

MEMO# 32233

February 24, 2020

ESMA Consultation on the New MiFID II and MiFIR Regimes for Third Country Firms

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February 24, 2020 TO: ICI Global Members SUBJECTS: International/Global MiFID, EMIR, AIFMD, UCITS V RE: ESMA Consultation on the New MiFID II and MiFIR Regimes for Third Country Firms

On January 31, 2020, the European Securities and Markets Authority (ESMA) launched a consultation on draft technical standards on the provision of investment services and activities in the EU by third-country firms under Directive 2014/65/EU (MiFID II) and Regulation (EU) No 600/2014 (MiFIR).[\[1\]](#) The term “third-country firms” refers to firms that are established outside of the European Union (EU). Comments are due to ESMA by March 31, 2020.

ESMA expects to publish the draft technical standards and send its final report to the European Commission for endorsement in Q3 2020.

Background

Under MiFIR Article 46, third-country firms are permitted to provide investment services and activities to eligible counterparties and per se professional clients if they are registered in the register of third-country firms held by ESMA. The MiFIR third-country regime has not yet been triggered, as the European Commission has not issued an equivalence decision for a third-country jurisdiction, which is required for a firm to register.

Under MiFID II Article 39, third-country firms are permitted to provide investment services and activities to retail and professional clients through a branch established in an EU Member State. Such a branch remains under the exclusive supervisory responsibility of the Member State competent authority where it has been authorized.

The recently adopted Investment Firms Regulation (EU) No 2019/2033 (IFR) and Directive (EU) 2019/2034 (IFD) introduced changes to the existing MiFIR and MiFID II regimes for the provision of investment services and activities in the EU by third-country firms. Under the revised framework, third-country firms providing investment services and activities in the EU in accordance with Article 46 of MiFIR will be required to report, on an annual basis, detailed information to ESMA on their activities in the EU, including information about the scale and scope of such activities, specific figures regarding their dealing on own account

and underwriting and placing activities, the turnover and aggregated value of the assets corresponding to their activities in the EU, their investor protection and risk management arrangements, their governance arrangements and any other information necessary to enable ESMA or the competent authorities to carry out their tasks in accordance with MiFIR. In addition, ESMA is given the power to ask third country firms that are registered with it to provide: (1) any further information in respect of their operations (where necessary for the accomplishment of the tasks of ESMA or the competent authorities in accordance with MiFIR); and (2) the data relating to all orders and all transactions in the EU, whether on own account or on behalf of a client, for a period of five years. Lastly, ESMA now has the power to temporarily prohibit or restrict the provision of investment services or activities in the EU by a third-country firm under Article 46 of MiFIR where (1) the third-country firm has failed to comply with product intervention measures taken by ESMA or the European Banking Authority or the competent authorities of a Member State, or (2) the third-country firm has failed to comply with its annual reporting obligations to ESMA or with a request for information from ESMA, or (3) the third-country firm has not cooperated with an investigation or an on-site inspection carried out by ESMA in accordance with Article 47(2) of MiFIR.

Proposed Technical Standards

ESMA is mandated by the IFR and the IFD to develop draft technical standards setting out the functioning of this new regime. Specifically, in accordance with Article 46(7) and (8) of MiFIR, ESMA is tasked with developing:

- Draft regulatory technical standards to specify the information that third-country firms must provide to ESMA for the registration in the ESMA register of third-country firms and for the information that third-country firms have to report annually to ESMA;
- Draft implementing technical standards to specify the format in which the information for the registration of the firm and for the annual report to ESMA should be submitted.

In addition, in accordance with Article 41(5) of MiFID II, ESMA is tasked with developing:

- Draft implementing technical standards to specify the format in which the new flow of information provided by MiFID II is to be reported to NCAs by branches of third-country firms.

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endnotes

[1] The Consultation is *available at* <https://www.esma.europa.eu/press-news/esma-news/esma-consults-new-mifir-and-mifid-ii-regimes-third-country-firms>.

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