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Briefing

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MiFID II: Safe Harbour Update

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As mentioned in our briefing last week: MiFID II: Department of Finance publishes Feedback Statement on MiFID II Consultation, the Department has confirmed the approach that the Minister for Finance plans to take under MiFID II when a non-EEA firm provides investment services into Ireland.

To date, the Irish MiFID I framework has included a *'safe harbour'* whereby an investment firm is not regarded as operating in Ireland where:

» its head or registered office is in a non-EU country;

» it has not established a branch in Ireland; and

» it is not providing investment services to Irish individuals (who themselves do not provide investment services on a professional basis).

While the Irish transposing regulations for MiFID II have not yet been published, the Department of Finance has confirmed that:

» ***Retail clients and elected-up professional clients:*** The Minister will exercise the discretion under Article 39 of MiFID II to impose a requirement on non-EEA firms to establish branches where those firms intend to provide investment services to retail clients and elected-up professional clients in Ireland.

» ***Per se professional clients and eligible counterparties:*** Crucially, the Minister will broadly maintain the existing '*safe harbour*' for non-EEA firms providing investment services into Ireland on a cross-border basis to per se professional clients and eligible counterparties.

While the '*safe harbour*' will continue to be available, it will be more limited in scope and will not apply in the following circumstances:

» if the non-EEA firm provides investment services to retail or elected-up professional clients in Ireland (per Article 39 of MiFID II);

» if the non-EEA firm is registered by ESMA in accordance with Article 47 (*Equivalence decision*) of MiFIR, on the basis that the MiFIR third country regime supersedes any national third country regime when the firm is registered by ESMA following an equivalence decision by the

European Commission in respect of its home country. The Department has highlighted that the '*safe harbour*' will still exist for these firms, but under the MiFIR framework (and thereby across the EU) rather than under national law;

» in respect of non-EEA firms whose home country is on the list of non-cooperative jurisdictions maintained by the Financial Action Task Force and who are not subject to authorisation and supervision in respect of the investment services they provide to wholesale clients in Ireland; and

» in respect of non-EEA firms whose home country is not a signatory to the IOSCO Multilateral Memorandum of Understanding concerning consultation and cooperation and the exchange of information.

Many firms rely on the '*safe harbour*', including non-EU brokers, and investment managers providing services to Irish companies, SPVs and funds, so how the '*safe harbour*' and the carve-outs from its application will be reflected in the Irish transposing regulations will need to be reviewed carefully when those regulations are published. In its Feedback Statement, the Department confirmed that it is continuing to work on those regulations, and that work is expected to be completed "*in the coming weeks*".

Firms currently relying on the '*safe harbour*' will have to consider whether they will fall within its amended scope from January 2018 onwards. If they fall outside of the amended scope, amendments to existing transaction structures and relationships will have to be considered. The maintenance of the *'safe harbour'* for non-EU firms (albeit in modified form) is particularly welcome in the context of Brexit, given the number of UK firms that provide investment services into Ireland.

We will publish further updates as the Irish transposition process progresses.