relating to inducements in *COBS* 2.3) and the conflicts and record keeping provisions in *SYSC*.

(5) The provisions applying to an *incoming EEA firm* are set out in SUP 13A Annex 1G. The effect of SUP 13A.9.4E(1) is that some of the provisions which are expressed as not applying may need to be applied by a *firm* in order to meet a *MiFID* standard.



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