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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

New categories of investment products or investment services

Question

How should «new categories of investment products or investment services» within the meaning of Article 42 of MiFID II and Article 46 of MiFIR be understood?

ESMA Answer

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch 13, question 2]

To determine the categories of investment services for the purpose of Article 42 of MiFID II and Article 46 of MiFIR, ESMA is of the view that a third-country firm provides a new investment service or investment activity as defined in Section A of Annex I of MiFID II where this service or activity is added to the existing services or activities after 3 January 2018.

Investment products include financial instruments set out in Section C of Annex I of MiFID II and structured deposits as defined in Article 4(1) point 43) of MiFID II. ESMA is of the view that any investment product which is the subject of the investment service or activity provided by a third-country firm to a client after 3 January 2018 is a new investment product.

Under the reverse solicitation regime, a third-country firm cannot market new categories of investment products to the client. Whether a third-country firm markets a new category of an investment product needs to be assessed on a case-by-case basis, taking into account elements such as (i) the type of the financial instrument which is offered; (ii) the distinction between complex and non-complex products as referred to in Article 25(4) of MiFID II; (iii) the riskiness of the product. For example, a subordinated bond does not belong to the same category as a plain-vanilla debt instrument. In addition, categories of investment products should be granular enough to ensure that the reverse solicitation is not used as a way of circumventing a national regime of a Member State governing the provision of investment services by a third-country firm.

As an example, if a third-country firm has been providing investment advice to a client prior to 3 January 2018 under the national regime of a Member State governing the provision of investment services by third-country firms, the third-country firm will not be entitled to continue providing investment advice - without complying with Article 39 of MiFID II and 46 of MiFIR – in relation to an investment product other than those that belong to the same category on which the investment advice was provided prior to 3 January 2018 [new products]. This is without prejudice to any more restrictive approach adopted at national level regarding the transition to the MiFID II third-country regime. Reverse solicitation should not be assumed. Third-country firms should be able to provide records tracking the relationship with the client and in particular whether the client has taken the initiative to receive

investment advice with respect to a new product.