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Other aspects of MiFID II/R implementation in primary markets

Introduction

ICMA continues to focus on other primary market implementation aspects of MiFID II in addition to product governance (see previous article), notably in terms of allocation justification recording, inducements, costs and charges and trade and transaction reporting.

Allocation justification recording (underwriting and placing)

- *Legal basis:* The allocation justification rules arise under MiFID II's general conflict of interest provisions (MiFID II Art. 23 at Level 1), as complemented specifically regarding underwriting and placing (Delegated Regulation 2017/565 Arts. 38-43 and related Recitals 57-59 at Level 2): Delegated Regulation 2017/565 Art. 43 (and related Recital 59) at Level 2 and ESMA's investor protection Q&A (section 6, Q3 of 16 December 2016) at Level 3.
- *Concept:* MiFID firms providing a MiFID placing service to issuers will need to keep a (non-public) written record of a justification for each investor allocation made (which are relevant in the context of over-subscription). However, this does not seemingly need to be literally split out as a separate written rationale for each allocation – for example a collective justification could apply to several allocations. Nonetheless the requirement seems logistically onerous, as well as potentially challenging in terms of compatibility with current swift transaction timelines.
- *Approach:* A potential approach would be for a recorded justification "cascade" of firm allocation policies, initial issuer preferences, general decisions on average allocations and then individual justifications for deviations beyond the average allocation bands.

Inducements/costs and charges

- *Inducements regime legal basis/concept:* The inducements rules arise under MiFID II's provisions on conflict of interest and general principles and information to clients (MiFID II Arts. 23.1/24.9 at Level 1 and Delegated Directive 2017/593 Art. 11 at Level 2). Firms providing MiFID services (eg order reception/transmission to an investor "client") must disclose in advance to their client any fee/commission or non-monetary benefit received, in relation to the client service, from a third party.
- *Costs and charges regime legal basis/concept:* The costs and charges rules arise under MiFID II's provisions on general principles and information to clients (under MiFID II Art. 24.4 and Delegated Regulation 2017/565 Art. 50). Firms must *inter alia* disclose *ex ante* and annually *ex post* the costs and charges relating to the services and financial instruments concerned, also *"encompassing any third party payments"*.
- *Approach:* ICMA is considering what implications for primary markets there may be, including potential overlap between the two regimes.

Trade and transaction reporting

ESMA has specifically stated (September 2015 Final Report paragraph 278) that primary issuance is outside the scope of the (public) "trade" transparency regime (arising under MiFIR Art. 21 at Level 1). ESMA has not similarly stated in relation to (private) "transaction" reporting to regulators (arising under MiFIR Art. 26 at Level 1). Though both concepts are subject to a broadly similar "traded on a trading venue" (TOTV) scope, there is an additional confusing but subsidiary Level 2 reference (RTS22 Delegated Regulation 2017/590 Art. 2.5) to primary market scope. However, any technical difference in approach between underwriters on transaction reporting does not seem to be perceived as challenging in term of syndicate efficacy.

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