



## Cross Border Fund Distribution Rules Adopted by European Parliament

The European Parliament voted on 16<sup>th</sup> April 2019 to adopt the Commission's initiatives to improve the efficiency of cross-border distribution of collective investment schemes.

The changes consisting of a Regulation and a Directive, are designed to increase transparency, remove overly complex and burdensome requirements and harmonise diverging national rules.

- Directive amending the UCITS Directive and AIFMD with regard to the cross-border distribution of collective investment funds (the "Directive"); and
- Regulation on facilitating cross-border distribution of collective investment funds (the "Regulation").

The EU investment funds market amounts to a total of €14.3 trillion. It is recognised that the market has not yet achieved its full potential with 70% of the total assets under management held by investment funds authorised or registered for distribution only in their domestic market. Only 37% of Undertakings for Collective Investment in Transferable Securities (UCITS) and about 3% of alternative investment funds (AIFs) are currently registered for distribution in more than 3 Member States. This is partly due to regulatory barriers that currently hinder the cross-border distribution of investment funds.

### Key Changes

#### Harmonised rules relating to local facilities and agents

One of the most costly obligations under the UCITS Directive is the requirement to provide local facilities and appoint a local Paying or Facilities Agent. The Directive recognises that such facilities are rarely used by investors with the preferred method of interaction in a more direct way. Consequently, the Directive replaces the requirement for local facilities so that the requirements are

### Dillon Eustace Fund Registration Team contacts:



**Tara O'Callaghan**

DD: +353 (0)1 673 1831

[tara.ocallaghan@dilloneustace.ie](mailto:tara.ocallaghan@dilloneustace.ie)



**Fionnán Gannon**

DD: +353 (0)1 673 1867

[fionnan.gannon@dilloneustace.ie](mailto:fionnan.gannon@dilloneustace.ie)



**Helen Daly**

DD: +353 (0)1 673 1830

[helen.daly@dilloneustace.ie](mailto:helen.daly@dilloneustace.ie)

harmonised and may be provided electronically or by means of other distance communications with investors.

Similar provisions are introduced for AIFMs marketing AIFs to retail investors

### **Harmonised Rules relating to changes to information to be notified to host regulators**

In the event of a change to information notified to a Member State or a change regarding share classes to be marketed, the Directive provides that written notice must be given to each of the national competent authority of the home Member State of the UCITS and the competent authority of the host Member State at least one month before implementing that change.

If the competent authority of the home Member State is of the view that as a result of the change the UCITS would no longer comply with the UCITS Directive, it must then notify the UCITS within 15 working days that it is not to implement the change. Otherwise the national competent authority of the home member state must inform the host regulator without delay.

Importantly where a change is implemented subsequent to a notification by the competent authority of the home Member State that the UCITS is not to implement that change and pursuant to that change the UCITS no longer complies with the UCITS Directive, the competent authority of the home Member State of the UCITS is required to take all due measures including, where necessary, the express prohibition of marketing of the UCITS and shall notify accordingly the competent authorities of the host Member States without undue delay.

Similar changes are made to the AIFMD in respect of the approval or rejection of planned changes for AIFs.

### **Harmonised process for notification of discontinuation of marketing**

The current practice for notification of discontinuation of marketing differs between Member States. The Directive provides for a more harmonised approach in order to create more economic and legal certainty for managers in a host member state.

The UCITS will be required to fulfil all of the following conditions prior to deregistration:

- a) Ensure that no investor holds units of the UCITS in the relevant Member State or no more than 10 investors in that Member State hold less than 1% of the AUM of that UCITS;
- b) Make a blanket public offer to repurchase, free of charges and deductions, all shares or units held by investors in that Member State, which offer must remain open for at least 30 working days;
- c) Publicise its intention to stop marketing in that Member State, by a medium customary for marketing a UCITS (which may include electronic means); and
- d) Modify or terminate any contractual arrangements with financial intermediaries or delegates to prevent any further marketing.

The UCITS must make clear the consequences for investors if they do not accept the offer to redeem or repurchase their units.

Notifications of discontinuation of marketing shall, under the Directive, be made to the home competent authority which will, no later than 15 days from the date of receipt, transmit the request to the host competent authority and to ESMA and inform the UCITS. The UCITS may not be marketed thereafter, although the obligations to provide information to investors who remain will continue.

Similar provisions are introduced for AIFMs discontinuing marketing of AIFs, other than closed-ended AIFs and European long-term investment funds.

### **Pre-Marketing and Reverse Solicitation (AIFs)**

A new harmonised regime for pre-marketing AIFs in the EU is introduced with the aim of making it easier for AIFMs to test the appetite of potential professional investors in new markets.

While some Member States currently permit pre-marketing by an AIFM, the conditions attaching to such pre-marketing vary considerably between Member States.

*"Pre-marketing' is defined as the " provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or registered in the Union in order to test their interest in an AIF which is not yet established, or in an AIF which is established, but not yet notified for marketing in accordance with Article 31 or 32, or in compartments of such AIFs, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the investor to invest in the units or shares of that AIF or compartment."*

The Directive provides that an authorised EU AIFM engaging in pre-marketing may not present information to investors relating to or containing reference to an established AIF, enabling investors to commit to acquiring units or shares of a particular AIF, or amounting to a constitutional document, a prospectus, a subscription forms or similar document whether in a draft or a final form allowing investors to take an investment decision.

Any pre-marketing document will have to clearly state that the document does not constitute an offer or an invitation to subscribe to units or shares of an AIF and the information presented in those documents should not be relied upon because it is incomplete and may be subject to change.

AIFMs which engage in pre-marketing must notify their home competent authority in writing within two weeks of engaging in pre-marketing, specifying the Member States, time periods in which the pre-marketing took place, a brief description of the strategies presented and, where relevant, a list of the AIFs which were the subject of pre-marketing. The home competent authority shall promptly inform the competent authorities of the Member States in which the pre-marketing took place.

Fund managers will no longer be able to rely on reverse solicitation if they have carried out pre-marketing in relation to the AIF in question within the previous 18 months.

AIFMs shall ensure that investors do not acquire units in an AIF through pre-marketing and that investors contacted as part of pre-marketing may only acquire units under marketing permitted under the AIFMD marketing passport.

AIFMs should also ensure that pre-marketing is properly documented.

### **Marketing Communications**

Competent authorities shall be required to publish and maintain on their websites up-to-date and complete information on applicable laws, regulations and administrative provisions governing marketing requirements for UCITS and AIFs and summaries thereof.

UCITS and AIFs will be required to comply with harmonised requirements for their marketing materials with ESMA required to issue implementing technical standards to the Commission within eighteen months of the entry into force of the Regulation. ESMA is also tasked with drafting a range of standard templates, forms and procedures governing the transmission of the required information. National regulators will be required to transmit notifications, notification letters, written notices and information relating to notifications to ESMA

### **Regulator Fees**

National regulators will be permitted to charge fees which must be proportionate to the regulatory tasks carried out and subject to a transparent process. Details of such fees will be maintained on a centralized ESMA database.

### **ESMA Central Database**

The Regulation introduces increased transparency and the creation of a single ESMA database for information on national rules related to marketing requirements and applicable fees.

ESMA will also be required to publish and maintain on its website a database listing all AIFMs, ManCos, AIFs and UCITS which those AIFMs and ManCos are managing and marketing as well as the Member States in which those funds are marketed.

### **Timing**

Each legislative act will enter into force on the twentieth day following its publication in the official Journal of the European Union. Member states will have two years from the date of entry into force of the Directive to transpose the provisions thereof into national law. The Regulation will apply from the date of entry into force except for certain provisions which will apply twenty-four months after the date of entry into force.

If you have any questions in relation to the above please contact a member of the Foreign Registrations Team or your usual contact at Dillon Eustace.

**April 2019**

DILLON  EUSTACE

**Dublin**

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

**Cayman Islands**

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

**New York**

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

**Tokyo**

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

**DISCLAIMER:**

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

**Copyright Notice:**

© 2019 Dillon Eustace. All rights reserved.