INVESTMENT COMPANY INSTITUTE

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ESMA Statement on the Impact of Brexit on the MiFIR Share Trading Obligation

[31686]

March 29, 2019 TO: Equity Markets Advisory Committee
ICI Global Trading & Markets Committee RE: ESMA Statement on the Impact of Brexit on the MiFIR Share Trading Obligation

The European Securities and Markets Authority (ESMA) recently issued a statement outlining the approach it will take to the share trading obligation in Article 23 of the Markets in Financial Instruments Regulation (MiFIR) in the event of a no-deal Brexit and in the absence of an equivalence decision by the European Commission with respect to UK trading venues.[1] The UK's Financial Conduct Authority (FCA) issued a separate statement expressing their concerns with ESMA's approach.[2] Both statements are summarized below.

Regulated funds may wish to consider whether these statements, particularly the ESMA Statement, will affect the ability of a fund or its execution partners to access liquidity offered on non-EU trading venues.

Share Trading Obligation

Article 23 of MiFIR requires an investment firm to ensure that its trades in shares that are admitted to trading on a regulated market or traded on an EU trading venue take place on a: (1) regulated market; (2) multilateral trading facility; (3) systematic internalizer; or (4) third-country trading venue assessed as equivalent by the European Commission. This share trading obligation does not apply, however, to shares that are traded in the European Union on a "non-systematic, ad-hoc, irregular and infrequent" basis.

ESMA Interpretation of the Share Trading Obligation in a No-Deal Brexit

In an effort to "provide clarity" and "mitigate adverse effects" of a no-deal Brexit, the ESMA Statement provides that, in the event of a no-deal Brexit and in the absence of an equivalence decision by the European Commission with respect to UK trading venues, trades in shares that are admitted to trading on regulated markets in the European Union and United Kingdom, or traded on trading venues in the European Union and United Kingdom, will be:

1. characterized by ESMA as non-systematic, ad-hoc, irregular, and infrequent in the EU27 if such shares have an International Securities Identification Number (ISIN) that begins with “GB” (“GB Shares”) and do not qualify as liquid in the EU; and
2. considered by ESMA to be within the scope of the EU share trading obligation if such shares have an ISIN that begins with a country code corresponding to an EU27 member state, Iceland, Liechtenstein, or Norway.

For more information about the ISINs included in the EU share trading obligation, market participants should refer to a list published concurrently with the ESMA Statement.[3] According to this list, the following GB Shares will be included in the EU share trading obligation.

ISIN

Description

GB0000566504

BHP Group PLC

GB0007188757

Rio Tinto Ord Shs

GB0007980591

BP Ord Shs

GB0009252882

GlaxoSmithKline Ord Shs

GB0009895292

Astrazeneca Ord Shs

GB0059822006

Dialog Semiconductor PLC Registered Shares LS -,10

GB00B01FLG62

G4S PLC ORD 25P

GB00B03MLX29

ROYAL DUTCH SHELLA

GB00B03MM408

Royal Dutch Shell Ord Shs Class B

GB00B2B0DG97

RELX PLC ORD 14 51/116P

GB00B635TG28

EnQuest PLC

GB00BDCPN049

COCA-COLA EUROPEAN

GB00BDSFG982

TECHNIPFMC

GB00BH4HKS39

Vodafone Group Ord Shs

The ESMA Statement and accompanying list of ISINs that will be subject to the EU share trading obligation make clear that investment firms *must not* assume that all GB Shares necessarily fall outside the scope of the obligation. In the absence of the statement, investment firms might have relied on a November 2017 ESMA Q&A document that provided, in relevant part, that “while the [European] Commission is preparing equivalence decisions for the non-EU jurisdictions whose shares are traded systematically and frequently in the EU, the absence of an equivalence decision taken with respect to a particular third country's trading venue indicates that the Commission has currently no evidence that the EU trading in shares admitted to trading in that third country's regulated markets can be considered as systematic, regular and frequent.”

The ESMA Statement explains that its approach to the application of the share trading obligation in the event of a no-deal Brexit is based on the following four considerations:

1. The share trading obligation in Article 23 of MiFIR applies to all shares traded on an EU trading venue unless the trading is non-systematic, ad-hoc, irregular and infrequent;
2. EU27 shares are deemed to have their main pool of liquidity in the EU27 and are therefore traded in a systematic, deliberate, regular and frequent way in the EU27;
3. GB Shares are deemed to have their main pool of liquidity in the UK and are therefore traded in a non-systematic, ad-hoc, irregular and infrequent way in the EU27;
4. However, GB Shares that qualify as liquid based on trading in the EU27 only, on the basis of 2018 trading volumes excluding UK data, cannot be considered to be traded in a non-systematic, ad-hoc, irregular and infrequent way in the EU27 and are subject to the EU27 trading obligation.

The ESMA Statement notes that ESMA will consider whether to review its approach in light of market developments no later than twelve months following a no-deal Brexit.

The FCA Statement

Following the ESMA Statement, the UK’s FCA issued a statement expressing concern with ESMA’s approach and calling for further dialogue and a more “comprehensive and coordinated approach” to the application of share trading obligations. The FCA Statement explains that the onshoring of EU legislation in preparation for Brexit means that the United Kingdom also will have a share trading obligation. If the United Kingdom were to apply the same approach as ESMA to its onshored share trading obligation, firms would be subject to overlapping obligations that could disrupt market liquidity and reduce execution quality.

The FCA states that it “stands ready to engage constructively with ESMA and other European authorities” to avoid this result.

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endnotes

[1] ESMA Public Statement on the Impact of Brexit on the trading obligation for shares (Article 23 of MiFIR) (Mar. 19, 2019) (the “ESMA Statement”), *available at* https://www.esma.europa.eu/press-news/esma-news/esma%E2%80%99s-application-trading-obligation-shares-following-no-deal-brexit-0.

[2] FCA Statement on share trading obligations (Mar. 19, 2019), *available at* https://www.fca.org.uk/news/statements/fca-statement-share-trading-obligations.

[3] *See* ESMA Share Trading Obligation List of ISINs (Mar. 19, 2019), *available at* https://www.esma.europa.eu/files/stolistofisinsxlsx. The approach set forth in the ESMA Statement will also apply to shares that are admitted to trade, or are traded for the first time, after January 1, 2019. The application of the EU share trading obligation to shares that are not on the published list will continue to be determined in accordance with previous ESMA guidance and applicable equivalence decisions by the European Commission.