



MiFID II: Briefing on "advice"

On 11 July 2023, the European Securities and Markets Authority ("ESMA") issued a supervisory briefing on understanding the definition of advice under the Markets in Financial Instruments Directive (Directive 2014/65/2014), ("MiFID II"), (the "Briefing").

Background

Article 29(2) of the ESMA Regulation allows ESMA to encapsulate common supervisory practices in a non-binding briefing. The Briefing updates the CESR Q&A "Understanding the definition of advice under MiFID". It was written in light of the influence that technology has had on modern business models and addresses the provision of recommendations, the presentation of regulated recommendations, perimeter issues around the presentation, and issues regarding the form of communication.

The Definition of Investment Advice

Article 4(4) of MiFID II states that providing investment advice to a client entails providing tailored recommendations concerning transactions regarding financial instruments, subject to exceptions within MiFID II. Firms that do not wish to provide investment advice can inform their clients they cannot avail of this service in line with the ESMA Guidelines on certain aspects of the MiFID appropriateness requirements.

Five key tests for Investment Advice

In determining whether investment advice is being given, firms can use a series of five tests which are outlined in the Briefing.

Firstly, it must be established whether the service offered by the firm constitutes a recommendation under MiFID II. Article 9 of MiFID II Delegated Regulation states that a personal recommendation is made to a person in their capacity as an investor or potential investor or in their capacity as an agent for an investor or a personal investor.

Secondly, it must be ascertained whether the recommendation made relates to one or more

transactions in financial instruments. MiFID II Delegated Regulation states the types of transactions a recommendation could apply to and that even a recommendation not to buy, hold or sell a financial instrument can be considered a personal recommendation for the purposes of investment advice under MiFID II.

Thirdly, the presentation of the recommendation is assessed in terms of suitability. A financial investment can be presented as suitable to a client in both an implicit and explicit way, if the client could be clearly influenced by the presentation of the recommendation, the test is satisfied.

Fourthly, the recommendation given to the client will be examined to ascertain whether it was issued otherwise than exclusively to the public. Article 9 of the MiFID II Delegated Regulation states that a recommendation issued exclusively to the public shall not be considered a personal recommendation.

The fifth and final test questions whether the recommendation is made to a person in their capacity as an investor/potential investor or as an agent for an investor/potential investor. Article 9 of the MiFID II Delegated Regulation details that a recommendation can be made to either an investor/potential investor or an agent for an investor/potential investor. A person acting in this capacity will no doubt be made clear to the firm and the client, however article 54(6) of the MiFID II Delegated Regulation and the ESMA guidelines outline who firms should engage with when providing investment advice.

How can Clerkin Lynch help?

For further detail and guidance in relation to the Briefing, please contact the Clerkin Lynch team.



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