

## Reminder to Managers of New Fund Marketing Rules in the EU

June 28, 2021

### 1. Overview

The new rules on the promotion of funds introduced by the new Cross-Border Distribution of Collective Investment Undertakings Directive<sup>1</sup> and Regulation<sup>2</sup> (**Cross-Border Distribution of Funds (CBDF) Rules**) are due to apply in the EU from 2 August 2021.<sup>3</sup> Equivalent rules are not currently being implemented in the UK.

The CBDF Rules will have an impact on investment managers and placement agents marketing funds<sup>4</sup> in the EU. This note discusses the provisions under the CBDF Rules relating to pre-marketing activities by Alternative Investment Fund Managers (AIFMs), reverse solicitation, marketing communications, a new marketing deregistration process and marketing to non-professional investors.

### 2. When Do the New Rules Take Effect?

The rules entered into force on 1 August 2019 and will apply from 2 August 2021 in those EU member states that have implemented the CBDF Directive. The CBDF Regulation is directly applicable in the EU and will apply from 2 August 2021 without further implementation.

### 3. Does this Affect US, UK and Other Non-EU Managers?

The CBDF Rules are expressed to apply to EU AIFMs authorised<sup>5</sup> under Alternative Investment Fund Managers Directive (AIFMD). However, EU member states may impose equivalent requirements on non-EU AIFMs. The application of the CBDF Rules to non-EU AIFMs is likely to vary between EU member states.

Application of the new pre-marketing regime to non-EU AIFMs is anticipated – but not confirmed – in a number of key EU jurisdictions which allow non-EU AIFMs to register for marketing under the National Private Placement Regime (NPPR).<sup>6</sup>

In addition, the new requirements on marketing communications will apply to all funds marketed in the EU (including those managed by non-EU AIFMs).

### Contact Information

For further information or advice, please contact one of the partners named below or your usual contact at Akin Gump.

#### Ezra Zahabi

Partner

[ezra.zahabi@akingump.com](mailto:ezra.zahabi@akingump.com)

London

+44 20.7661.5367

#### Aleks Bakic

Partner

[abakic@akingump.com](mailto:abakic@akingump.com)

London

+44 20.7012.9844

#### John Daghlian

Partner

[john.daghlian@akingump.com](mailto:john.daghlian@akingump.com)

London

+44 20.7012.9636

#### Christopher M. Gorman-Evans

Partner

[cgorman-evans@akingump.com](mailto:cgorman-evans@akingump.com)

London

+44 20.7012.9656

New York

+1 212.872.8037

#### Thomas John Holton

Partner

[john.holton@akingump.com](mailto:john.holton@akingump.com)

London

+44 20.7661.5336

#### Mary Lavelle

Partner

[mary.lavelle@akingump.com](mailto:mary.lavelle@akingump.com)

London

+44 20.7012.9815

## 4. New Pre-Marketing Regime

### Definition

"Pre-marketing" was previously not a formal legal concept. The CBDF Rules will explicitly allow pre-marketing, which is defined as:

*"provision of information or communication, direct or indirect, on investment strategies or investment ideas by [a manager] or on its behalf, to potential professional investors domiciled or with a registered office in the Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with [the AIFMD]<sup>7</sup>, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment."<sup>8</sup>*

### Pre-Marketing Conditions

For pre-marketing to be permitted, certain requirements must be complied with:<sup>9</sup>

1. Pre-marketing materials provided to prospective investors must not include:
  - a) any materials (including draft) which contain information sufficient for an investor to make an investment decision regarding investment in an AIF
  - b) subscription forms (or similar) (draft or final form) or
  - c) final form constitutional documents or offering documents of a not-yet-established AIF.<sup>10</sup> Draft offering documents must include a disclaimer stating they "do not constitute an offer or an invitation to subscribe to units or shares of an AIF and the information presented therein should not be relied upon because it is incomplete and may be subject to change."
2. The AIFM must ensure that investors do not invest in an AIF during the pre-marketing phase and that investors contacted during the pre-marketing only invest once a marketing notification has been made.<sup>11</sup>
3. A third party may only pre-market the AIF if (a) it complies with the pre-marketing conditions; and (b) it is one of the following: a MiFID investment firm or tied-agent, an EU credit institution, a UCITS management company or an EU AIFM.<sup>12</sup>
4. Pre-marketing must be adequately documented.<sup>13</sup>

### Pre-Marketing Informal Letter

Under the new rules, the AIFM must notify the relevant regulator<sup>14</sup> by an "informal letter" within two weeks of commencing pre-marketing, specifying, as applicable, the following information:<sup>15</sup> in which EU states and for which periods pre-marketing has taken, is taking or will take place; a brief description of the pre-marketing including information on the investment strategies presented and, where relevant, a list of the AIFs (and compartments) being pre-marketed.

## 5. Reverse Solicitation

The CBDF Rules prescribe that any subscription by an EU professional investor within 18 months of the commencement of pre-marketing activities to an AIF to which the

**Ian Meade**  
Partner  
[imeade@akingump.com](mailto:imeade@akingump.com)  
London  
+44 20.7012.9664

**Tim Pearce**  
Partner  
[tpearce@akingump.com](mailto:tpearce@akingump.com)  
London  
+44 20.7012.9663

**Daniel Quinn**  
Partner  
[daniel.quinn@akingump.com](mailto:daniel.quinn@akingump.com)  
London  
+44 20.7012.9842

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pre-marketing activities related shall be considered to be the result of marketing and shall be subject to the marketing notification procedures.

## 6. Marketing Communications

The CBDF Rules introduce additional requirements on marketing communications to:

1. Be identifiable as marketing communications
2. Describe the risks and rewards of investing in the AIF in an equally prominent manner and
3. Be fair, clear and not misleading.<sup>16</sup>

The above general requirements are further implemented by the new European Securities and Markets Authority (ESMA) Guidelines on Marketing Communications.<sup>17</sup>

Marketing communications that include an invitation to invest in an AIF must not contradict the information disclosed to investors under Article 23 of the AIFMD (i.e., the AIFMD investor disclosure statement) or diminish its significance.<sup>18</sup>

## 7. Standardised De-Notification Process

The new rules introduce a harmonised process and conditions for terminating the marketing registration (“de-notification”) with respect to an AIF.<sup>19</sup>

Under the new rules, an EU AIFM may only de-notify an EU AIF in a host member state if it meets all of the following requirements:

1. For a period of 36 months from the de-notification date, the AIFM must not engage in pre-marketing of the relevant AIF, or in respect of similar investment strategies or investment ideas, in the relevant member state.
2. A “blanket offer” must be made to repurchase or redeem, free of any charges or deductions, all AIF units or shares held by investors in the relevant member state. However, this condition does not apply to “closed-ended” AIFs. The offer must be publicly available for at least 30 working days and be addressed, directly or through intermediaries, individually to all investors (in that member state) whose identity is known to the manager.
3. The intention to terminate marketing arrangements in the relevant member state must be made public by means of a publicly available medium that is customary for marketing AIFs and suitable for a typical AIF investor.
4. Contractual arrangements with financial intermediaries or delegates must be modified or terminated with effect from the date of de-notification, to prevent any new or further, direct or indirect, offering or placement of the units or shares.
5. The ongoing investor transparency requirements continue to apply to investors who remain invested in the fund, meaning the manager would continue the need to produce and provide an AIFMD-compliant annual report.

## 8. Marketing to Non-Professional Investors

If marketing to non-professional investors (which may include certain HNWIs and family offices), AIFMs may (depending on the local implementing measures in the relevant jurisdiction) be required by the relevant national regulator to provide prior

notice of its marketing communications as part of a new “verification” process conducted by the local regulator.<sup>20</sup>

Further, the new rules seek to achieve “consistent treatment” in the marketing of AIFs to EU non-professional investors by requiring that certain “facilities” be made available to them for the performance of certain tasks and the provision of information related to their investment.<sup>21</sup>

This does not require an AIFM to establish a physical presence and may be satisfied by appointing a third-party provider. Further, although an AIFM may continue to communicate with investors electronically it will need to comply with the applicable local language requirements.<sup>22</sup>

The “facilities” that must be made available to retail investors must perform the following tasks:<sup>23</sup>

1. Process investors’ subscriptions, payment, repurchase or redemption orders relating to an investment in the AIF.
2. Provide investors with information on how orders can be made and how repurchase and redemption proceeds are paid.
3. Facilitate the handling of information relating to the exercise of investors’ rights arising from their investment in the AIF.
4. Make fund rules or instruments of incorporation and the latest annual report available for inspection for obtaining copies.
5. Act as a contact point for communicating with regulators.

<sup>1</sup> Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings (See [here](#)).

<sup>2</sup> Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014 (See [here](#)).

<sup>3</sup> The CBDF Rules are also expected to apply in Iceland, Liechtenstein and Norway (i.e., the three countries of the European Free Trade Association that together with the EU Member States form the EEA) once they are incorporated into the EEA Agreement (See [here](#) for the Regulation and [here](#) for the Directive).

<sup>4</sup> This means alternative investment funds (AIFs), including EuVECAs, ELTIFs and EuSEFs, and UCITS.

<sup>5</sup> Under the AIFMD, an AIFM may either be authorised (i.e., a “full-scope” AIFM) or registered if it manages AIFs with assets under management below certain thresholds (a “sub-threshold” or “small” AIFM).

<sup>6</sup> This is as a result of the recitals to the CBDF Directive that state EU member states should ensure that “national laws, regulations and administrative provisions” that implemented the “harmonised rules on pre-marketing, should not in any way disadvantage EU AIFMs vis-à-vis non- EU AIFMs,” such as by subjecting non-EEA AIFMs to less onerous requirements.

<sup>7</sup> Article 32 AIFMD - Marketing of units or shares of EU AIFs in member states other than in the home member state of the AIFM.

<sup>8</sup> Article 2 Cross-Border Distribution of Collective Investment Undertakings Directive; New Article 4(1)(aea) AIFMD.

<sup>9</sup> Article 2(2) Cross-Border Distribution of Collective Investment Undertakings Directive

<sup>10</sup> New Article 30a (1) AIFMD

<sup>11</sup> New Article 30a (2) AIFMD

<sup>12</sup> New Article 30a (3) AIFMD

<sup>13</sup> New Article 30a (4) AIFMD

<sup>14</sup> With respect to an EU AIFM, its home member state regulator.

<sup>15</sup> New Article 30a (2) AIFMD, third paragraph.

<sup>16</sup> Article 4(1) Cross-Border Distribution of Collective Investment Undertakings Regulation

<sup>17</sup> Article 4(6) Cross-Border Distribution of Collective Investment Undertakings Regulation; Final Report: Guidelines on marketing communications under the Regulation on cross-border distribution of funds, 27 May 2021 (See [here](#)).

<sup>18</sup> Article 4(4) Cross-Border Distribution of Collective Investment Undertakings Regulation

<sup>19</sup> Article 2(4) Cross-Border Distribution of Collective Investment Undertakings Directive; New Article 32a AIFMD

<sup>20</sup> Article 7(3) Cross-Border Distribution of Collective Investment Undertakings Regulation

<sup>21</sup> Article 2(6) Cross-Border Distribution of Collective Investment Undertakings Directive; New Article 43a AIFMD.

<sup>22</sup> New Article 43a (3)(a) and (b) AIFMD

<sup>23</sup> New Article 43a (1)(a) to (f) AIFMD

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