

Ignore MiFID bluster; IMD is what you need

29 March 2011 by Paul Stanfield, Chief Executive, FEIFA

There has been considerable discussion - if not much true debate - in recent months with regards to the scope of certain aspects of EU regulation and the implications of non-compliance. This is, of course, a very important subject, and one that has created significant misunderstandings in certain quarters.

The Headlines

Already this year we have seen two very alarming headlines: "IAW and three others fined by Cypriot regulator" and "Investment advice under IMD is a crime, says report", both of which may have led to confusion, if the underlying circumstances are not fully appreciated.

For instance, the latter article suggested that investment advice provided under IMD could lead to criminal prosecution, as MiFID authorisation is required for such activities. This conclusion completely ignores the fact that advice with regards to insurance and assurance contracts is specifically excluded from MiFID - as it falls under the IMD (see section (10) of MiFID).

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EU Consultations

In fact, the recent EU consultation on "IMD2" made it clear that the Commission understands that advising on investment assets held within insurance policies takes place under IMD. The consultation referred to a possible need for a revised IMD to separate out such activities from intermediation of general insurance products to ensure that practitioners of the former are appropriately qualified and experienced.

Our submission to that consultation agreed with that general principle and the resulting need to protect consumers in this regard.

The Belgian Issue

Another recent story focused on potential legal action being taken against a number of advisers in Belgium, who had provided investment advice but were IMD authorised – the conclusion was that IMD licensing did not allow them to advise on the underlying assets of the life policies on which they were advising.

My understanding of the particular circumstances in this situation is that the advisers in question were using a non-EU life assurance bond and thus not meeting the requirements of the IMD, in which case MiFID authorisation would then be required.

The key aspect here is that this does not prove that advising on the underlying funds of a life policy requires MiFID licensing. Rather, it is that if an adviser is operating under the IMD then he or she needs to ensure that the relevant regulatory criteria are met, not least being that an EU/compliant insurance contract is being utilised.

What can be advised on within a life wrapper?

There has also been some comment around what can be advised on within a life wrapper. One argument is that only insurance funds are acceptable, as assets such as equities and non EU funds come under MiFID.

Once more, this conclusion comes from clauses within MiFID and ignores the exemption relating to advice on insurance contracts, which clearly comes under the IMD. This latter Directive lays down no restrictions on the kinds of assets that can be held and advised on within, say, an EU life bond.

The Conclusions

The main points to conclude are that:

- IFAs who operate under the IMD can (and are obliged to) advise on the underlying assets of a client's life assurance bond. This is confirmed by the IMD itself and the exclusion for such advice stated in MiFID.
- Clauses in MiFID are irrelevant to IMD-licensed advice, as the relevant and specific exclusion in MiFID defers advice on insurance and assurance contracts to the IMD - thus MiFID requirements become irrelevant.
- The recent EU consultation on IMD reconfirms this fact but also highlights the need for IMD to adapt to ensure that consumers are protected – advice on such structures is likely to require advisers to be more qualified and experienced than IMD presently demands. Thus, going forward, I would expect to see any adaptations to the IMD reflecting this.
- For advisers to be working appropriately under IMD licensing, an EU-based, compliant insurance or assurance contract should be used. If a non-EU policy is utilised, the IFA is likely to be operating outside of IMD and thus would probably require MiFID authorisation. In fact, using a non-EU bond will be non-compliant in many cases, irrespective of the licensing status of the IFA.
- In theory, any assets can be held within an EU life policy, subject to any restrictions laid down by the provider and/or the individual jurisdiction (for instance, the tax efficiency of such contracts is only retained in some EU countries if certain fund types are unavailable).
- National laws and regulations also need to be taken into account, in conjunction with EU Directives.