



### **THE TROUBLE WITH DEADLINES**

One of the major frustrations in business life is working to deadlines. It must be the same with regulation.

The European Commission has recently ruled out pushing back the scheduled January 2017 implementation date of Markets in Financial Instruments Directive II (MiFID II), despite the short timeline and delays in getting the legislation into place. The original directive was implemented in November 2007, however it was then revised by the European Commission and in April 2014, the European Parliament voted MiFID II through, with implementation set for the beginning of 2017. In March this year, working with TISA and other industry representatives, the FCA published another of its discussion papers on MiFID. We expect this to be followed by a consultation paper in December. TISA has established working groups to help interpret key areas that will affect implementation in financial services distribution and impact advice delivery. The discussion paper said: "MiFID II is being implemented to a challenging legislative timetable, and its provisions will take effect from 3 January 2017." The European Commission has confirmed: "We have no plans to push back [MiFID II] at present. For the time being we will stick to the current planning."

The real issue for all at the moment is uncertainty over the full impact until we get the level of detail needed to start actually writing the system specifications. In the working groups that TISA has been involved in with the FCA it is apparent that because of the time of policy staff taken up by work on the implementation measures, it will be extremely challenging for the regulator to get a consultation paper out by December 2015.

One issue that does seem to have a little more clarity is the indication that advisers will not be required to tape face-to-face conversations under the regulations. This follows the TISA workshops and some detailed questions that had been raised about the taping regime, including concerns around data protection issues. The FCA stated that the requirements on accessibility of the information and monitoring of calls were similar to those that the regulator would expect under its current taping rules. Firms would be expected to respond in a reasonable timeframe to reasonable requests from clients for copies of tapes without a charge, with full detail again, due to be set out in the December consultation paper.

At the recent TISA MiFID seminar, the FCA admitted it had lost the debate in Europe surrounding telephone recordings, as it became known that any firm under the MiFID II rules would be forced to keep five years of telephone recordings.

A major area of concern for advisers and distributors which has arisen from MiFID II is the threat that advisers could be banned from collecting any trail commission for legacy business. Under RDR, previously agreed trail commission is allowed to be paid on pre-RDR investment amounts where products are topped up after 31 December 2012, and on fund switches within a product.

In addition trail commission will also be effectively turned off next April (2016) for advised platform clients, when the two-year sunset clause on legacy payments between fund managers and platforms will expire. However, oncoming regulation from the European Commission, due to come into force in January 2017, could put an end to all trail



paid to IFAs on retail investment business. Currently, there is no provision for grandfathering of legacy business. The implication is that from 3 January 2017 when MiFID arrives, legacy business still having commission paid will have to stop on that date.

The MiFID II directive states: *“It is...appropriate to further restrict the possibility for firms providing the service of investment advice on an independent basis and the service of portfolio management to accept and retain fees, commissions or any monetary and non-monetary benefits from third parties, and particularly from issuers or product providers.”*

Effectively this could mean an end to trail commission to those offering advice on an independent basis. Once again, the immovable deadline is struggling with no technical details released. However, as the regulation stands at the moment, it looks bleak for advisers relying on trail. It will be

contrary to the requirements of MiFID II to continue to accept trail commission. Those business models still predicated on trail also now have a short deadline to change. In addition, it may be difficult to claim clients continuing to pay trail commission is in their or the public's interest. It could happen that there will not be an outright ban on trail commission but it may gradually wither away. The timescales for any clarity on the issue appear vague. The European Commission was meant to report on final technical guidance on MiFID II by this summer, but this is now expected by the end of September or early October. The FCA's discussion paper did not raise the issue of trail commission.

While we look forward to the FCA consultation paper and the eventual Policy statement, the 2017 deadline still remains and is looming large!

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