



**THE TA FORUM  
DISTANCE COMMUNICATIONS AND THE IMPACT OF MiFID II ON TIMING OBLIGATIONS**

**BACKGROUND**

The Financial Services (Distance Marketing) Regulations 2004 (the Regulations), which gave effect to the European Union's Distance Marketing Directive (No 2002/65/EC), provide protection to consumers of financial services and products by ensuring providers of those services and products disclose sufficient information both before and after the conclusion of a contract.

The Regulations are provided in COBS 5 (Distance Communications) – which has not been amended in any way by MiFID II.

**CLIENT AGREEMENTS**

As a result of the implementation of MiFID II, COBS 8 has been split into COBS 8, which contains the non-MiFID requirements relating to the provision of client agreements, and COBS 8A, containing the MiFID provisions.

It must be noted that COBS 8A requires investment firms to provide the terms of any client agreement for the provision of investment services or ancillary services in good time before a client or potential client is bound by such agreement (COBS 8A.1.5 EU). This differs to the non-MiFID requirements of COBS 8.1.3R, which allows an investment firms (in certain circumstances) to provide the terms of the client agreement after the client is bound by those terms.

**INFORMATION ABOUT THE FIRM & COMPENSATION INFORMATION**

Similarly, prior to MiFID II implementation, an investment firm could in certain circumstances provide information about the firm and compensation information to clients immediately after it began to provide designated investment business.

And while the non-MiFID provisions of the revised COBS 6.1 (COBS 6.1.11R (2)) continue to allow this, there is no similar provision in the new COBS 6.1ZA. In relation to its MiFID business, an investment firm must provide such information in good time before the provision of services to the client, (COBS 6.1ZA.5 EU), even if the agreement was concluded using a means of distance communication.

**INFORMATION ABOUT DESIGNATED INVESTMENTS**

MiFID II has not affected the timing requirements for the provision of product information to consumers. Key Investor Information Documents (KIID) and NURS-KII documents must be provided in good time before a client enters into a contract (COBS 14.2.16R(2)). There is no exception for contracts concluded via distance communication.

It's worth noting that the FCA in January 2018 withdrew the modification by consent available in COBS 14.2 in relation to KIID and NURS-KII documents, whereby firms could in certain circumstances provide pre-sale documentation both for UCITS and NURS post-sale. The withdrawal of the waiver is not related to MiFID II, and the related amendments to COBS in January 2018.

## **SUITABILITY REPORTS**

The Suitability provisions relating to MiFID business are now contained in a new section COBS 9A. The provisions state that when an agreement to buy or sell a financial instrument is concluded using a means of distance communication (COBS 9A.3.2R) , a MiFID investment firm can provide a suitability report immediately after the client is bound by any such agreement (COBS 9A.3.2R), provided that the client has consented to receiving the suitability report without undue delay after the conclusion of the transaction, and the firm has given the client the option of delaying the transaction in order to receive the suitability report in advance.

## **CONCLUSION & REQUIREMENTS**

Transfer Agents should review with the relevant firm the current processes and procedures for communication of client information as required in COBS.

It should be noted that apart from the possibility of providing suitability reports post sale, provision of client agreements, information about the firm, compensation and designated investments, and a general descriptions of the nature and risks of financial instrument, relating to MiFID firms or products must be made pre-sale; there is no exemption relating to contracts concluded via distance communication.