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Kirkland Alert

Revised Proposals for Marketing of Funds in Europe

27 June 2019

Our [Alert](#) in February discussed the proposals to amend the rules on marketing of alternative investment funds ("AIFs") to investors in Europe. The European Council adopted a cross-border directive on distribution of collective investment undertakings ("CBDF Directive") and a related regulation ("CBDF Regulation") (collectively, "the Omnibus Proposals") on 14 June 2019 which, amongst others, amend the existing marketing regime under AIFMD. The Omnibus Proposals have been revised in certain significant respects since our last update.

This *Alert* explains the changes to the concept of "pre-marketing" and its interaction with marketing under the current AIFMD regime ("AIFMD Marketing").

The Omnibus Proposals are in final form and await publication in the Official Journal of the European Union. Once published, Member States have 24 months to implement the Omnibus Proposals, which are expected to come into force mid-2021.

Impact on AIFMs and Risks to Non-EEA AIFMs

This note is directly relevant to European alternative investment fund managers ("AIFMs") who market to professional investors in the European Economic Area ("EEA") and to placement agents.

However, it is important to note that although there is no express guidance from regulators in the Member States, certain changes (for example, the new definition of "pre-marketing" or the requirement to notify a regulator of any pre-marketing activities) may be adopted by Member States for national private placement regimes ("NPPRs") used by non-EEA AIFMs.

AIFMD Marketing and Pre-marketing

The marketing passport available to EEA AIFMs only applies to promotional activities that fall within the description of AIFMD Marketing. As is widely acknowledged in the market, the situation is complex, as Member States take different views about what constitutes AIFMD Marketing and when AIFMD Marketing is deemed to begin. The key change for sponsors under the Omnibus Proposals is the introduction of a standardised concept of "pre-marketing," or soft marketing.

The final position is much more pragmatic than the original iteration of the Omnibus Proposals, but there are a few potential issues that sponsors need to be aware of when assessing interest for any fund raise post-implementation in 2021.

New definition of pre-marketing

Pre-marketing under the revised Omnibus Proposals means:

- the provision of information or communication (direct or indirect) on investment strategies or ideas;
- to professional investors in the EEA;
- to test their interest in an AIF that either (i) is not yet established, or (ii) is established, but has not yet notified for marketing to the relevant regulator; and
- the communication should not amount to an offer or placement to the potential investor.

Pre-marketing conditions

The conditions for pre-marketing seek to delineate pre-marketing activities from AIFMD Marketing. The requirement to register for AIFMD Marketing (which requires a marketing passport) is not triggered if:

- no subscription documents (including in draft form) are distributed; and
- no final form constitutional (e.g., limited partnership agreements) or offering documents (e.g., private

placement memoranda) are distributed to professional investors.

Where draft form documents are distributed, accompanying disclaimers should clearly state that:

- they do not constitute an offer or invitation to subscribe for units/shares in an AIF; and
- the information in the draft documents should not be relied upon because it is incomplete and subject to change.

Additional notification requirements

The revised Omnibus Proposals introduce an additional regulatory hurdle and give regulators more control over the pre-marketing process.

An EEA AIFM will have to notify (through an informal letter) its home state regulator within two weeks of commencing pre-marketing in any Member State. The letter should contain certain basic information as to where, for how long and what type of promotional activities were conducted by that AIFM. The home state regulator will then notify the other Member States where the EEA AIFM expects to conduct pre-marketing activities.

As Member States prepare for implementation of the Omnibus Proposal with the aim of harmonising the marketing rules, it is hoped that no Member State will make the pre-marketing notification more onerous than this.

Formal limitation on reliance on reverse solicitation

A subscription within 18 months of the commencement of any pre-marketing activity will be deemed to have resulted from active marketing, triggering the passporting requirement under AIFMD for EEA AIFMs. In practice, it is expected that this change will restrict reliance on reverse solicitation, as it will preclude the argument that any subsequent subscriptions were a result of reverse solicitation. As currently drafted, it is

not clear whether this condition applies per investor or per jurisdiction, and any guidance from Member States would be welcome.

Under the CBDF Regulation, the European Commission is required to investigate and report within two years its findings on reverse solicitation. The report is required to specify the extent to which subscriptions to interests in funds result from reverse solicitation, the geographical distribution of reverse solicitation and its impact on the passporting regime.

It is unclear whether this will eventually lead to a more rigorous effort by the European regulators to restrict reliance on reverse solicitation.

Use of intermediaries

If an EEA AIFM appoints a third party to carry out pre-marketing on its behalf, the third party will need to be a MiFID investment firm (or a tied agent of a MiFID investment firm), a CRD IV credit institution, a UCITS management company or another AIFM.

Unsurprisingly, that third party will be subject to all of the above conditions. In practice, this would restrict the use of placement agents operating outside the scope of activities regulated under MiFID for such pre-marketing activities. This condition will also restrict European sponsors relying on their EEA-based investor relations teams to conduct the marketing to EEA investors if those teams are not housed in a MiFID (or otherwise regulated) firm.

In addition, non-EEA sponsors seeking to “rent an EEA AIFM” should be aware that any person seeking to market a fund on that EEA AIFM’s behalf will also need to be a MiFID investment firm (or a tied agent of a MiFID investment firm), a CRD IV credit institution, a UCITS management company or another AIFM.

AIFMs that have their investor relations teams based in London should bear this in mind as the Brexit process progresses.

De-notification

An EEA AIFM may cease marketing and de-notify passporting arrangements for such marketing if:

- except in the case of closed ended AIFs, a blanket offer to repurchase the shares/units held by investors is publicly available for at least 30 business days;
- the intention to cease marketing is made public (including electronically) in a form that is customary for marketing AIFs; and
- any contracts with distributors or intermediaries are modified or terminated with effect from the date of de-notification (so as to prevent any new offers).

There is a notification requirement: the EEA AIFM must notify the authority of the home Member State of its intention to cease marketing and confirm the points listed above.

The Omnibus Proposals introduce a 36-month blackout period on any further marketing once a de-notification of a fund is made. The CBDF Directive is drafted widely such that the blackout period extends to funds that have a similar “investment strategy” or “idea.” There is no further guidance on what would constitute a similar “investment strategy” or “idea.”

Sponsors should assess whether such a moratorium would extend to successor funds or funds with similar strategies but different geographical target markets. Sponsors also need to consider their fundraising timelines while assessing whether to de-notify a fund, as the blackout period may preclude the ability of a sponsor to market another fund with a similar “investment strategy” or “idea” in that jurisdiction.

Relevance to non-EEA

As drafted, these changes do **not** directly apply to:

AIFMs

- non-EEA AIFMs marketing under Member States' NPPRs; or
- EEA AIFMs marketing non-EEA AIFs under the NPPRs.

However, the CBDF Directive expressly prohibits Member States from adopting laws and regulations that are more advantageous for non-EEA AIFMs than for EEA AIFMs. As such, there is a concern that Member States may implement a similar approach for such AIFMs.

Sponsors should prepare for the definition of pre-marketing, the related conditions and the trigger for deemed marketing to be extended to AIFMs marketing under NPPRs.

There is some ambiguity on how the pre-marketing notification to regulators will work, as non-EEA AIFMs do not have a home state regulator. It may be the case that Member States will require non-EEA AIFMs to notify each Member State where it expects to conduct the pre-marketing. This represents a sea change, as non-EEA AIFMs can currently conduct pre-marketing activities with limited regulatory oversight in various Member States.

In adopting the de-notification process, Member States may also extend the possibility of de-notification to AIFMs marketing under NPPRs. If they do, sponsors should note that the 36-month blackout period may likely apply.

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