

## MiFID II/ MIFIR and Asset Management In a nutshell



## MiFID II/ MIFIR and Asset Management

With less than 12 months until MiFID II/MiFIR transitions from an implementation project to the way of life, understanding how your business will be impacted is of the utmost importance. Changes may be required in order to comply with requirements that have been placed on you directly by the UK implementation of MiFID II and direct effect of MiFIR, but there may also be indirect impacts owing to the changes your counterparties are required to make by virtue of their own MiFID II/MiFIR obligations.

### Asset Managers

MiFID II, along with other pieces of EU legislation, differentiates between AIFMs, CIS operators and UCITS managers who offer collective portfolio management and MiFID investment firms that provide individual portfolio management.

Generally, AIFMs, CIS operators and UCITS managers are exempt from MiFID II (as they are subject to their own specific regulation); however, if AIFMs and UCITS Managers perform certain 'top-up' MiFID activities they will be subject to certain MiFID II requirements but only in relation to such MiFID business. For other investment managers, who are not AIFMs and UCITS managers, MiFID II will apply in full.

### What should I be doing to prepare for 3 January 2018?

There are a broad range of new and enhanced requirements placed upon asset managers under MiFID II and MiFIR. It's important that asset managers understand how this will impact the internal processes and procedures as well as how this will impact the way they do business. Further, for those managers operating in other Member States, it is important to seek clarity on if local transposition will be gold-plated, as has been in the case in the UK.

Please speak with your usual Linklaters contact if you wish to discuss.

### UK Goldplating

As MiFID II is a directive, it requires transposition into local law within each Member State. This can lead to enhancements being made by Member States. The Financial Conduct Authority (FCA) has proposed to do this for certain requirements a number of which were set out in the FCA's third Consultation Paper on MiFID II implementation (CP16/29) of September 2016 and which are summarised in Diagram 1.

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They have the best contentious regulatory team in the City - if it's anything serious I want them to be acting for me.

Chambers UK 2017,  
Financial services: UK

Diagram 1



## Some of the key areas for Asset Managers to consider



### Inducements and payment for research

Article 24 MiFID II prohibits investment firms providing portfolio management services, or investment advice on an independent basis, from accepting fees, commission or any monetary or non-monetary benefits from third parties in relation to the provision of services to clients. This includes research.

Research may only be received if its paid:

- > by the investment firm itself; or
- > from a separate research payment account ("RPA") funded by a specific research charge to the client.



### Transaction Reporting

MiFIR broadens the transaction reporting requirements, not only in relation to what information needs to be detailed in the report but also the scope of financial instruments that need to be reported and the events that trigger the requirement to report.

Article 26(1) MiFIR requires a transaction report to be made where an investment firm "executes" a "transaction". What amounts to execution for these purposes

is broad and includes, amongst other activities, the receipt and transmission of orders. A transaction is defined as the "acquisition, disposal or modification of a reportable financial instrument" and is therefore broader in scope than the traditional definition of transaction.

The so-called portfolio manager exemption that enabled portfolio managers to rely on EU firms to report on their behalf, is no longer available.

There is a limited exemption for firms "transmitting orders" to rely upon the executing broker; however, this is subject to a number of requirements including the need for a transmission agreement to be in place between them. Portfolio managers are not prohibited from delegating transaction reporting to a third party but they will remain responsible for complying with their regulatory responsibility.



### Best Execution

Under MiFID II, investment firms, when executing client orders, must take "all sufficient steps" to obtain best execution, under MiFID I firms had to take "all reasonable steps", meaning a high compliance standard is now required.

Further, pursuant to Article 24(6) MiFID II firms who execute client orders to report top 5 execution venues in terms of trading volume and on quality of execution received.

The FCA have proposed to extend these requirements to AIFMs and UCITS managers.



## Product governance

Articles 16(3) and 24(2) MiFID II introduce detail the new product governance requirements, that form part of the larger MiFID II investor protection package. The requirements apply to MiFID investment firms that “manufacture” financial instruments and/

or “distribute” financial instruments or services to clients and apply irrespective of the clients’ categorisation.

The product governance requirements will not apply to AIFMs or UCITS managers when managing or marketing

their funds, but an investment firm that is marketing or distributing an AIF or a UCITS fund on the manager’s behalf will be subject to these rules, meaning there will likely be some indirect consequences.



## Taping

Article 16(7) MiFID II requires firms to record telephone conversations or electronic communications relating to, at least, transactions concluded when dealing on own account and the provision of client order services that relate to the reception, transmission and execution of client orders. Such communications must be kept for five years.

The FCA are proposing to impose the requirements on a wider range of activities than required under MiFID II, to include:

> the service of portfolio management, including removing the current qualified exemption for discretionary investment managers; and

> the activities of collective portfolio managers (full-scope UK AIFMs, small authorised UK AIFMs and residual CIS operators, incoming EEA AIFM branches and UCITS management companies).



## Trading

As part of the broader agenda to bring transparency to the market, MiFID II and MiFIR introduce both mandatory trading obligations for shares and certain derivative contracts and a new type

of trading venue, an organised trading facility or “OTF” (a new non-equity multilateral trading system).

MiFID II, MiFIR, related legislation and guidance provide further guidance on

what amounts to a multilateral trading system, which will require firms, including portfolio managers, to reconsider the categorisation of their trading systems.



## Post-trade transparency

The volume, price and the conclusion time of transactions, in both equity and non-equity instruments (that are traded on a trading venue), are required to be publicly reported once per transaction. Where such transactions are entered into by two investment firms over-the-counter (OTC) transactions, it is the systematic internaliser (SI) or, if neither party are an SI, the seller’s responsibility to report.

Where asset managers are trading with EU investment firms, it will predominantly be the case that the asset manager will be the buyer and therefore can rely on their counterparty to perform the post-trade transparency. However, where an asset manager is:

> transacting with a non-EU counterparty, it will be the asset manager’s responsibility to

ensure post-trade transparency takes place; or

> involved agency cross-trades (acting on behalf of both transaction parties, and thus a seller),

the asset manager will be responsible for post-trade publication.

## Key contacts



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Their regulatory group is extremely responsive, cognisant of regulatory initiatives and always gives practical advice.

**Chambers UK 2016,**  
Financial services: UK

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