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Passporting into the UK



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Introduction

Passporting permits an authorised firm in another EEA member state to carry out regulated activities in another EEA member state on the basis of its home member state authorisation. Passporting is only available to firms based in the EEA, which means that non-EEA firms are unable to use the passport and will need to obtain direct authorisation from each relevant EEA member state in which they want to carry on business.

Passporting can either be carried out by establishing a branch in the other member state or by providing services on a cross-border basis without using an establishment in that other member state.

The passport is available to firms authorised, among others, under the following directives:

- (i) MiFID
- (ii) AIFMD
- (iii) UCITS IV

The remainder of this note focusses on passporting under MiFID only. If you would be interested in receiving information regarding the AIFMD passport, which differs in respect of marketing and managing a fund, and the UCITS passport, we can prepare separate notes on either or both of these accordingly.

Please note that MiFID will be replaced with effect from 3 January 2018 by MiFID II and MiFID II will carry forward the MiFID passporting regime, albeit with certain modifications.

Passporting into the UK and notification to the FCA

The FCA is the appropriate UK regulator for any notifications relating to passporting under MiFID. The procedure for applying for authorisation depends upon whether the EEA firm wishes to establish a branch or provide its services cross-border.

If the EEA firm qualifies for authorisation, the EEA firm will have permission to carry out each of its permitted regulated activities in its home state in the UK (provided such activity is a regulated activity under FSMA). The EEA firm's permissions in the UK will be treated as equivalent to those in its home state, thus any restrictions on its home authorisation will be correspondingly carried through to its permissions in the UK. Similarly, if the EEA firm wishes to carry out a certain MiFID investment service in the UK, which it does not already have permission for, it will need to apply to its home state regulatory to add that particular activity or service to its home authorisation before it can passport that activity or service into the UK.

MiFID II will introduce harmonised templates for notifications with the result that all EEA countries will use the same templates from 3 January 2018. ESMA has produced draft implementing technical standards (ITS) to establish standard forms, templates and procedures for transmitting passport notifications, but, as at the date of this note, these have not yet been adopted by the European Commission. Once adopted, they will replace the current MiFID passporting templates. According to the draft ITS, an EEA firm will also be required to submit a separate passport notification for each Member State into which the EEA firm intends to operate under MiFID II.

Establishing a branch in the UK

An EEA firm wishing to establish a branch in the UK is required to notify its home state regulator with the following information:

- (i) the EEA member state i.e. the UK, in which it intends to establish a branch;
- (ii) the address of the branch;
- (iii) a description of the activities and services that will be carried on in the branch;
- (iv) the organisational structure of the branch;
- (v) the names of the persons responsible for the management of the branch; and
- (vi) whether the firm intends to use tied agents.



The home state regulator must forward the notification of the above details to the FCA, together with confirmation that it has given the relevant EEA firm consent to establish a branch in the UK (the “consent notice”).

The FCA will notify the EEA firm within 2 months from the date on which it received the consent notice from the home state regulator.

The EEA firm may carry on business in the UK from the date that the following conditions (the “establishment conditions”) are satisfied:

- (a) the FCA has received the consent notice from the home state regulator;
- (b) the consent notice complies with the MiFID requirements (set out in (i) – (vi) above); and
- (c) one of the following has occurred: (1) the FCA has informed the EEA firm that it has received the consent notice or (2) two months have elapsed since the FCA received the consent notice.

As soon as these establishment conditions are satisfied, the EEA firm is authorised to carry out activities from its branch in the UK and does not need to wait to be added to the FCA Register before commencing business.

The relevant rules relating to establishing a branch in the UK can be found in SUP 13A.4 of the FCA Handbook at: www.handbook.fca.org.uk/handbook/SUP/13A/4.html.

Change of branch details

Once established, the EEA firm must notify its home regulator at least one month prior to doing any of the following:

- (a) changing any of the requisite branch details;
- (b) using, for the first time, any tied agent established in the UK; or
- (c) ceasing to use a tied agent established in the UK.

The home regulator will then notify the FCA of the relevant changes.

The relevant rules relating to changing branch details can be found in SUP 14.2 of the FCA Handbook at: www.handbook.fca.org.uk/handbook/SUP/14/2.html.

FCA supervision

When an EEA firm establishes a branch in the UK, the regulation and supervision of the branch is divided between the home member state and the FCA.

The FCA’s responsibilities include the following:

- (1) organisation and operational obligations specified in Article 32(7) of MiFID i.e.
 - conduct of business obligations
 - information provided to clients or potential clients
 - client profile information
 - client records
 - reporting on services provided to clients
 - best execution and order handling
 - obligation to uphold market integrity and transaction reporting
 - pre- and post-trade transparency
- (2) the right to examine the branch’s arrangements and to request changes in order to ensure compliance with these requirements; and
- (3) the right to enforce record keeping obligations with regard to transactions undertaken by the branch.

The home member state is responsible for regulating and supervising the EEA firm in relation to all other MiFID requirements other than the above.

Providing cross-border services into the UK

An EEA firm wishing to provide cross-border services into the UK is required to notify its home state regulator with the following information:

- (i) the EEA member state i.e. the UK, in which it intends to operate;
- (ii) the investment services and any ancillary services it intends to perform; and



- (iii) whether the firm intends to use tied agents in the UK.

The home state regulator must forward the notification of the above details to the FCA within one month of having received the information (the “regulator’s notice”).

FCA supervision

An EEA firm only need comply with the rules and regulations of its home member state when providing cross-border services. The FCA has no powers of supervision in respect of such a firm and MiFID in fact prohibits a host member state from imposing additional requirements on any such firm. The EEA firm is able to provide the cross-border services in the UK from the date that the following conditions (the “service conditions”) are satisfied:

- (a) the EEA firm has given its home state regulator; and
- (b) the FCA has received the regulator’s notice from the home state regulator.

The relevant rules relating to providing cross-border services into the UK can be found in SUP 13A.5 of the FCA Handbook at: [/www.handbook.fca.org.uk/handbook/SUP/13A/5.html](http://www.handbook.fca.org.uk/handbook/SUP/13A/5.html).

Changes to cross-border services

The EEA firm must notify its home regulator at least one month prior to doing any of the following:

- (d) changing any particulars of the operations carried on in the UK;
- (e) using, for the first time, any tied agent established in the UK; or
- (f) ceasing to use a tied agent established in the UK.

The home regulator will then notify the FCA of the relevant changes.

The relevant rules relating to changing cross-border services can be found in SUP 14.3 of the FCA Handbook at: www.handbook.fca.org.uk/handbook/SUP/14/3.html.



We have taken great care to ensure the accuracy of this document. However, it is written in general terms, is for general guidance and does not constitute advice in any form. You are strongly recommended to seek specific advice before taking any action based on the information it contains.

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APRIL 2017

Contacts



Claire Cummings

T: +44 (0) 207 585 1406

claire.cummings@cummingslaw.com



Helen Busby

T: +44 (0) 207 585 1406

helen.busby@cummingslaw.com



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www.cummingslaw.com | +44 (0)20 7585 1406