

Cross-border Distribution of Collective Investment Undertakings

Our 'Alert' of May 2018 drew attention to proposed changes that would impact upon both UCITS Management Companies and AIFMs (and, where appropriate, managers of EuVECAs and EuSEFs).

The final Directive (**2019/1160**) and Regulation (**2019/1156**) have now been published in the Official Journal.

Directive 2019/1160

Pre-Marketing of AIFs

Pre-marketing of AIFs to potential professional investors in the Union to test their interest in an AIF that is not yet established (or that is established but no marketing notification to the home State/host State has been made) will be permitted without it being regarded as 'marketing' under the AIFMD (the concept of what is 'marketing' vs. 'pre-marketing' varies across Member States).

Pre-marketing will **not be permitted** where the information presented:

- is sufficient to allow investors to commit to investment or
- amounts to subscription forms whether in draft or final or
- amounts to constitutional documents, a prospectus or offering documents in a **final** form

Where a **draft** prospectus or offering document is provided it must state that it does not constitute an offer or an invitation to subscribe to the AIF and that the information should not be relied upon because it is incomplete and may be subject to change.

It is a requirement that EU AIFMs **must ensure** that investors **do not acquire** units or shares in an AIF **through pre-marketing**.

It should be noted that any investment by professional investors in an AIF **within 18 months** of the commencement of the pre-marketing of that AIF will be deemed to be as a result of marketing (i.e. it will be **not** regarded as **reverse solicitation**). It will therefore be subject to either the marketing notification requirement (home State) or a marketing passport (other Member State).

The FCA has long regarded the use of draft documentation as not falling within the definition of 'marketing' under the AIFMD (PERG 8.37.6). However the above mentioned '18 months' rule may require the FCA to review its current guidance on 'marketing at the initiative of the investor' (PERG 8.37.11).

An EU AIFM must send appropriate details to its home Member State within **two weeks** of commencing pre-marketing.

Any third party employed to undertake pre-marketing on behalf of the AIFM must be either an investment firm (authorised under MiFID) or a credit institution or a UCITS Management Company or an AIFM or be a MiFID tied agent.

Harmonisation of the requirements for the **discontinuation of the marketing** of a UCITS or an AIF ('de-notification') in a host Member State are introduced and are subject to the following conditions:

- a blanket offer is made to investors (to be publicly available for at least 30 working days) to redeem holdings at no cost – the one exception will be closed-ended AIFs
- the intention to terminate marketing arrangements is made public

- any contractual arrangements with intermediaries is modified/terminated from the date of de-notification so as to prevent any further offering or placement of units or shares

Those investors who remain will still be entitled to receive material such as the prospectus, periodic reports and the KIID/KID.

For a period of **36 months** from the date of de-notification an **AIFM** will be prohibited from pre-marketing these units or shares “or in respect of similar investment strategies or investment ideas”.

Retail AIFs and UCITS

UCITS Management Companies, and **AIFMs** wishing to market to **retail investors** will be required to **establish facilities** in **each** Member State where it is intended to market to perform the following tasks:

- process subscription, repurchase and redemption orders
- provide investors with information on how orders referred to above can be made and how repurchase and redemption proceeds are paid
- facilitate the handling of information and access to procedures and arrangements to the investors' exercise of their rights arising from their investment in the UCITS
- make the information and documents such as the prospectus, periodical reports and the KIID/KID available to investors
- provide investors with information relevant to the tasks that the facilities perform in a durable medium
- act as a contact point for communicating with the competent authorities

The above rewrites the current ‘facilities requirement’ in Article 92 of UCITS.

It will **not** be a requirement to have a **physical presence** in the host State and nor will there be a need to appoint a third party to undertake the above - recitals 5 and 6 refer to “electronically or by telephone”. Any such facilities must be in the official language(s) of the Member State where the fund is marketed (or in a language approved by the competent authorities of that State).

The Directive has to be transposed by Member States by **2 August 2021**.

Regulation 2019/1156

Competent authorities will be required to publish and maintain on their websites full information on the appropriate laws and regulations in respect of the marketing requirements for both AIFs and UCITS. In turn, ESMA will maintain a **central database** containing summaries of this information together with relevant links.

The Regulation also amends the **EuVECA** and the **EuSEF** Regulations to introduce the concept of pre-marketing to both of them in a manner similar to that for AIFs.

Useful Links

[Directive 2019/1160](#)

[Regulation 2019/1156](#)

[EuVECA Regulation \(345/2013\)](#)

[EuSEF Regulation \(346/2013\)](#)

[PERG 8.37](#)

[Optima Alert May 2018](#)