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Changes to AIFMD Marketing Rules from August 2021 – How will these New Rules Impact Fund Managers?

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On 2 August 2021, changes to fund marketing rules will come into effect in the European Union ("**EU**"). The revised rules (the "**Marketing Rules**") amend the existing regime relating to the marketing of alternative investment funds ("**AIFs**") under the Alternative Investment Fund Managers Directive (2011/61/EU) ("**AIFMD")**. These changes are brought into effect by EU Regulation 2019/1156 and EU Directive 2019/1160.

The following summarises the key proposals under the Marketing Rules that are expected to impact alternative investment fund managers ("**AIFMs**") below.

1. **Harmonised definition of "pre-marketing"**

The Marketing Rules provide a definition of what "pre-marketing" means across EU Member States. Under the current regime, approval is required only where fund promotional activities would fall with the AIFMD definition of "marketing". However, EU Member States take divergent views as to what constitutes "marketing" under the AIFMD, resulting in varying interpretations of what permissible versus restricted marketing is, among EU Member States. The Marketing Rules address this by providing a harmonised definition, so that going forward, fund managers will be clearer on what activities will constitute "pre-marketing".

The key elements to the new pre-marketing definition are as follows:

- there must be a provision of information (whether direct or indirect) on investment strategies or investment ideas;
- by, or on behalf of, an EU AIFM (*see section 6 below with respect to non-EU AIFMs*);
- to professional investors in the EU;
- to test the investors' interest in an AIF that has either:
    - not been established as yet; or

    - is established, but has not yet been notified for marketing to the relevant EU Member State regulator; and

- the provision of information must not amount to an offer or placement to the investor.

While the proposed definition seeks to clarify what "pre-marketing" is, it remains to be seen as to how this will interpreted by individual EU Member States and whether differing approaches will still be taken by different regulators in practice.

2. **Conditions for "pre-marketing"**

The Marketing Rules amend the AIFMD by providing that "pre-marketing" can be carried on by, or on behalf of, an authorised EU AIFM, **except** where:

- the information presented to potential professional investors is sufficient to allow investors to commit to acquiring units or shares of a particular AIF;
- the information presented to potential professional investors amounts to subscription forms or similar documents (whether in a draft or a final form); or
- the information presented to potential professional investors amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

The above would instead constitute "marketing".

The Marketing Rules also provide that where a draft prospectus or offering memorandum is provided as part of "pre-marketing", it must not contain sufficient information to allow an investor to make an investment decision and must include appropriate disclaimers. The Marketing Rules confirm that the provision of a subscription agreement or final form PPM would constitute "marketing" rather than "pre-marketing".

3. **Notification of pre-marketing**

The Marketing Rules introduce a requirement on EU AIFMs to notify their home Member State regulator (by way of an "informal letter" in paper form or by electronic means) within two weeks of having commenced "pre-marketing" in any Member State. The letter will be required to:

- specify the Member States and the periods in which the pre-marketing is taking or has taken place; and

- provide a brief description of the pre-marketing, including information on the investment strategies presented and, where relevant, a list of the AIFs and AIF compartments subject to pre-marketing.

The home Member State regulator of the EU AIFM (e.g. in the case of a Luxembourg AIFM this would be the *Commission de Surveillance du Secteur Financier* ("**CSSF**")) would then notify the EU Member States where the EU AIFM expects to conduct pre-marketing activities.

4. **Impact on intermediaries and certain UK fund sponsors**

Where an EU AIFM uses a third party distributor to carry out pre-marketing activities on its behalf, the third party will also be subject to the Marketing Rules' requirements. It would also need to ensure that the third party is itself either an authorised EU AIFM, an authorised EU investment firm, EU tied agent under the Markets in Financial Instruments Directive ("**MiFID**"), an EU-authorised credit institution or an EU UCITS manager.

Some placement agents currently operate outside the regulatory perimeter in relation to their marketing and pre-marketing activities. However, these changes will make it more difficult to take this approach as marketing and, by extension, marketing activities to investors will need to be carried on by specific types of authorised firms or tied agents in the EU (as detailed above).

This change will have an impact on non-EU fund sponsors as they would not be able to carry out pre-marketing or marketing activities in EU Member States in relation to an EU AIF managed by an EU AIFM even if such sponsors were to provide investment advice or delegated portfolio management services to the EU AIFM.

Non-EU firms impacted by this change would need to consider possible solutions to facilitate the promotion of such AIFs in the EU and market practice is likely to continue to evolve with respect to these issues. The range of potential contingency options include:

a. EU AIFM markets the fund with the support of individuals from the fund sponsor;
b. appointing a placement agent with its own EU-authorised firm or EU MiFID tied agent; or
c. establishing an EU MiFID firm or tied agent and carrying out EU marketing activities through this entity.

The feasibility of each of the above options, and any associated risks, should be assessed on a case-by-case basis. Fund managers and sponsors should consider the relevant issues which impact their existing marketing activities and should ensure that any relevant external service providers are comfortable with the approach taken.

5. **Potential restriction on reliance on "reverse solicitation"**

The Marketing Rules provide further clarity in respect of reverse solicitation. Any subscription by professional investors in the relevant EU Member State within 18 months of the EU AIFM having begun pre-marketing will be deemed to have been as a result of active "marketing" (therefore triggering the requirement to use the AIFMD marketing passport) under the Marketing Rules.

The Marketing Rules are unclear as to whether this would apply on a "per investor" or "per Member State" basis. Should EU regulators interpret this on a "per Member State" basis, this would mean that after the pre-marketing has commenced, before any investor can receive fund documentation amounting to "marketing", the relevant registration for marketing in that Member State would need to have been obtained. If EU regulators interpret this on a "per investor" basis, then even if there has been pre-marketing to one professional investor, if a second professional investor approaches the AIFM at its own initiative and requests all the fund documentation, then this information can be provided to the second investor ahead of any AIFMD marketing approval because there has been no pre-marketing to that second investor. We would expect the second approach to be the most proportionate and consistent with current market practice in relation to reverse solicitation.

While the Marketing Rules will not mean that reverse solicitation cannot be relied on after the Marketing Rules come into force, it is expected that the circumstances when it can be relied on will be narrowed.

6. **Impact on non-EU AIFMs**

The EU legislation is currently drafted such that the Marketing Rules only apply to EU AIFMs managing EU AIFs and consequently, would not apply to non-EU AIFMs marketing funds under the EU Member States' national private placement regimes ("**NPPRs**") nor do they apply to EU AIFMs marketing non-EU AIFs under the NPPRs. However, the recitals in the EU Directive effecting the Marketing Rules state that the EU Member States should not adopt laws and regulations that are more advantageous for non-EU AIFMs than for EU AIFMs and, therefore, certain EU Member States may well apply the Marketing Rules to any funds marketed under the NPPRs (although this should be kept under review). It is prudent for AIFMs marketing in the EU under the NPPRs on or after August 2021 to plan on the basis that the Marketing Rules will be apply to such marketing.

7. **Impact in the UK**

The Marketing Rules have not been applied (and are not expected to apply) in the UK now that the UK is no longer part of the EU and the Brexit transitional period has come to an end (as of 31 December 2020). UK AIFMs marketing in the EU *via* the NPPRs will need to monitor whether the EU Member State into which it wishes to market will apply the Marketing Rules (as is expected to be the case).

8. **Next steps**

Fund managers and sponsors will no doubt have adapted their marketing approach under the AIFMD since it came into force and will now need to reassess how they approach marketing under the Marketing Rules from August this year and should start planning accordingly to ensure they are compliant when the Market Rules come into force.

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