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EU adopts new rules on marketing investment funds

Background

The EU has now adopted supplementary rules on how funds are marketed to professional investors in the EU that the European Parliament voted on in April this year.

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The new rules adopted earlier this month aim to create more consistency in how different EU countries interpret certain concepts under the existing legislation. However, while the changes will provide a more harmonized approach, questions remain as to whether this will have a positive impact on fund managers.

Timing

The new rules are due to come into force in early July of this year and take effect towards the end of 2021. Whilst this is a long way off, it is an indication of how certain concepts will be interpreted and the view of EU regulators on these topics.

What will change?

New definition of “pre-marketing”

One of the key changes is the new definition of “pre-marketing”. Broadly, this will allow EU authorized fund managers to market a new fund without making a marketing application in an EU member state provided the information:

- is not sufficient to allow investors to commit to acquiring interests in a particular fund;
- does not include subscription forms or similar documents (whether in a draft or a final form); or
- does not amount to a final constitutional document or offering document if the fund has been established. If not established, those documents can be provided in draft form, provided certain prescribed language is included.

If a fund manager intends to pre-market a fund in an EU member state, it will also need to notify its home state regulator of their pre-marketing activities within two weeks of commencing them.

Whilst this is helpful for funds that have not yet been established and it provides more consistency across different EU countries, it will make it more restrictive in some countries for the managers of funds that have already been established to test the market in a meaningful way. It is likely that from a practical perspective, any marketing that would not trigger these ‘pre-marketing’ requirements would be limited to high-level/generic discussions around strategy rather than discussing potential funds.

Content requirements

The new rules also impose content requirements on fund documents. Broadly, the risks and rewards of potential investments must be given equal prominence in marketing materials, marketing materials must be clear, fair and not misleading, marketing communications to investors must be clearly identifiable as such and it must be made clear to potential investors that marketing arrangements may be terminated.

Reverse solicitation

The new rules specify that any purchase of units in a fund within 18 months of the commencement of pre-marketing will be considered to be the result of marketing. Therefore, the rules suggest that, for the entire year and a half following the date on which pre-marketing commences, no investors (even those that have not received pre-marketing materials) may invest unless a full marketing notification has been made by the manager. This is clearly more restrictive and managers will need to ascertain the benefit of pre-marketing against closing down a legitimate reverse solicitation enquiry from an investor.

Who do the new rules apply to?

The new rules apply to full scope EU authorized fund managers using the passporting regime to market their funds and will also include EU managers who have the EuVECA designation for the funds. In their current form they do not apply to non-EU managers or sub-threshold managers who do not have the EuVECA designation. This is likely to change towards the end of this year when AIFMD is due to be reviewed, bringing non-EU AIFMs within scope of the rules. However, it is likely member states will apply the new rules to both EU and non-EU managers regardless to ensure EU-managers are not put at an unfair competitive disadvantage to non-EU managers.

Other points to note

The new rules include provisions that make it clear that third parties marketing funds in the EU on behalf of an EU-authorized manager must be an EU-regulated entity. This clarifies a grey area and will be of particular relevance considering their Brexit contingency plans.

If you would like to discuss the above, please contact [Eve Ellis](#) or [Kirsten Lapham](#).