

# MiFID II – challenges for share plans



Over recent months much attention has been paid – and quite rightly so – to the new EU Prospectus Regulation and to the General Data Protection Regulation. However, MiFID II is about to come into force (on 3 January 2018) and thus far seems to have captured rather less of the limelight. The FCA only issued their latest update on MiFID II towards the end of August. The Markets In Financial Instruments Directive - ‘MiFID II’ - is the successor to a less expansive piece of legislation brought in by the EU after the global financial crisis. MiFID’s aim is to harmonise requirements across the EU, increase competition and give investors greater protection by increasing transparency, on fees and commissions for example. The devil, as always, is in the detail.

MiFID II will have a profound effect on how plan issuer companies and their plan administrators run share plans, as the legislation covers several services which are core to the operation of share plans in the UK, namely nominee, custodial and dealing services. The new regulations will prompt many changes in the way administrators handle share plans data, including but not limited to new reporting requirements, product governance, updating of Ts & Cs and the processing of transactions.

The last item on the list is one which should be grabbing our collective attention right now: the new requirements mean that if the plan administrator does not hold the prescribed National Identifier for the participant, then planned transactions (regardless of plan type, to be clear)– even if these are just sell-to-cover arrangements for tax purposes – cannot go ahead. This could be problematic where companies don’t wish to net-settle (due to the impact on cashflow, for example, particularly when high value awards and/or large participant numbers are involved) as the tax charge will still

crystallise on the vesting date. For companies with participants in jurisdictions such as the US where there is a 24-hour remittance rule for tax monies, indeed any jurisdiction where the local tax authority is keen to ensure prompt receipt of their tax funds due, this is potentially a very difficult situation.

One possible, partial solution could be to convert existing restricted share awards into nil-cost options prior to the original vesting date. This successfully defers the tax liability in most but not all jurisdictions. It won't work in the USA due to s409A legislation and there are other jurisdictions where the tax charge will still crystallise on the earliest exercise date, but it could still be helpful in other jurisdictions.

This being a EU directive rather than a regulation, implementation varies by EU Member State and as an example, National Identifiers are different for each EU Member State. Somewhat unhelpfully some of these are still changing – Germany originally agreed to the use of passport numbers or personal identity card numbers but has now opted to use a 'CONCAT' code (a concatenation of various pieces of information for an individual including name and date of birth) instead. The latest list is available here on ESMA's website: <https://www.esma.europa.eu/press-news/esma-news/esma-proposes-two-amendments-natural-person-identifiers-under-mifid-ii>

Whilst the UK's choice of identifier – National Insurance Number - makes sense and should not pose any challenges to implement, most plan issuer companies do not hold the other National Identifiers (which can be passport numbers, tax identification numbers or social security numbers, or a concatenation code, depending on the country's choices) for their non-UK employees, and nor will plan administrators. Most importantly, it should be noted that concatenation is NOT the 'get out of jail free' card or default position for all countries' nationals if the prescribed first and second priority identifiers cannot be obtained.

Companies – especially those with vestings scheduled for Q1 2018 - should be discussing how to collect this data from their existing plan participant populations with their plan administrators right now. For new awards, the thought is that award acceptance – requiring employees to submit this information as part of the process of accepting any new awards – will now become a must-do. Formal award acceptance has of course become more widely used in recent years, not least as a means of helping malus and clawback clauses to 'stick', but we see it becoming a multi-purpose feature of awards administration now with this added impetus from MiFID II. Whether that sits comfortably alongside GDPR requirements for consent given freely and without detriment is another question.

A further requirement causing some concern amongst those I've been in contact with is the requirement to issue quarterly statements to share plan participants in what is quaintly called a 'durable format', regardless of whether this information is freely available online already. Advice sought by some administrators seems to suggest that these statements may be produced in hard copy or PDF format online, but in the latter format only if their system can also evidence whether the participant has actually accessed said statement - or not, as the case will probably prove to be. This is a particularly regressive requirement, in the context of share plans, as much effort is already expended on participant communications across all formats. It will also be a very unwelcome addition to plan running costs.

There remains lack of clarity on the reporting requirements for Share Incentive Plans, namely whether transactions should continue to be reported at trust level or whether they will now be required to be reported at participant level (which would entail the collection of National Identifiers for all participants). The position on reporting is also unclear for stock purchase plans, the global equivalent of the UK SIP. There is an exemption, but it isn't sufficient to work comprehensively for most stock purchase plans as the value limit has been set at too low a level. And then there is the complication of FX to add into the mix with global share purchases. What if funds are remitted by the company's payroll to the trust, and between then and the scheduled purchase date it is found that one or more participant National Identifiers are not held? Should the participants funds be returned to the employer/payroll, re-FXed and possibly further eroded? This surely wasn't the intention of the EU Commissioners or of ESMA.

The EU's aims with the MiFID legislation are noble – greater competition, harmonisation across member states and investor protection are all to be lauded and supported. And let's be clear – the share plans industry is not the industry that the EU Commissioners have in their sights with this legislation. Ours is a low risk proposition, already well-regulated, and share plans practitioners and their firms have high standards of transparency and communication already embedded into their current practices. In their current form, the rules could potentially do considerable collateral damage to share plans and we must speak up and ensure that our voice is heard. There are some relatively straightforward amendments that would go a long way to minimising the issues that we've identified so far:

- A definitive answer on the required reporting level for SIPs (our preference is continued reporting at trust level, rather than participant level);
- A tweak to the existing (largely unhelpful) exemption to accommodate stock purchase plans;
- Exemption from / modification of the requirement to issue quarterly statements; and
- Permission for an exemption allowing sell-to-cover trades to be executed without a National Identifier (in order to satisfy tax liabilities), where attempts to obtain this have been exhausted.

ProShare has assembled a focus group to address these issues and make representations to the FCA. If you would like to participate then please contact us without delay at [team@proshare.org](mailto:team@proshare.org).

WELCOME: to our newest members, Ladbrokes Coral Group plc and Ocorian. Find out more about Ocorian at <http://bit.ly/2hr9feS>

A handwritten signature in black ink, appearing to read 'Gabbi Stopp', with a long horizontal line underneath it.

Gabbi Stopp  
Head of Employee Share Ownership  
ProShare