



Legal Update

Pre-Marketing of Investment Funds: Updated Rules

The EU's new regulatory framework facilitating the cross-border distribution of funds took effect on 2 August 2021. EC Directive 2019/1160 and Regulation 2019/1156 are designed to assist in the removal of barriers to cross border distribution within the EU, to harmonise regulatory systems across Member States, and to introduce new marketing and information requirements for funds. While the Regulation has been directly effective across EU Member States since 1 August 2019, the provisions of the Directive were transposed into Irish law by the EU (AIFM) (Amendment) Regulations 2021 (S.I. No. 414 of 2021). In this update we examine these new rules, with a specific focus on the new pre-marketing requirements.

Pre-Marketing Stage

The Directive establishes new parameters within which EU AIFMs (only) may 'pre-market'. This is defined as "a direct or indirect provision of information on investment strategies or investment ideas by an AIFM or on its behalf to professional investors domiciled or registered in the EU in order to test their interest in an AIF which is not yet established".

Under the Directive, in order to be considered 'pre-marketing', an activity must fall within the above definition and satisfy the following conditions:

1. it must not amount to an offer or placement and whilst draft documents can be distributed to potential investors, no subscription documents can be provided;
2. draft documents should be clearly marked as such and explicitly state that all information provided at the pre-marketing stage is incomplete, subject to change and should therefore not be relied upon; and
3. AIFMs shall be required to document all pre-marketing activities and provide an update to their local regulator detailing their pre-marketing activities within 2 weeks of commencement.

This written notification must:

- Identify the Member States where pre-marketing has commenced or is planned;
- Identify the AIFs and Sub Funds being pre-marketed (if any); and
- Set out the details of the pre-marketing including details of the relevant investment strategies.

Other Changes

The Directive addresses other issues, such as a new procedure for notifications of material changes of information filed for the marketing passport, with specified timeframes depending on circumstances. The Directive also provides for a new procedure for discontinuing marketing.

The Regulation imposes similar standards for marketing communications on EU AIFMs and UCITS Managers. Fund marketing communications must: (i) be identifiable as such; (ii) describe the benefits and risks of certain investment options; and (iii) not contain misleading information.

Recommended Action

It is advisable for fund managers intending to market to EU investors to review their marketing processes and documentation, as well as cross-border facilities to ensure that they are in compliance with the new requirements.



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