EU Lawmakers May Delay MiFID 2 Implementation

Skadden

11/10/15

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Patrick Brandt
London
44.20.7519.7155
patrick.brandt@skadden.com

Stephen G. Sims
London
44.20.7519.7127
stephen.sims@skadden.com

40 Bank Street
Canary Wharf
London, E14 5DS
44.20.7519.7000

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

Today's press reports indicate that European Union lawmakers are likely to delay MiFID 2 implementation. MiFID 2 is the name given to the EU laws which will reform EU securities and derivatives markets. Once implemented, MiFID 2 will force more securities and derivatives trading onto electronic exchanges, reduce the availability of dark pools, tighten up the regulation of high-frequency trading and commodity derivatives trading, enhance investor protection standards, increase regulatory reporting and introduce a new regime governing how non-EU entities access EU financial markets. Implementation was scheduled to take place on January 3, 2017. However, the radical nature of the changes that EU regulated entities need to make and the volume of secondary legislation yet to be finalized raised concerns on the achievability of the January 2017 deadline.

If accurate, the delay would be welcomed by the EU financial services industry and regulators who need to supervise the new requirements. EU lawmakers would then need to decide how to implement the delay.

The first option is to simply delay implementation of the MiFID 2 regime for a year or to any other time that lawmakers agree. Assuming a one-year delay, MiFID 2 would come into force in January 2018 (or another agreed date), subject to the limited transitional relief that MiFID 2 already provides. This would be cleaner and easier for the industry to manage.

The second option is to phase in implementation, with some requirements brought into force on January 3, 2017, and more difficult requirements implemented later. EU lawmakers have used this approach before in the European Market Infrastructure Regulation, which phased in derivatives risk mitigation, trade reporting and clearing obligations at different times. MiFID 2, however, is a more complex piece of legislation, with a number of interconnected components, some of which are yet to be finalized. It will be difficult for lawmakers to pick which elements should be phased in sooner and which should be delayed. Although the phasing-in option is open to lawmakers, it would be difficult to get right and manage, and could cause unintended consequences that hamper industry implementation projects.

We believe the first option is better and should be adopted. Nevertheless, some EU lawmakers could argue for a phasing-in of MiFID 2, ostensibly because the EU lags behind the United States and some Asian countries in complying with G-20 derivatives trading commitments. This raises the potential risk of an unsatisfactory compromise, which hopefully will be avoided.