

## ESMA Focus on Reverse Solicitation

In early January 2022 ESMA released a copy of a letter dated 17th December 2021 (the “Letter”) which it had sent to the European Commission in relation to their request for information relating to the practice of reverse solicitation. The Letter notes the difficulty in obtaining relevant information on the prevalence of this practice, highlights some statistics it was able to obtain in specific markets and proposes a new reporting obligation in this regard. The Letter notes the belief among national regulators that the practice may be used to circumvent marketing requirements, among other concerns, indicating that a crack-down on the practice may be pending.

### Background

The Alternative Investment Fund Manager’s Directive (“AIFMD”), Directive 2011/61, provided for a pan EU passport for alternative investment funds (“AIFs”) for the first time. However, obtaining this requires compliance with the relevant requirements. As some alternative investment fund managers (“AIFMs”), particularly those outside the EU not subject to equivalent obligations, have determined this to be too onerous, their funds were not actively marketed in the EU. However, as the AIFMD focuses on the concept of marketing it does not prohibit sales where these occur without this, e.g., when an investor approaches an AIFM and subscribes into an AIF without having been solicited to do so. This is known as “reverse solicitation”.

### Other Relevant Recent Updates

The EU has recently seen the adoption of the new Cross Border Distribution Framework (“CBDF”), comprising EU Directive 2019/1160 and Regulation 2019/1156, in 2021 (see our related Legal Updates). This revised regime is aimed at ensuring greater harmonisation and efficiency for cross border distribution. It also addresses the concept of “pre-marketing”, another potential loophole in the AIFMD, since marketing of a fund which has not yet been created, for example, falls outside the scope of this legislation. Under the related revised rules of the CBDF any subscriptions made within 18 months of the commencement of pre-marketing of an AIF mean that the fund is subject to the registration requirements and accordingly the reverse solicitation “exemption” will not apply

during this period. However, the new pre-marketing regime only applies to EU-AIFMs not non-EU AIFMS.

Separately, a draft proposal to update the AIFMD has been released, which includes provisions relating to the ability of third country AIFs to avail of national private placement regimes (“NPPRs”), with a restriction on this being a likely change.

### Findings of the Letter

The Letter notes the general difficulty in finding information pertaining to the volume of reverse solicitation. However, it notes the significant figure of 25% of total subscriptions raised by Italian managers from professional investors being raised by this. The Letter highlights the potential for this to circumvent requirements, raising concerns around both investor protection and competition issues. The difference in treatment of EU-AIFMs and non-EU AIFMS under the CBDF also raises further concerns that an uneven playing field has been created which discriminates against EU AIFMs. Accordingly, the introduction of a new reporting requirement to collect related data is proposed.

### Implications and Next Steps

With the reform of the NPPRs already proposed and a renewed focus on reverse solicitation, it seems inevitable that steps will be taken to curtail this. Managers currently receiving significant subscriptions through reverse solicitation would be advised to consider one of the formal routes to market to ensure continued European investment.



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