Does it Suit Your Investor?
The New European MiFID Template

September 29, 2017

MiFID II introduced a set of new requirements for investment firms as "producers" of investment products and for placement agents as "distributors" of such products. Most of the requirements set forth in MiDIF II are provided in connection with retail clients. However, certain requirements also apply when dealing with professional clients.

Suitability Report

One of these requirements is the so-called "suitability report". MiFID II demands that a suitability report must be provided to a client prior to the conclusion of any transaction recommended by an investment firm (see ESMA's Consultation Paper on Guidelines on certain aspects of the MiFID II suitability requirements dated 13 July 2017). Please note that the investment firm is free to decide the format of the suitability report as long as the necessary information is provided to the client.

A suitability report must address a number of topics, such as the client's investment objectives, specific circumstances, needs, knowledge and experience as well as its attitude to risk and capacity for loss when making an investment. The suitability report to be provided to the client must include an outline of the advice given and how the investment recommendation provided is specifically suitable for this particular client, its objectives and specific needs and circumstances. In other words, the client's particular nature must be taken into account and all material characteristics of the investment in relation to said client must be considered in the suitability report.

EFAMA Template

The European Fund and Asset Management Association (EFAMA) has published a template as to how such a suitability report may look like. The use of the template is free and does not infringe any intellectual property and copyrights.

In this beinformed we wish to focus on item 38 of the EFAMA template which addresses the specific investment needs of certain potential investors, such as German insurance companies and pension schemes.

Documents to beinformed:

- EFAMA European MiFID Template EMT

As stated above, a client's particular objectives, needs and circumstances need to be addressed in the suitability report. Thus, in the case of certain professional clients, such as the aforementioned German insurance companies and pension schemes, any suitability report intended for such group of clients should therefore also address any German regulatory requirements to which such clients are subject. To give an idea of the importance and strictness of these German rules and regulations, one could draw a comparison with US pension and retirement plans subject to the Employee Retirement Income Security Act of 1974 (ERISA). Just as an investment by a US pension plan must satisfy ERISA's requirements, so must any investment by German insurance companies and pension schemes abide by their particular, and potentially very strict, regulatory requirements.

Please note that German insurance companies are subject to the supervision of the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungen, or "BaFin"). As of January 2016, large German insurance companies are now governed by Solvency II, which introduced a new set of rules that include the "prudent person principle". In order to satisfy this principle, German insurance companies must now prepare an internal schedule of investments. This internal schedule replaces the previous Investment Regulation (Anlageverordnung, or "AnlV"). As a result, each German insurance company will now have their own proprietary internal investment schedule. While it is expected that the internal investment schedules of German insurance companies will have some overlapping, it is entirely possible that these various internal investment schedules may have unique requirements that apply only to a particular insurance company. However, as many German insurance companies still use the Investment Regulation as a starting point, we therefore recommend taking the Investment Regulation into account when preparing the suitability report for such clients. German pension schemes, on the other hand, are still subject to the Investment Regulation.

be in touch: Any questions? Please do not hesitate to contact us!

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Examples of Regulatory Requirements

Examples of the regulatory requirements that may apply in an investment by a German insurance company or pension scheme could include the following:

- The investment/investment vehicle may have to be located within a certain jurisdiction, such as one of the OECD member countries;
- the transfer of the interest held may not require third party consent;
- no liability may be imposed on the transferor following the transfer;
- leverage restrictions may be imposed on the investment vehicle;
- the inclusion of the so-called "trustee blocking note" (Treuhändersperrvermerk) in the investment vehicle's constitutive documents;
- the prohibition of distributions-in-kind;
- the provision of annual financial statements and other additional information within a specified timeframe in order to allow the client to fulfil its own reporting requirements in a timely manner.

We have assisted foreign funds with their German investors and their specific regulatory requirements for decades. If you wish to be prepared for MIFID and are willing to follow the non-binding EFAMA MIFiD template to suit the needs of your German investors, please contact us!

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