

EU cross-border distribution of funds (CBDF) - Implementation and challenges of new rules



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AIMA CBDF Implementation Guide

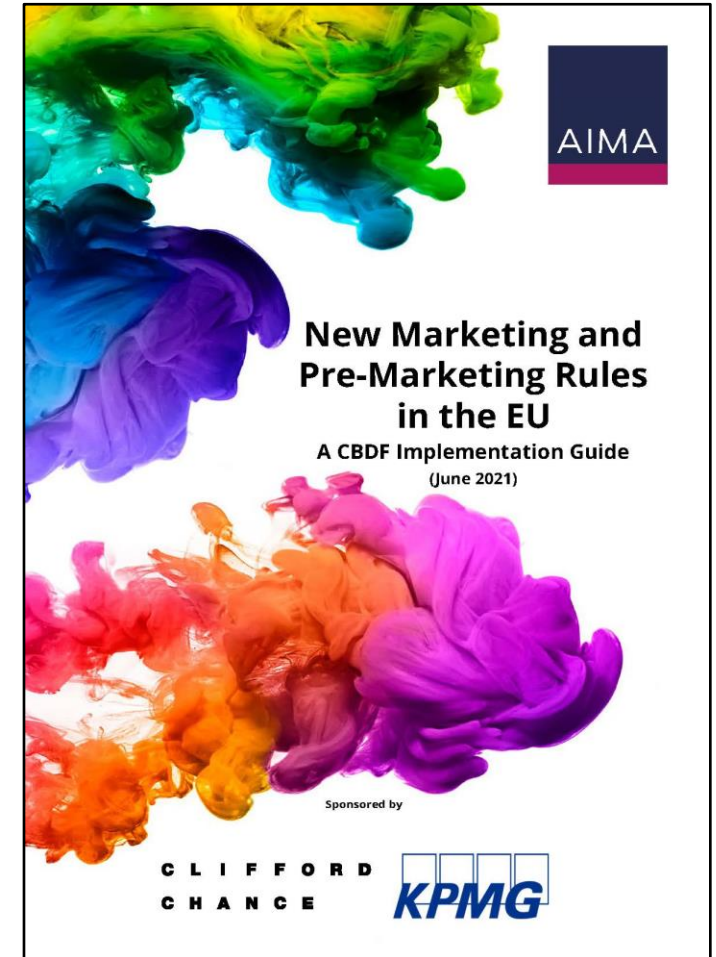
A multi-jurisdictional, practical manual on all aspects of the Cross-Border Distribution of Funds (“CBDF”) Directive and Regulation – well before any supervisory guidance in Europe!

Scope and Timeline of the CBDF Package

- Preceding EU/EEA regulatory measure prior to **AIFMD II (Q4/21)**
- Facilitating the cross-border distribution of **UCITS and AIFs** in the EU/EEA
- Introducing **two new harmonised key concepts** (pre-marketing and de-notification)
- Applicable from **2 August 2021**

Coverage of the AIMA CBDF Implementation Guide

- **Bridging the gap** between regulatory provisions and practical application
- All **key elements of the CBDF package**, incl. pre-marketing, de-notification, facilities and marketing communications
- Transposition outcomes in **12 EU/EEA Member States**, including the most important jurisdictions (as per AuM) for UCITS and AIFs
- Particular notes for **Non-EU providers** entering the EU/EEA single market



CROSS-BORDER DISTRIBUTION OF INVESTMENT FUNDS

PRE-MARKETING

Definition of 'pre-marketing' / further conditions

Current position

- AIFMD regulates “marketing”, which is broadly defined as a “direct or indirect offering or placement”
- This wide definition has led to uncertainty and divergence on what is and is not “marketing” across the EU

New Position

- A definition of 'pre-marketing' is introduced into AIFMD:
 - *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 with a registered office in the Union*
 - *in order to test their interest in*
 - *an AIF or a compartment which is not yet established, or*
 - *which is established, but not yet notified for marketing in accordance with Article 31 or 32,*
 - *in that Member State where the potential investors are domiciled or have their registered office*
 - *and which....does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment”*

Conditions for 'pre-marketing'

- Information presented may not: (a) be sufficient to allow investors to commit to acquiring units or shares of a particular AIF; (b) amount to subscription forms or similar documents whether in a draft or a final form; or (c) amount to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.
- EU AIFMs shall ensure that investors do not acquire units or shares in an AIF through pre-marketing and
- Investors contacted as part of pre-marketing may only acquire units or shares in that AIF through marketing permitted under Article 31 or 32 of the AIFMD.
- Any subscription by professional investors, within 18 months of the EU AIFM having begun pre-marketing should be considered to be the result of marketing and should be subject to the applicable notification procedures in AIFMD
- An EU AIFM should send, within 2 weeks of having begun pre-marketing, an informal letter about its marketing to its home member state NCA. The home member state NCA shall promptly inform the competent authorities of the Member States in which the EU AIFM is or was engaged in pre-marketing.
- EU AIFMs should ensure that their pre-marketing is adequately documented
- But what about third country AIFMs?

CROSS-BORDER DISTRIBUTION OF INVESTMENT FUNDS

RETAIL FUNDS

Requirement to put in place “Facilities”



Current position

- For AIFs, the regulation of marketing to retail investors is left to individual Member States
- Non-EU AIFMs market under national private placement regimes

New Position

- The AIFM must establish facilities that perform the following tasks:
 - Process investors' subscriptions, payment, repurchase or redemption orders
 - Provide investors with information on how orders can be made and how repurchase and redemption proceeds are paid
 - Facilitate the handling of information relating to the exercise of investors' rights
 - Make fund rules or instruments of incorporation and the latest annual report of the AIF available for inspection
 - Act as a contact point for communicating with regulators
- No physical presence needed
- Use of electronic or other means of distance communication permitted
- The facilities can be run by a third party

Changes to Passporting Notifications

The Directive (EU) 2019/1160 amends passporting notification procedures in relation to UCITS and AIFs which have been notified for marketing on a cross-border basis.

Changes to the UCITS marketing passport

- Modified notification procedures and timeframe in Art. 93(8) UCITSD on changes of initial notification
- Written notice of changes one month before implementation to home and host Member State NCA
- 15 working days to inform UCITS of non-compliance/non-implementation of changes by home Member State NCA
- Re means of communication, home and host NCA procedures to be checked

Changes to the AIFMD marketing and management passport

- Modified notification procedures and timeframe in Art. 32(7) AIFMD on changes of initial notification
- Notification of home NCA in the event of material changes on information previously filed
- One month prior to implementation or immediately (in case of unplanned changes)
- 15 working days (no acceptance period re AIFM), 1 month (confirmation period re host NCA)

Directive (EU) 2019/1160, Recitals

“(3) It is necessary to fill in the regulatory gap and align the procedure for notifying competent authorities of changes regarding UCITS with the notification procedure laid down in Directive 2011/61/EU.”

Marketing Communications

The Regulation (EU) 2019/156 establishes uniform rules on marketing communications addressed to investors as well as ex-ante verification procedures.

Scope and basic requirements of marketing communications

- Generally, all UCITS ManCos and Authorised EU-AIFMs with respect to all UCITS or AIFs they manage and market in the EU/EEA
 - Non-EU AIFMs: Monitoring of NCA administrative practice required
- General requirements:**
- Identifiable as marketing communication
 - Risks and rewards described in equally prominent manner
 - fair, clear, not misleading

ESMA - Guidelines on marketing communications

- “[...] In particular [the Guidelines] establish common principles on [...] marketing communications [...]. However, the Guidelines do not intend to replace existing national requirements on the information to be included in marketing communications (such as those relating to the fiscal treatment of the investment in the promoted fund) to the extent these are compatible with any existing harmonised EU rules (e.g. rules on disclosure of costs or performance in the KIID should not be contradicted or diminished by different national disclosure requirements on costs or performance in marketing communications).”



Passporting De-Notification

The Directive (EU) 2019/1160 provides, for the first time, a harmonized set of provisions relating to the process for withdrawing or closing out a passporting notification once made.

The basic requirements pursuant to Art. 93a UCITSD/Art. 32a AIFMD -new-

- Blanket repurchase/redemption offer
- Public announcement of intention to stop marketing
- Update or termination of contracts with financial intermediaries and delegates

Additional communications of information

UCITS (Art. 93a(5) UCITSD)

- Rules or instruments of incorporation, prospectus, latest annual report/subsequent half-yearly reports
- KIID

EU AIF (Art. 32(5) AIFMD)

- Annex IV of AIFMD, points (b) to (f), in particular rules or instruments of incorporation and depositary identification
- As of now, no additional Annex IV filing requirements

Directive (EU) 2019/1160, Recitals

“(7) The absence of clear and uniform conditions for the discontinuation of marketing of units or shares of a UCITS or an AIF in a host Member State creates economic and legal uncertainty for fund managers. Therefore, Directives 2009/65/EC and 2011/61/EU should set out clear conditions under which de-notification of the arrangements made for marketing as regards some or all of the units or shares could take place. Those conditions should balance, on the one hand, the ability of collective investment undertakings or their managers to terminate their arrangements made for marketing of their shares or units when the established conditions are met and, on the other hand, the interests of investors in such undertakings.

“(8) The possibility to cease marketing UCITS or AIFs in a particular Member State should neither come at a cost to investors nor diminish their safeguards under Directive 2009/65/EC or Directive 2011/61/EU, in particular with regard to their right to accurate information on the continued activities of those funds.”

Thank you for watching.

If you have any questions, please contact
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