

EU Proposes Harmonisation of Fund Pre-marketing Rules, but Barriers Remain for Non-EU Sponsors

07 / 26 / 21

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Greg Norman

Partner / London
greg.p.norman@skadden.com
44.20.7519.7192

Elena Faloutsou

Associate / London
elena.faloutsou@skadden.com
44.20.7519.7180

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

40 Bank Street, Canary Wharf
London, E14 5DS, UK
44.20.7519.7000

The European Union's new cross-border fund distribution legislation comes into effect August 2, 2021, updating the existing framework for marketing alternative investment funds (AIFs) in the European Union (EU). The changes aim to further harmonise the rules relating to marketing funds and to improve investor protection. While harmonisation, particularly the introduction of an EU-wide definition of "pre-marketing," will be welcomed by AIF managers (AIFMs) based in the EU, the new rules present some new challenges for fund sponsors seeking to access EU investors.

Cross-Border Distribution Legislation

On June 20, 2019, the EU legislator adopted two pieces of legislation: (1) [Directive \(EU\) 2019/1160](#) (CBDD), which amended earlier directives covering cross-border distribution of collective investment undertakings; and (2) [Regulation \(EU\) 2019/1156](#) (CBDR) on facilitating cross-border distribution of collective investment undertakings. The CBDD took effect August 1, 2019, and was to be transposed into the national laws of the EU member states by August 2, 2021. It is possible, however, that certain member states will not have adopted their implementing legislation by the deadline. The CBDR is directly applicable in the EU, with no need for implementing legislation, and its key provisions on marketing communications will also become effective August 2, 2021.

Pre-marketing

Definition

One of the key elements of the CBDD is the introduction of a definition of "pre-marketing" in the context of the EU's Alternative Investment Fund Managers Directive (AIFMD).¹ The AIFMD extends to any marketing of an AIF in the EU, and under its marketing rules the AIFM must have a marketing passport, in the case of EU AIFMs, or have registered the AIF under the private placement regime of each member state where the AIF is to be marketed. However, member states have differed in what activities they consider "marketing" and what documents can be provided to potential investors without triggering registration requirements. As a result, both EU and non-EU AIFMs have had to comply with the differing rules of each jurisdiction in which they wish to market their fund. A clear and harmonised definition of pre-marketing is therefore a welcome improvement that should simplify fundraising plans.

The CBDD defines "pre-marketing" as:

1. provision of information or communication on investment strategies or investment ideas;
2. by an AIFM authorised in the EU or its delegate performing pre-marketing activities on its behalf;
3. to prospective professional investors domiciled or with their registered office in the EU;
4. to test their interest in an EU AIF which is not yet established or not yet notified for marketing under the AIFMD marketing passport in the EU member state of the prospective investor.

At its core, the EU's definition of pre-marketing is very similar to that adopted by the U.K. Financial Conduct Authority and should enable AIFMs to provide fund documentation to prospective investors in the EU without having to register for marketing under

¹ Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers.

EU Proposes Harmonisation of Fund Pre-marketing Rules, but Barriers Remain for Non-EU Sponsors

the AIFMD, provided that the documentation cannot be used to subscribe or commit to the relevant AIF. In practice, this will mean that AIFMs can provide materials such as marketing decks and term sheets in order to gauge demand before pursuing a full marketing registration. Consistent with current practice, AIFMs will need to register for marketing in order to provide subscription forms, or final constitutional or offering documents.

Potential Pitfalls

As drafted, the CBDD only applies to authorised EU AIFMs, leaving the door open for individual EU member states to determine whether equivalent rules should apply to non-EU AIFMs. In Germany for example, the regulator has confirmed that AIFMs based outside the EU will be required to submit a pre-marketing notification in a manner similar to EU AIFMs (although, unlike EU AIFMs, there is no option to “passport” the notification and it will need to be completed on a jurisdiction-by-jurisdiction basis). Similarly, it is unclear how the rules should apply to new managers who may want to conduct some market-testing before getting fully authorised as an AIFM.

The CBDD also sets out requirements regarding pre-marketing by third-party intermediaries such as placement agents, requiring them to be authorised in the EU under one of a number of regulatory regimes (*i.e.*, as a credit institution, an investment firm under the Directive on Markets in Financial Instruments (MiFID), a management company under the Undertakings for Collective Investment in Transferable Securities Directive or an AIFM), or to be a MiFID tied agent. However, neither pre-marketing nor marketing activities fall clearly within any of the defined activities regulated under MiFID or other European regulations, so this requirement was something of a surprise. It also presents a new challenge for the third-party AIFM model. Many non-EU managers have sought to use a third-party AIFM in order to comply with AIFMD. The introduction of this new requirement would mean that non-EU managers that rely on third-party AIFMs may be unable to carry out pre-marketing activities without additional arrangements such as a secondment arrangement (where fundraising personnel from the non-EU manager are seconded to the EU third-party AIFM in order to carry out marketing activities).

Process

Under the CBDD, authorised EU AIFMs are required to submit a notification to their home state regulator within two weeks of the launch of pre-marketing by way of an informal letter in paper or electronic form. The letter must contain at least the following information:

1. the EU member state(s) in which pre-marketing is taking or has taken place, and the relevant time periods;
2. a brief description of the pre-marketing engaged in, including information on the investment strategies presented to investors in that context; and
3. where relevant, a list of the AIFs (or AIF subfunds) that are or were the subject of pre-marketing.

Once an AIFM has submitted a pre-marketing notification, any subscription for interests in an AIF by an EU investor within 18 months of commencement of pre-marketing will be deemed to be the result of marketing by the relevant AIFM (*i.e.*, it will not be treated as occurring on the investor’s own initiative) and will trigger the application of the AIFMD marketing notification procedures. In other words, commencing pre-marketing will prevent reliance by the AIFM on reverse solicitation for 18 months.

Marketing Communications

A key element of the CBDR is the introduction of harmonised rules on marketing communications by (amongst others) EU AIFMs to investors in the EU. The European Securities and Markets Authority (ESMA) issued [guidelines earlier this year](#) on marketing communications under the CBDR (Guidelines). These will become applicable six months after the date of their publication in all EU official languages. It is currently unclear when the publication process will be complete.

The CBDR and the Guidelines set out two core principles for marketing communications: (1) Marketing communications to investors, whether retail or professional, must be identifiable as such and describe the risks and rewards of investing in the AIF in an equally prominent manner; and (2) all information included in marketing communications must be fair, clear and not misleading, and — as further specified by the Guidelines — suitable to the target investors. The suitability condition may require AIFMs to adapt materials depending on whether the fund is open to retail investors or only to professional investors.

Neither the CBDR nor the Guidelines define a “marketing communication” for these purposes. Instead, the Guidelines provide: (1) illustrative examples of documents that may be considered as marketing communications (*e.g.*, press articles, interviews, advertisements, web pages, video or live presentations or factsheets intended to advertise an AIF, as well as messages on social media platforms); and (2) a list of communications that should not be considered as marketing communications (*e.g.*, legal and regulatory documents of the AIF, corporate communications, short online messages only including a link to a web page where a marketing communication is available and communications issued during pre-marketing). Perhaps surprisingly, these obligations will apply to communications, such as a fund marketing presentation, made during marketing, but not

EU Proposes Harmonisation of Fund Pre-marketing Rules, but Barriers Remain for Non-EU Sponsors

during pre-marketing. Nevertheless, fund managers and sponsors will want to consider the CBDR and the Guidelines for all marketing communications to ensure a consistency of approach.

Conclusion

The CBDD and CBDR bring some welcome clarification to the marketing processes for EU fund managers. However, as is often the case when trying to design rules for the wide spectrum of structures and participants in private funds, there remain a number of considerations to be reviewed by fund sponsors wishing to access EU investors. There appear to be signs that the harmonisation and implementation by EU member states will make the rules clearer for both EU and non-EU fund managers, but some structures and marketing strategies will require continued analysis as the rules come into force across the EU.