

Information Circular

Markets in Financial Instruments Directive II (“MIFID II”)¹

Removal of own account dealing exemptions

You may find this circular helpful if you are:

- (i) a non-financial entity incorporated or established in a European Union (“EU”) Member State;
- (ii) engaged in the trading of derivatives **other than** commodity derivatives, emissions allowances or emissions allowance derivatives; **or**
- (iii) are engaged in any **high-frequency** algorithmic trading techniques (whether in relation to commodity derivatives or otherwise).

NO ADVICE

Whilst we hope that you find this circular useful, please note that it is for information purposes only and does not constitute legal advice. Accordingly, you are referred to the disclaimer at the end of this circular.

(i) Current position

The first Markets in Financial Instruments Directive (“MIFID I”) exempts persons who do not provide any investment services or activities other than dealing on own account from the requirement to be authorised by their national competent authority (unless they are market makers or deal on own account outside a regulated market or a multilateral trading facility on an organised, frequent and systemic basis by providing a system accessible to third parties in order to engage in dealings with them).

(ii) Position from 3rd January 2018

Article 2(d) of MIFID II will narrow the scope of exemptions that are available from 3rd January 2018. In short, the equivalent exemption will not apply to:

*Persons trading in products **other than** commodity derivatives, emissions allowances or emissions allowance derivatives*

- EU persons who are members or participants of a regulated market or a multilateral trading facility, or who have direct electronic access to a trading venue, except for non-financial entities carrying out hedging activities for themselves or their group;
- EU persons who deal on own account when executing client orders; OR

¹ Directive 2014/65/EU.

Note: the above also means that persons that engage in matched principal dealing will also **not** be able to benefit from any exemption.

*Persons trading in any type of product, **including** commodity derivatives*

- EU persons who apply a high frequency algorithmic trading technique (whether trading in commodity derivatives or otherwise).

(iii) What is meant by “dealing on own account”?

See appendix two.

(iv) What is a “high frequency algorithmic trading technique”?

See appendix two.

(v) What is meant by “direct electronic access”?

See appendix two.

(vi) We are a collective investment undertaking or a pension fund or the depository or manager of such undertakings, are we required to meet the conditions set out in (ii), above, in order to be exempt?

No – see Article 2(d) and (i) of MIFID II.

(vii) I trade in commodity derivatives, emissions allowances or derivatives thereof. Are any other exemptions available in MIFID II?

Yes. The ancillary exemption is available. Please refer to our Information Circular entitled “MIFID II ancillary exemption” at the following location for more information:

<https://www.sucdenfinancial.com/en/about/client-documentation>

(viii) What should I be doing now?

If you believe that you could be caught by the above, then we would recommend that you:

- monitor your NCA’s website for details of its annual notification requirements (you must notify your competent authority if you plan to rely on a exemption); and
- take legal advice if you require any further clarification, or are otherwise unsure about, the contents of this letter.

(ix) Can Sucden Financial help its clients in fulfilling any obligations that they have as a result of the changes that MiFID II is making to this exemption?

Unfortunately, Sucden Financial is unable to provide legal and/or regulatory advice to its clients because it is not authorised to do so.

Appendix One

Useful websites

- MIFID II:
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0065>

Regulatory Technical Standards:
https://ec.europa.eu/info/law/markets-financial-instruments-mifid-ii-directive-2014-65-eu/amending-and-supplementary-acts/implementing-and-delegated-acts_en
- European Securities and Markets Authority's MIFID II page:
<https://www.esma.europa.eu/policy-rules/mifid-ii-and-mifir>
- UK Financial Conduct Authority's ("FCA") MiFID II page:
<https://www.fca.org.uk/markets/mifid-ii>

Specific link to the FCA's Application and notification user guide:
<https://www.fca.org.uk/publication/documents/mifid-ii-application-notification-guide.pdf>
- French Autorité des Marchés Financiers page re: the regulation of commodities (in French):
<http://www.amf-france.org/Reglementation/Dossiers-thematiques/Marches/Matieres-premieres/La-regulation-des-marches-des-matieres-premieres.html>
- German Bundesanstalt für Finanzdienstleistungsaufsicht page:
https://www.bafin.de/DE/Startseite/startseite_node.html

Appendix Two

Excerpts from MIFID II

Please note that you should also consult the relevant Regulatory Technical Standards when examining the below

Recital 23

...Persons dealing on own account when executing client orders or applying a high-frequency algorithmic trading technique should also be covered by the scope of this Directive and should not benefit from any exemption.

Recital 24

Dealing on own account when executing client orders should include firms executing orders from different clients by matching them on a matched principal basis (back-to-back trading), which should be regarded as acting as principal and should be subject to the provisions of this Directive covering both the execution of orders on behalf of clients and dealing on own account.

Recital 50

Since the scope of prudential regulation should be limited to those entities which, by virtue of running a trading book on a professional basis, represent a source of a counterparty risk to other market participants, entities which deal on own account in financial instruments other than commodity derivatives, emission allowances or derivatives thereof, should be excluded from the scope of this Directive provided that they are not market makers, do not deal on own account when executing client orders, are not members or participants of a regulated market or MTF, do not have direct electronic access to a trading venue and do not apply a high-frequency algorithmic trading technique.

Article 2(1) Exemptions

...

(d) persons dealing on own account in financial instruments other than commodity derivatives or emission allowances or derivatives thereof and not providing any other investment services or performing any other investment activities in financial instruments other than commodity derivatives or emission allowances or derivatives thereof unless such persons:

- (i) are market makers;
- (ii) are members of or participants in a regulated market or an MTF or have direct electronic access to a trading venue;
- (iii) apply a high-frequency algorithmic trading technique; or
- (iv) deal on own account when executing client orders;

Persons exempt under points (a), (i) or (j) are not required to meet the conditions laid down in this point in order to be exempt.

Article 4 Definitions

...

(6) **'dealing on own account'** means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments

(40) **'high-frequency algorithmic trading technique'** means an algorithmic trading technique characterised by:

- (a) infrastructure intended to minimise network and other types of latencies, including at least one of the following facilities for algorithmic order entry: co-location, proximity hosting or high-speed direct electronic access;
- (b) system-determination of order initiation, generation, routing or execution without human intervention for individual trades or orders; and
- (c) high message intraday rates which constitute orders, quotes or cancellations;

(41) **'direct electronic access'** means an arrangement where a member or participant or client of a trading venue permits a person to use its trading code so the person can electronically transmit orders relating to a financial instrument directly to the trading venue and includes arrangements which involve the use by a person of the infrastructure of the member or participant or client, or any connecting system provided by the member or participant or client, to transmit the orders (direct market access) and arrangements where such an infrastructure is not used by a person (sponsored access)...

Disclaimer

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