

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

Circular addressed to Investment Firms and Credit Institutions when selling bail-in securities

Background

ESMA has published a [Statement](#) on MiFID practices for firms selling financial instruments subject to the BRRD resolution regime. The under-mentioned Q&As only seek to point out the salient issues of this Statement. Nonetheless, investment firms and credit institutions are urged to consider the Statement in its entirety.

i. What is the BRRD?

The Banking Recovery & Resolution Directive (hereinafter referred to as ‘BRRD’) came into force on 2 July 2014. The main provisions of the BRRD were applicable with effect from 1 January 2015. The BRRD introduces a clear and comprehensive bank recovery and resolution regime that covers both national and cross-border bank failures and provides resolution authorities with a set of resolution tools and powers which may only be used when banks are judged to be failing or likely to fail. The BRRD is part of a package of reforms designed to remove implicit government support and protection for creditors and investors, including retail investors, in bank capital, debt instruments and other unsecured financial instruments issued by banks.

ii. What are the implications of the BRRD on investors?

The above new approach may have implications for investors since resolution may potentially affect any financial instruments of the institution which are not secured by sufficient assets or collateral or which are subject to specific protections under the BRRD. Consequently investors could face full write down or partial loss of their investments in resolution as they will not be able to rely on expectations of ‘bail-outs’ in the event of bank failure. This risk arising from the resolution potentially affects individual investors either directly or via their investment in funds and their pensions.

iii. Who would usually offer financial instruments subject to the resolution regime?

These types of financial instruments are usually offered by the issuing credit institutions and investment firms directly to their own clients or through other group entities to their clients (self-placement).

The new BRRD rules imply that firms are likely to issue a significant amount of potentially loss-bearing instruments to fulfil their prudential obligations.

iv. What is ESMA's response to the implications of the BRRD?

ESMA is concerned that investors, in particular retail investors, are unaware of the risks they may face when buying these instruments. ESMA has published a Statement drawing the attention of banks and investment firms to consider certain measures further to their responsibility to act in their clients' best interests when selling financial instruments issued by entities subject to the BRRD ("bail-in able instruments").

The Statement emphasises that firms must comply with their obligations under MiFID and the importance of:

- Providing investors – existing and new – with up-to-date, complete information drafted under the supervision of the compliance function;
- Managing potential conflicts of interest, in particular, in self-placing scenarios; and
- Ensuring the financial product is suitable and appropriate for the investor, which may entail collecting more in-depth information about the client than usual to reflect the fact a client could lose money without the firm entering into insolvency.

v. What is ESMA's opinion on the treatment of new investors who would like to purchase bail-in financial instruments?

ESMA is of the opinion that clients or potential clients investing in financial instruments subject to the resolution regime should receive accurate disclosures at the point of sale in good time and in any case before clients are bound by any agreement. The Statement elaborates further on the various issues which may need to be disclosed to the client.

vi. What is ESMA's opinion on the treatment of existing investors who have already purchased bail-in financial instruments?

In the case of existing investors (who already hold financial instruments subject to the resolution regime) as well as future notifications to new clients about material changes to information provided at point of sale, ESMA has limited post-sale information to situations in which there is on-going client relationship. The Statement provides examples of scenarios depicting on-going client relationships.

The Statement also indicates the timing of the provision of information relevant to investments in financial instruments subject to the resolution regime.

It also provides further guidance on the provision of portfolio management services and the possibility of investments being made into financial instruments subject to the resolution regime, in the context of this service.

Contacts

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