



What are your MiFID II product governance controls like?

March 2021

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Who should read this briefing document and why is this important?

Readers: product managers, lawyers and compliance teams

Reason: to avoid the possibility of regulatory action and your product being withdrawn from sale it must comply with product governance requirements.

What are the requirements?

There are 6 key requirements:

1. Target market must be correctly identified (and the rationale recorded).
2. Product assessed against the target market to ensure no mis-match.
3. Costs and charges to be compatible with the product type.
4. Product development and internal approval processes are in place including:
 - Regular reviews of the target market to ensure it remains correctly identified; and
 - Ensuring that the returns are in line with expectations as set out in product literature and contractual information (e.g. KIIDs or KIDs).
5. Clear product information – written in a form readily understood by retail client even if target market is institutional or sophisticated.
6. Where products are distributed by third parties there must be:
 - A written agreement between them that ensures that there is cooperation on issues relating to the target market; and
 - A mechanism to ensure the manufacturer receives information from the distributor on the target market to maintain the integrity of the target market assessment.

The end objective is that products are manufactured and sold to suitable investors and deliver good customer outcomes (value for money) and that firms involved in the manufacturing and distribution of products should be able to evidence this through their processes and records of decisions.

What is happening?

ESMA is reviewing whether EU regulators are consistently applying these rules across the EU via a “common supervisory action” (CSA). As the FCA has on-shored EU legislation (see below for more details) the CSA may lead to changes to the FCA’s requirements.

Why should this concern me?

UK Manufacturers / distributors

The UK has now left the EU. However, the FCA’s rules in the Handbook (PROD 3.2) remain in force including the MiFID II product governance requirements. This is because of ‘on-shoring’, the process which amended EU legislation and regulatory requirements so that they work in a UK-only context.

This includes directly applicable EU legislation such as EU Regulations and Decisions that form part of UK law by virtue of the European Union (Withdrawal) Act 2018, now that the Brexit transition period has ended.

Non-UK Manufacturers /Distributors

Within the UK you will have taken steps to ensure that you are correctly regulated as required post Brexit and the Temporary Transitional Power (TTP). **The TTP applies until 31 March 2022.** This means firms and other regulated persons do not generally need to adjust to the changes to their UK regulatory obligations brought about by on-shoring straight away, although there are some exceptions to this. (If your firm is dual regulated please check the PRA approach which differs for its areas of responsibility to ensure that the foregoing is applicable.)

Other considerations

Firms also need to prepare for new requirements to incorporate consideration of sustainability factors into their product governance arrangements by early 2022, and the wider MiFID II review may herald further changes to product governance requirements. Meanwhile, firms need to consider the impact of the pandemic on the investments in their portfolios, and what that means for individual funds and fund investors.

What do I do now?

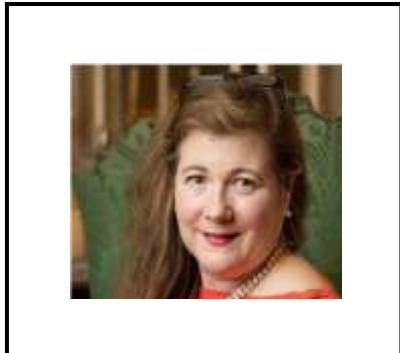
- ⇒ All firms should check that their product manufacturing processes, policies and distribution arrangements meet their regulator's requirements (as they are set out now).
- ⇒ All firms (including UK-domiciled firms in the UK) should keep a watching brief to make sure that the CSA does not lead to any local requirements changing should their local regulator identify any gaps when it compares itself to other regulators.
- ⇒ Those in the UK need to ensure that they are clear on which regulations they are following and whether, if they are a non-UK firm, they have opted to follow the TTP route or go for full regulation.

How can Merlys help?

Merlys can:

- ⇒ undertake reviews of a firm's processes, policies and distribution arrangements to ensure they are currently compliant
- ⇒ advise and revise policies and make any necessary contractual adjustments to existing distribution arrangements to ensure all parties are compliant
- ⇒ assist with "future-proofing" a firm's processes to ensure future compliance
- ⇒ advise more widely on the post-Brexit position particularly for non-UK firms

*This briefing note is intended to act as general guidance and is not intended to offer specific legal advice. Merlys is very happy to assist you with any aspect of the content in this article, as it relates to your business. **Contact us:***



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