

New EU marketing rules — implications for fund managers

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On 2 August 2021, the EU's cross-border distribution of funds rules (Directive (EU) 2019/1160) amending the EU's Alternative Investment Fund Manager's Directive ("AIFMD") and Regulation (EU) 2019/1156) came into effect.

The new rules materially impact the manner in which fund managers, including alternative investment fund managers (AIFMs), carry out fundraising activity (such as sharing term sheets and offering documents) with EU investors.

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There will need to be changes to fundraising planning and timelines, as well as changes to marketing to non-professional investors and the content of marketing communications, which managers will need to think about.

There has been some divergence in the way the rules are implemented between different EU countries (and implementation has been delayed in some countries), meaning that managers will also for a period of time face a patchwork of marketing rules across the EU.

The significant consequences for fund managers as a result of these rules are as follows:

- (1) Changes to both permitted "pre-marketing" in the EU and availability of reverse solicitation
- (2) Additional requirements when marketing to non-professional investors
- (3) A need for closer review of the content of marketing communications.

While the rules strictly apply to EU AIFMs, many EU countries have extended or will extend their application to non-EU AIFMs as part

of their implementation of the rules (and so no matter the location of the fund manager, any planned EU marketing would need consideration of these rules).

Importantly, in some countries, non-EU AIFMs will no longer be permitted to carry out any pre-marketing. It is also worth having in mind that, as we are now in a "post-Brexit world," the UK is not implementing these new rules.

Pre-marketing and reverse solicitation

New pre-marketing definition and notification requirement

Pre-marketing was previously not defined by AIFMD and came to be known as all the activities that could be done in a country prior to AIFMD "marketing" which would require activation of the passport (for EU AIFMs) or registration under the national private placement regimes (for non-EU AIFMs).

Pre-marketing is crucial to gauge investor interest before committing to the regulatory compliance associated with AIFMD marketing. The commencement of marketing was interpreted differently across EU countries, which in turn meant that varying levels of pre-marketing were permitted (including in some countries, like Sweden, perhaps only teasers or presentations) prior to activation of the passport or registration.

In an attempt to harmonise pre-marketing across the EU there is a new definition of pre-marketing which might shift what is permitted as pre-marketing in some EU countries. However, the definition still leaves room for divergent implementation across the EU, which means that managers will continue to need to obtain local advice in each EU country when planning their pre-marketing activities, at least in the near term.

The key elements of the definition are:

- direct or indirect provision of information or communication on investment strategies or investment ideas;
- by an AIFM or on its behalf (e.g. by a placement agent);
- to potential professional investors (as defined in MiFID) in the EU;
- to test their interest in a fund which is not yet established, or is established but not yet notified for marketing under the AIFMD; and

- which does not amount to an offer to invest in the relevant fund.

In addition, the rules permit the distribution of a draft PPM and LPA, provided that they clearly state that they do not constitute an offer and they are incomplete, subject to change and cannot be relied on. Draft or final subscription documents cannot be provided to potential investors, nor can any material that is sufficient to enable investors to commit to subscribing to a particular fund.

There are new requirements for marketing communications, whether to professional or non-professional investors, requiring a level of review of such communications that has not been the norm in the EU to date.

There are two implications of the new definition:

- There may be a shift in those EU countries that did not permit provision of certain documents as pre-marketing (e.g. a draft PPM), which enables managers to do more as part of pre-marketing than they were able to do before.
- There may still be divergent approaches taken across the EU on what is regarded as an “offer” or what documents should look like in order to be regarded as being in “draft” form (e.g. what exactly is a “draft” PPM?), requiring local legal advice as part of the fundraising process.
- Within two weeks of commencing pre-marketing (where permitted), a non-EU AIFM must notify the regulator in the relevant EU country of the investor. (EU AIFMs only need notify their home regulator.) This notification must be done whether or not the manager proceeds to full marketing and is separate to the notification required at that stage. There is a possibility that differing processes are required in each country for this notification.

Availability of reverse solicitation

As reverse solicitation (i.e. where an investor reaches out to a manager without any prior marketing of the fund to that investor) is not regarded as marketing under the AIFMD, it was a useful tool for some managers, particularly in countries where they did not expect much investor interest.

Under the new rules there is a presumption that there is no possibility of reverse solicitation from any investor in a country

following pre-marketing in that country for a period of 18 months even if the specific investor for whom reverse solicitation is being relied on has not been pre-marketed to.

Any subscription during those 18 months must only be accepted through the marketing procedures permitted under the AIFMD — i.e., via the marketing passport or the national private placement regimes.

Marketing to non-professional investors

Certain investors that are relatively sophisticated, such as high net worth investors, are not actually regarded as “professional investors” (under EU regulatory definitions).

There will be additional requirements on marketing to such non-professional (“retail”) investors, which may impact fundraising timelines and increase uncertainty in the short term.

National regulators have the discretion to require prior notification of “marketing communications” (see below) addressed to non-professional investors and have 10 working days to ask AIFMs to make any amendments to such communications.

It remains to be seen which regulators impose this requirement and to what extent they scrutinise marketing communications — this is another area of possible divergence across the EU.

There is a new concept of “local facilities” to process subscriptions and redemption requests, provide pre-contractual disclosures and periodic reports, and act as a contact point to communicate with regulators. There is no requirement to appoint a third party or establish a physical presence to provide these facilities so it appears that facilities in electronic format (such as a password protected section of a website) would be sufficient.

Content of marketing communications

There are new requirements for marketing communications, whether to professional or non-professional investors, requiring a level of review of such communications that has not been the norm in the EU to date. While “marketing communications” are not defined, pre-marketing activity is excluded from them.

Marketing communications must:

- be identifiable as such;
- display risks and rewards in an equally prominent manner; and
- be fair, clear and not misleading.

The European Securities and Markets Authority has provided granular guidance on the content of marketing communications. This detailed guidance, coupled with the potential scrutiny from regulators in the context of marketing to non-professional investors, means that marketing material will require much more careful review which would impact fundraising timetables and costs.

About the authors



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