WALKERS

Global Legal and Professional Services

Irish MiFID II Implementation - Help for Collateral Managers

Sept 2017

Introduction

As detailed in Walkers MiFID implementation updated (available here), the European Union (Markets in Financial Instruments) Regulations 2017 (S.I. 375/2017) (the "MiFID II Regulations") have now been signed into Irish law and will come into operation on 3 January 2018.

The Department of Finance has previously indicated to the market in its national discretions feedback statement that Ireland will be largely adopting a copy-out approach when implementing MiFID II. Our previous client briefing on this feedback statement is available here.

One key aspect of the MiFID II Regulations that is likely to be of considerable comfort to collateral managers based both in the UK and outside the EEA is the retention (albeit in somewhat limited form) of the current Irish MiFID I "safe harbour" exemption for third country firms.

The Current MiFID I "Safe Harbour"

Currently, under the MiFID I regime that will be in place until 3 January 2018, there is a generous exemption (the "MiFID I Safe Harbour") for third country investment firms. The MiFID I Safe Harbour is somewhat similar to, but broader than, the UK's 'overseas persons' exemption.

The MiFID I Safe Harbour provides that third country headquartered firms that:

(a) do not have a branch in Ireland; and

(b) only provide services to corporates (i.e. non-natural persons),

will not be held to be "operating in Ireland" and are therefore exempt from MiFID I licencing requirements.

The MiFID II Safe Harbour

The MiFID II Regulations replicate, in a somewhat limited format, the existing Safe Harbour contained in the current Irish legislation that implements MiFID I.

In summary, the MiFID II Safe Harbour exemption from Irish licencing and conduct of business rules can be availed of by a non-EEA headquartered firm that:

(a) has no branch in Ireland; and

(b) only provides services to professional clients and/or eligible counterparties (as defined in the MiFID II Regulations) in Ireland.

Provided that the above conditions are met, the relevant firm will be exempt from licencing or conduct of business requirements under the MiFID II Regulations[1].

This is somewhat narrower in scope that the MiFID I Safe Harbour - e.g. firms providing services to retail and opt-up professional clients will be outside of scope of the MiFID II Safe Harbour, where they may have been in scope previously.

Notwithstanding the somewhat restricted scope, confirmation of the MiFID II Safe Harbour is a helpful development, particularly to offset some of the disruption risk of a "hard" or no-deal Brexit, where collateral managers currently 'passporting' the provision of services from the UK to Irish issuers may effectively become 'unregulated' third country firms in early 2019. In these circumstances, the MiFID II Safe Harbour should provide a useful exemption from inadvertently triggering Irish licencing requirements.

Walkers and other industry participants were closely engaged with the Department of Finance on prior to the publication of the MiFID II Regulations on this specific point of implementation.

Summary and Next Steps

Although the retention of the 'safe harbour' exemption is a helpful development, it is not necessarily a panacea for all of the challenges facing UK managers in the event of a hard Brexit - for example, this will not directly address any concerns around the status of UK investment firms with regard to risk retention rules post-Brexit.

Outside of the UK, it would be prudent for non-EEA firms operating on a cross-border basis into Ireland to also closely review the amendments introduced by the MiFID II Regulations. These firms should ensure that the narrower scope of the MiFID II Safe Harbour does not give rise to licensing or other requirements where no such requirements previously existed under MiFID I.

Walkers are advising a number of UK financial service providers on post-Brexit contingency planning and are happy to assist clients with queries around migration and third country access to Ireland.

---

1 Should a firm avail of the formal "equivalence" regime contained in Article 47 of Regulation 600/2014/EU ("MiFIR"), the MiFIR regime will take preference to the Safe Harbour. Certain other restrictions also apply to firms from countries that are deemed as non-cooperative by the Financial Action Task Force and/or are not signatories to the IOSCO Multilateral Memorandum of Understanding concerning consolation and co-operation and the exchange of information.

Key Contacts

If you have any queries on the above or would like to discuss in more detail please do not hesitate to contact us or your regular Walkers contact.

Eoin O'Connor
Partner, Regulatory & Compliance
T: +353 1 470 6664
E: eoin.oconnor@walkersglobal.com

Garry Ferguson
Partner, Finance and Capital Markets
T: +353 1 470 6659
E: garry.ferguson@walkersglobal.com

Noeleen Ruddy
Partner, Finance and Capital Markets
T: +353 1 470 6650
E: noeleen.ruddy@walkersglobal.com

Andrew Traynor
Partner, Finance and Capital Markets
T: +353 1 470 6632
E: andrew.traynor@walkersglobal.com

Shane Martin
Director, Regulatory & Compliance
T: +353 1 470 6673
E: shane.martin@walkersglobal.com

Kerill O'Shaughnessy
Partner, Investment Funds
T: +353 1 470 6676
E: kerill.o'shaughnessy@walkersglobal.com