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REGULATORY INTELLIGENCE

Reverse solicitation: a shot across the bow

Published 10-Feb-2021 by
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On January 13, 2021 the European Securities and Markets Authority (ESMA) issued a public statement (statement) which was billed as a reminder to firms of the Markets in Financial Instruments Directive II (MiFID II) rules on reverse solicitation. There is nothing new or particularly surprising contained in ESMA's statement, but it has caused considerable consternation to some firms in the UK market.

The UK exited the Brexit transition period on December 31, 2020 and from that time firms based in the United Kingdom are third-country firms and can no longer access the EU market on the basis of the MiFID II passports which they had enjoyed while the UK was a member of the EU. Firms in the United Kingdom have therefore had to find alternative ways in which to access the European markets in future. For some, that has involved establishing a physical presence within the EU (or expanding an existing presence). For others it has involved some navel gazing to determine to what extent the European market is significant for the business. Some have resolved that they can serve their EU clients on the basis of reverse solicitation.

The statement's main principles

The statement reiterates the following broad principles:

- Under Article 42 of MiFID II, where a firm provides investment services at the own exclusive initiative of a retail client or "elective" professional client, the firm does not trigger the authorisation requirement (including establishment of a branch) under Article 39 of MiFID II.
- Where a third-country firm provides services at the own exclusive initiative of the client under Article 42, the firm is not able to market additional categories of products or services to that client.
- Firms should be mindful of and follow the guidance set out in ESMA's Q&As on MiFID II and Markets in Financial Instruments Regulations (MiFIR) investor protection and intermediaries topics (ESMA Q&A) in relation to the application of the concept of "own exclusive initiative".
- Where a third-country firm solicits clients or potential clients or promotes or advertises investment services or activities in the EU, such services cannot be deemed to be provided at the own exclusive initiative of the client. This is true regardless of any contractual clause or disclaimer purporting the opposite (Recital 111 of MiFID II).

In the statement, ESMA claims that: "… some questionable practices by firms around reverse solicitation have emerged. For example, some firms appear to be trying to circumvent MiFID II requirements by including general clauses in the terms of business or through the use of online pop-up "I agree" boxes whereby clients state that any transaction is executed on the exclusive initiative of the client".

ESMA has already provided significant guidance in the ESMA Q&As in relation to the application of the concept of "own exclusive initiative" for the purposes of Article 42 of MiFID II. That guidance is unchanged by the occurrence of Brexit and applies equally to firms in the UK as it does to firms in any other third country. That guidance, in particular, refers to the fact that ESMA considers that every communication means such as press releases, advertising on the internet, brochures, telephone calls or face-to-face meetings should be considered to determine whether a (potential) client has been solicited or whether any investment service or financial product has been promoted or advertised.

Reverse solicitation is still a legitmate means of accessing the markets

The statement does not sound the death knell of reverse solicitation as a legitimate means of accessing the EU markets. It does demonstrate however is that ESMA is alive to potential misuse and overuse of reverse solicitation. It is highly likely that this will not be the last that we will hear from ESMA and the EU national competent authorities on this issue. It is clear that the EU will be focused on this issue and we can expect supervisory steps and action to be taken in the event that third-country firms are found to be over-relying upon reverse solicitation in circumstances where the firm has, in fact, solicited the client or advertised or otherwise promoted its investment services in the EU.

The statement does not require firms to take any positive steps or to cease to rely upon reverse solicitation but those firms who are relying upon reverse solicitation would be well-advised to review their arrangements and assess whether (on a client-by-client, transaction-by-transaction basis) they are comfortable with relying upon reverse solicitation. Firms should ensure they have demonstrable evidence to show that the client approached the firm at the client's own exclusive initiative (or at the very least that there is no evidence to the contrary).

Firms should also consider their marketing efforts in the EU. The globally accessible internet poses particular challenges for firms in terms of determining whether their marketing efforts are capable of being viewed in and have effect in particular jurisdictions and even

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more traditional media can cause issues. For example, an advert placed in a German language newspaper is clearly aimed at the German market, whereas an advert placed in the Financial Times is less clear yet potentially has global distribution.

Closing thoughts

The authors note that the statement only mentions the concept of "own exclusive initiative" for the purposes of Article 42 of MiFID II. The concept also applies under Article 46(5) of MiFIR within the third country regime for per se professional clients and eligible counterparties. The MiFIR third-country regime is not yet in operation, but the statement will become relevant to that regime to the extent that equivalency decisions are made in relation to any third-country under Article 47 of MiFIR.

While it is clear that the statement is relevant to firms providing MiFID services on a reverse solicitation basis, a read-across into other regimes is sensible. For example, third-country private fund sponsors admitting investors into alternative investment funds on the basis of reverse solicitation would be well-advised to reconsider whether they have demonstrable evidence that the investor approached the sponsor (or its agent) at its own exclusive initiative since it is highly likely that the European regulators will have a heightened sensitivity on these issues in the coming period.

Complaints Procedure

Produced by Thomson Reuters Accelus Regulatory Intelligence 10-Feb-2021

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