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Changes to Marketing Alternative Investment Funds in the EU

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The EU has adopted a package of measures which will implement some important changes to the way in which alternative investment fund managers ("**AIFMs**") market their funds cross-border in the EEA. One of the principal aims of the changes is to remove barriers to cross-border marketing of alternative investment funds ("**AIFs**") which have arisen in large part due to differing implementation of the Alternative Investment Fund Managers Directive ("**AIFMD**") across member states of the EEA since 2014.

The new definition of and conditions for "pre-marketing" will establish a defined phase of "pre-marketing" as distinct from "marketing" under the AIFMD. Importantly, once an EEA AIFM has engaged in "pre-marketing" activity in a jurisdiction any investment from an investor in that jurisdiction within 18-months of such pre-marketing will be deemed to be the result of marketing activity. Consequently, the ability to rely upon reverse solicitation will be curtailed within the EEA. The impact for non-EEA AIFMs is not yet clear since the CBD/R (as defined below) address only EEA AIFMs. However, it is highly unlikely that jurisdictions in the EEA will want to retain different pre-marketing regimes for EEA versus non-EEA AIFMs. This is something that non-EEA AIFMs looking to raise capital within the EEA in 2021 and beyond should keep under review.

The package of reforms is comprised of Directive (EU) 2019/1160 regarding the cross-border distribution of collective investment undertakings ("**CBD**") and Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment undertakings ("**CBR**") (together "**CBD/R**") and will come into force within the EEA on 2 August 2021.

The CBD/R apply to EEA AIFMs. However, it should be noted that Member States do not have a completely free hand in relation to their national private placement regimes ("**NPPR**"). It is highly likely that at least some of the changes will also impact how non-EEA AIFMs are able to market their funds into the EEA under the applicable NPPR. The full impact for non-EEA AIFMs will only be seen over time. However, non-EEA AIFMs should have the CBD/R on their radar and monitor changes to how they market their funds into the EEA as the implementation date approaches.

It should be noted that the CBD/R applies to the distribution of funds under both the AIFMD and the UCITS Directive. However, this briefing note focusses exclusively on the changes relevant to AIFMs.

Principal changes:

- Harmonised definition and conditions of "pre-marketing"
- Notification requirement to the national competent authority ("**NCA**") of the AIFM when "pre-marketing" has commenced
- Any subscription within 18-months of "pre-marketing" will be deemed to be the result of marketing

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- Any third party marketing an AIF on behalf of an AIFM must be authorised as a MiFID investment firm, credit institution, AIFM or UCITS management company
- Restrictions on marketing of a successor fund following de-notification of marketing

Harmonised “pre-marketing” regime for EEA AIFMs

Since 2014, due to differences in the implementation of the AIFMD as regards when “marketing” commences for the purposes of the AIFMD, frustrations have been voiced regarding the inconsistent ability to pre-market across Europe in order to test the investor appetite for an investment strategy in the EEA. This arises because in some jurisdictions “marketing” is considered to occur at an early stage in the investment process, whereas in other jurisdictions (e.g. Luxembourg (and the UK)) “marketing” is considered to occur at a much later stage when the offer of interests in an AIF is capable of being accepted by investors on the basis of final form subscription documents.

The CBD/R introduces an EEA-wide definition of “pre-marketing”, i.e. those promotional activities which can take place before the marketing passport (which only applies once “marketing” has commenced) is available. The definition of “pre-marketing” is broad:

“provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM 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 Article 31 or 32, 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”.

Key features of “pre-marketing”:

- Provision of information or communication on investment strategies or ideas (whether direct or indirect)
- By an EEA AIFM or on its behalf (e.g. placement agent or non-EEA sponsor)
- To potential professional investors in the EEA
- In order to test their interest:
- In an AIF/compartment which is not yet established; or
- In an AIF/compartment which is established, but not yet notified for marketing under AIFMD in that Member State
- 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/compartment

Conditions for “pre-marketing”

The definition of “pre-marketing” is augmented by the new conditions for pre-marketing. An EEA AIFM may engage in “pre-marketing”, except where the information provided to investors:

- Is sufficient to allow investors to commit to acquiring interests in the AIF;
- Amounts to subscription forms (or similar documents) whether in draft or final form;
- Amounts to constitutional documents, a prospectus or offering documents of an AIF which has not yet been established, in final form.

In addition, any draft offering documents must not contain sufficient information to allow investors to take an investment decision and must include a statement that: (i) the document does not constitute an offer or an invitation to subscribe for interests in the AIF;

and (ii) the information presented should not be relied upon because it is incomplete or subject to change. It is clear that simply labelling a document as draft but otherwise being in final form will not be acceptable. In addition, the circulation of subscription forms is prohibited and they must not be provided even in draft form during a “pre-marketing” exercise.

Notification of pre-marketing

It will be a requirement for EEA AIFMs to notify their NCA within two weeks of commencing “pre-marketing”. The notification will need to specify where and for which periods the pre-marketing is taking or has taken place with a brief description of the pre-marketing.

This notification of pre-marketing is distinct from the AIFMD marketing process and it will not be possible for an EEA AIFM to accept a subscription before the AIFMD marketing process has been completed. Importantly, any subscription made within 18-months of pre-marketing activity will be considered to be the result of marketing activity, triggering the AIFMD marketing process. Consequently, commencing pre-marketing will effectively preclude reliance by the AIFM on reverse solicitation for a period of 18-months.

Placement agents and other distributors

Significantly, any third party carrying out pre-marketing on behalf of an AIFM must be authorised in the EEA as an investment firm (or a tied agent of an investment firm), credit institution, UCITS management company or AIFM. This is an important change, particularly in light of Brexit. Placement agents and other distributors will need to consider whether they have the appropriate regulatory authorisations and seek to move EEA distribution into an appropriately authorised entity in advance of 2 August 2021.

Discontinuing marketing

There has been considerable uncertainty and diverge of practices across the EEA in relation to when an AIFM marketing under the AIFMD marketing passport can discontinue marketing. The CBD/R introduces a new formalised procedure for this. An AIFM will be able to discontinue marketing where certain conditions are fulfilled and a notification is made to the relevant NCA.

The conditions are:

- Except in the case of closed-ended AIFs, making a blanket offer to repurchase or redeem interests held by investors in that Member State;
- Publicising the intention to terminate marketing arrangements;
- Terminating or modifying contracts with intermediaries/distributors to ensure they do not continue to market the AIF.

There is effectively a restriction on pre-marketing of successor AIFs once an AIF has been de-notified from marketing. The AIFM cannot engage in pre-marketing that AIF (or a successor AIF with similar investment strategy/idea) in that Member State for 36 months from the date of de-notification. Clearly this will cause difficulties, particularly for closed-ended funds. It is likely that AIFMs will simply choose not to de-register for marketing in order to not impact when the successor fund can be taken to market.

Impact on non-EEA sponsors

The CBD/R impacts EEA AIFMs directly. However, the changes will impact non-EEA managers in a range of ways:

- EU Member States do not have a completely free hand as regards non-EEA

AIFMs marketing in their jurisdiction under Article 42 of the AIFMD and their NPPRs. The CBD contains a recital that states that national rules cannot in any way disadvantage EEA AIFMs vis-à-vis non-EEA AIFMs. It is therefore highly likely that we will see a levelling-up of the NPPRs across the EEA with the requirements of the CBD/R on pre-marketing and discontinuation of marketing.

- Non-EEA managers using an EEA host AIFM in order to avail themselves of the EEA marketing passport for a parallel vehicle will find the marketing of the fund subject to the new requirements. In particular, the requirement that any person marketing the fund on behalf of the EEA AIFM (i.e. the sponsor) must be authorised under the relevant sectoral legislation in the EU.

Application in the UK

The Financial Services (Implementation of Legislation) Bill 2017-19 provided a mechanism to implement EU financial services legislation that: (1) had been adopted by the EU, but did not yet apply; and (2) EU proposals that were in negotiation and that may have been adopted up to two years post-Brexit. The CBD/R were listed in the Schedule to the Bill. However, the Bill was not passed by the end of the 2017-19 parliamentary session and made no further progress. It is, therefore, currently uncertain how the CBD/R will be implemented in the UK post-Brexit.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Investment Funds, Private Equity or Financial Institutions practice groups, or the authors:

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