

# Memorandum

## EU Rules on the Cross Border Distribution of Funds Come Into Effect Within Weeks—Are You Ready?

June 29, 2021

On August 2, 2021, the EU's new Directive and Regulation on cross-border distribution of collective investment undertakings, known as the "**CBDF Rules**," will come into effect, materially impacting the manner in which fund managers carry out fundraising activity in Europe. For fund sponsors raising capital in the EU, including EU and non-EU alternative investment fund managers ("**AIFMs**") and UCITS managers, the CBDF Rules represent one of the most significant regulatory developments to follow the 2011 implementation of the alternative investment fund managers directive (Directive 2011/61/EU) (the "**AIFMD**"). Fund sponsors should anticipate that aspects of the CBDF Rules will have marketing and regulatory ramifications—including, with respect to fundraising planning and timelines, marketing to non-professional investors and the content of marketing communications—similar to those triggered by the AIFMD.

### Key Takeaways

**What:** Key changes are:

- new definition of pre-marketing;
- new notification requirement for pre-marketing;
- changes to, and limits on, reverse solicitation;
- additional requirements in respect of marketing to non-professional investors; and
- rules and guidance on the content of marketing communications.

**When:** Applicable from August 2, 2021

**Who:** Applicable to fund managers

## Pre-Marketing

### NEW DEFINITION

“Pre-marketing” has historically been a critical avenue for sponsors—especially smaller and mid-market sponsors—to gauge the interest of European investors in products and strategies without tripping the notification/registration requirements under the AIFMD. The recurring challenge has been the lack of a uniform definition and consistent application of the scope of “pre-marketing” across Europe. The CBDF Rules bring in a new definition of “pre-marketing,” the key elements of which are:

- direct or indirect provision of information or communication on investment strategies or investment ideas;
- by an AIFM or on its behalf (*e.g.* by a placement agent);
- to potential professional investors in the EU;
- to test their interest in an AIF (or compartment) which is not yet established, or is established but not yet notified for marketing under the AIFMD; and
- which does not amount to an offer to invest in the relevant AIF (or compartment).

Importantly, the CBDF Rules permit the presentation of information to professional investors (as defined in the EU MiFID) as part of pre-marketing where:

1. it is not sufficient to enable investors to commit to subscribing to a particular AIF;
2. draft or final subscription documents are not provided; and
3. any draft PPM or LPA is provided clearly stating that
  - a. it does not constitute an offer; and
  - b. it is incomplete and subject to change and therefore cannot be relied on.

While the scope of pre-marketing under the CBDF Rules appears to signify a shift towards more flexibility in those European countries which have historically been more restrictive on pre-marketing, there could still be scope for divergent approaches on what constitutes an “offer,” as well as what documents should look like in order to be regarded as being in “draft” form. As a result, managers will continue to need to obtain local advice in each EU country when planning their pre-marketing activities, at least in the near term.

### NEW NOTIFICATION REQUIREMENT FOR PRE-MARKETING

As part of the implementation of the CBDF Rules, there will be a new notification requirement in respect of pre-marketing which must be made in the applicable EU jurisdictions within two-weeks of beginning pre-marketing activities. Importantly, this obligation is on top of the notification/registration process under the marketing passport (EU AIFMs) and national private placement regimes (non-EU AIFMs) required at the stage of full AIFMD marketing and is imposed irrespective of whether a sponsor engages in “marketing” in the EU. Although

the Directive provides that the AIFM must *notify its home regulator of its pre-marketing activities using “an informal letter, in paper form or electronic means,”* it remains to be seen whether this will be as simple and uniform a process in each EU country as envisaged by the Directive.

### **Critical Limitations on Reverse Solicitation**

Following pre-marketing in an EU jurisdiction, any subscription over the next 18 months thereafter will be regarded as arising as a result of such pre-marketing and must only be accepted through the marketing procedures permitted under the AIFMD—*i.e.*, via the marketing passport or the national private placement regimes. Accordingly, a sponsor will not be able to rely on reverse solicitation in an EU country for 18 months after having started pre-marketing in that country, even if the specific investor for whom reverse solicitation is being relied on has not been pre-marketed to.

### **Marketing to Non-Professional Investors**

The CBDF Rules bring in additional requirements on marketing to non-professional investors, including relatively sophisticated investors that cannot be opted up to professional status, such as high net worth investors.

### **PRIOR NOTIFICATION OF MARKETING COMMUNICATIONS**

Importantly, national regulators may require prior notification of marketing communications (see below) addressed to retail investors and have 10 working days to ask AIFMs to make any amendments to such communications. It remains to be seen which regulators impose this requirement and to what extent they scrutinize marketing communications—this is another area of possible divergence across the EU.

### **LOCAL FACILITIES**

Whilst not a requirement to have an in-country presence, CBDF has a concept of “local facilities” for retail investors to process subscriptions and redemption requests, provide pre-contractual disclosures and periodic reports, act as a contact point to communicate with regulators etc. These must all be provided in the official language of the country where the investor is based, or in a language approved by that country’s regulator.

There is no requirement to appoint a third party or establish a physical presence to provide these facilities so it appears that facilities in electronic format (such as a password protected section of a website) would be sufficient.

### **Marketing Communications**

The Regulation brings in requirements for marketing communications, whether to professional or non-professional investors, to:

1. be identifiable as such;
2. display risks and rewards in an equally prominent manner; and
3. be fair, clear and not misleading.

ESMA finalized Guidelines on the content of marketing communications on May 27, 2021. The Guidelines contain extensive detail on how information in marketing materials should be presented and the Guidelines will apply 6 months after publication (so are likely to apply from December or January next year). The Guidelines apply both to AIFMs and to persons marketing on their behalf.

Whilst the Guidelines do not specifically define what constitutes “marketing,” pre-marketing activity is excluded, and so it seems that anything which is “AIFMD marketing” will be subject to the Guidelines.

Marketing communications should:

- be clearly labelled as such with a specified disclaimer, with #marketingcommunication being acceptable in the context of short social media posts;
- present risks and rewards in the same font size and risks should not be relegated to footnotes. The Guidelines mention presenting risks and rewards in the form of a two-column table as an example of good practice;
- not be inconsistent with, add to, diminish or contradict, the legal and regulatory documents of the fund (Art 23 disclosures, LPA, website disclosures under SFDR and periodic reports);
- include words like “active” or “actively managed” to describe investment performance;
- only contain statements adequately justified based on objective and verifiable sources;
- be adapted for non-professional investors, with less technical wording and providing adequate explanations etc.; and
- be translated to the official language or must be in a language accepted by the regulator of the country where marketing is being carried out.

Given the granularity of the Guidelines and potential prior notification of marketing communications, we expect marketing material will require much more careful review compared to current practice.

For further information about this memorandum, please contact one of the following or a member of the Firm's [Private Funds Practice](#).

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