INVESTMENT COMPANY INSTITUTE

MEMO# 31792

June 7, 2019

ESMA Issues Revised Position on MiFIR Share Trading Obligation; FCA Voices Concerns

[31792]

June 7, 2019 TO: Equity Markets Advisory Committee
ICI Global Trading & Markets Committee RE: ESMA Issues Revised Position on MiFIR Share Trading Obligation; FCA Voices Concerns

As previously reported, the European Securities and Markets Authority (ESMA) has outlined how the share trading obligation in Article 23 of the Markets in Financial Instruments Regulation (MiFIR) would apply 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] ESMA recently announced that it has "further considered" the application of the share trading obligation and issued a new statement setting out a revised interpretation of the obligation.[2] The UK's Financial Conduct Authority (FCA) promptly issued a statement raising concerns with ESMA's revised approach.[3] This memorandum provides background on the share trading obligation and ESMA's prior interpretation of the obligation and summarizes the latest statements made by ESMA and the FCA regarding this issue.

Background on the Share Trading Obligation and ESMA's Prior Position

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.[4]

On March 19, 2019,[5] ESMA stated that, in the event of a no-deal Brexit and in the absence of an equivalence decision in respect of UK trading venues, the share trading obligation would apply to: (1) all shares having an ISIN that begins with a country code corresponding to an EU27 member state, Iceland, Lichtenstein, or Norway; and (2) certain shares with a UK ISIN that ESMA deemed to be liquid in the EU27. As a practical matter, this interpretation would have applied the MiFIR share trading obligation to 14 UK share listings, at least initially.

In response, the FCA issued a statement raising concerns with ESMA's approach and calling for further dialogue on the application of share trading obligations.[6]

ESMA's Revised Approach to the Share Trading Obligation in a No-Deal Brexit

On May 29, 2019, ESMA released a public statement designed "to further mitigate potential adverse effects" that could have arisen from its March 19, 2019 statement on the application of the share trading obligation.[7] The new statement provides that MiFIR's share trading obligation will apply based on a share's ISIN.

Accordingly, in the event of a no-deal Brexit and in the absence of an equivalence decision with respect to UK trading venues, MiFIR's share trading obligation *will apply* to shares having an ISIN that starts with a country code corresponding to an EU27 member state, Iceland, Lichtenstein, or Norway. The obligation *will not apply* to shares that have a GB ISIN.[8]

FCA's Concerns with ESMA's Approach

The FCA promptly raised concerns with ESMA's revised approach. The FCA argued that applying MiFIR's share trading obligation to all shares issued by EU-based firms would still cause disruptions to investors, some issuers, and other market participants, because some shares with EU ISINs are most liquid on UK trading venues. The FCA also criticized the ISIN-based approach for not mitigating the risk that the UK and MiFIR share trading obligations could conflict.[9]

The FCA stated that a system of reciprocal equivalence for UK and EU trading venues "remains the best way of dealing with overlapping share trading obligations."[10] In the absence of reciprocal equivalence, the FCA recommended that the UK and EU apply their respective share trading obligations "in a way that maintains the status quo for a limited period of time after [Br]exit."[11]

The FCA also stated that it will consider its approach to the implementation of any UK share trading obligation that is needed in the event of a no-deal Brexit. The FCA will set out its approach, including its expectation of how firms can comply with applicable requirements, "if it is clear that there will be a no-deal [Br]exit."[12]

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endnotes

[1] *See* ESMA public statement on the impact of Brexit on the trading obligation for shares (Article 23 of MiFIR) (Mar. 19, 2019), *available at* https://www.esma.europa.eu/sites/default/files/library/esma70-155-7329_public_statement_trading_obligation_shares.pdf.

[2] *See* ESMA public statement on the impact of Brexit on the trading obligation for shares (Article 23 of MiFIR) (May 29, 2019), *available at* https://www.esma.europa.eu/sites/default/files/library/esma70-154-1204_revised_public_statement_trading_obligation_shares.pdf.

[3] *See* FCA update on share trading obligations (May 29, 2019), *available at* https://www.fca.org.uk/news/statements/fca-update-share-trading-obligations.

[4] Article 23 of MiFIR, full text *available at* https://www.esma.europa.eu/databases-library/interactive-single-rulebook/clone-mifir/article-23.

[5] *See* ESMA public statement from March 19, 2019, *supra* note 1.

[6] *See* ICI Global Memo No. 31686, *available at* https://www.iciglobal.org/iciglobal/pubs/memos/ci.memo31686.global.

[7] *See* ESMA public statement, *supra* note 2.

[8] The statement also provides that the application of MiFIR's trading obligation to shares with other ISINs (*e.g.*, shares with Swiss ISINs) "should continue to be determined taking into account the previous ESMA guidance, published on 13 November 2017." *See* ESMA Statement at 2 (hyperlink supplied).

[9] *See* FCA update on share trading obligations, *supra* note 3, further noting that the FCA considers that "the risk of disruption from potentially conflicting EU27 and UK [share trading obligations] is not mitigated by the revised ESMA approach given that article 23 of the onshored MIFIR implies overlapping obligations for firms."

[10] *Id.*

[11] *Id.*

[12] *Id.*