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Additional Information

Level 1 Regulation

Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- Investor Protection and Intermediaries

Topic

Provision of investment services and activities by third country firms

Subject Matter

Initiation at own initiative

Question

Article 42 of MiFID II regulates the provision of services by third country firms at the exclusive initiative of the client. How should “initiates at its own exclusive initiative the provision of an investment service or activity by a third-country firm” be understood in Article 42 of MiFID II?

ESMA Answer

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch 13, question 1]

According to Article 42 of MiFID II, where a retail client or professional client within the meaning of Section II of Annex II established or situated in the Union initiates at its own exclusive initiative the provision of an investment service or activity by a third-country firm, the third country firm is not subject to the requirements under Article 39.

As provided in recital 111, in order to qualify for Article 42 of MiFID II, “where a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client”.

ESMA is of the view that such a solicitation, promotion or advertising should be considered regardless of the person through whom it is issued: the third country firm itself, an entity acting on its behalf or having close links with such third country firm or any other person acting on behalf of such entity.

As for the means of such solicitations, ESMA is of the view that every communication means used such as press releases, advertising on internet, brochures, phone calls or face-to-face meetings should be considered to determine if the client or potential client has been subject to any solicitation, promotion or advertising in the Union on the firm’s investment services or activities or on financial instruments.

Firms are reminded that such clarification is without prejudice to any provisions attached to the marketing of such products.

The client’s own exclusive initiative shall be assessed in concreto on a case by case basis for each investment service or activity provided, regardless of any contractual clause or disclaimer purporting to state, for example, that the third country firm will be deemed to respond to the exclusive initiative of the client.

Such approach should be used for the purpose of Article 46 of MiFIR as well.