

Cross Border Distribution of Investment Funds in Europe

Jennifer Wood
12 March 2019

Agenda

- Accessing the UK after exit day
- Cross border distribution of collective investment funds

-
- Exit day: 11 pm GMT on 29 March 2019 (maybe)
 - Possibilities:
 - Exit as planned
 - With a deal
 - Without a deal
 - Delay – but for how long and to what end?
 - European Parliament elections
 - Second referendum
 - UK election
 - Revoke Article 50 and stay in

Planning for a 'no deal' exit

-
- Do nothing
 - Use the UK Temporary Permissions Regime for investment funds:
 - Have to qualify
 - Have to apply prior to COB on 28 March 2019
 - Lasts for up to three years after Exit Day (subject to extension by the FCA)
 - No fee payable to apply for TPR
 - Rules applicable pre-Exit Day continue to apply while in the TPR
 - Apply via Connect
 - Firms with UK separate accounts will need to apply for the UK Temporary Permissions Regime for firms

Qualifying for the TPR for funds

- Existing UK and EEA AIFs managed by an EEA AIFM (unless the AIF is a feeder of a third country master AIF), provided they were notified under Article 32 for marketing in the UK prior to Exit Day, subject to timely application
- Existing UCITS managed by an EEA management company, provided they were notified for marketing in the UK prior to Exit Day, subject to timely application
- New sub-funds of an existing UCITS created after Exit Day provided the umbrella is in the TPR as of the Exit Day, subject to conditions

But some will not qualify:

- New sub-funds of a UK or EEA AIF created after Exit Day
- Sub-funds of UCITS or AIFs that were existing but not notified for marketing in the UK pre-Exit Day
- Non-EEA AIFs

Options for funds outside TPR

- **EEA AIFs:** Use the Article 42 national private placement regime
- **UCITS:** Use Section 272 option or the Article 42 national private placement regime
- **Non-EEA AIFs marketed under the Article 36 national private placement regime pre-Exit Day** will qualify for the Temporary Transitional Power which keeps the status quo until 30 June 2020
- **Other non-EEA AIFs:** Use the Article 42 national private placement regime

TPR for firms

- Have to qualify
- Have to apply prior to COB on 28 March 2019
- Lasts for up to three years after Exit Day (subject to extension by the FCA)
- No fee payable to apply for TPR
- Apply via Connect
- Most rules applicable pre-Exit Day continue to apply but some local UK requirements will also apply

Cross Border Distribution of Collective Investment Funds

Directive

- Timing

- Timing
- Pre-marketing definition
 - “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.”

- Timing
- Pre-marketing limits
 - EU AIFMs, EU AIFs and professional investors only
 - Must not:
 - Enable the investor to commit to acquiring shares
 - Amount to a subscription form
 - Be an offering document in final form for a not yet established AIF
 - Use limits reverse solicitation
 - Ex-post regulatory notifications required within 2 weeks

- Timing
- Pre-marketing
- Facilities
 - Applies to AIFMs marketing to retail investors and all UCITS
 - Must “make available” facilities to perform certain tasks
 - No physical presence can be required
 - Electronic means permitted
 - Third parties optional but must have written contract with specific terms and must be “subject to regulation and supervision governing the tasks to be performed”

Directive

- Timing
- Pre-marketing
- Facilities
- De-notification
 - Applies to EU AIFMs marketing under passport and all UCITS
 - Redemption/repurchase offer (unless closed-end)
 - Public notice of intention to stop marketing
 - Modify/terminate contractual arrangements with 3PMs
 - Continue to provide required ongoing disclosures

Directive

- Timing
- Pre-marketing
- Facilities
- De-notification
- Assessment affecting third country passporting

Directive

- Timing
- Pre-marketing
- Facilities
- De-notification
- Assessment affecting third country passporting
- Review possible extension of pre-marketing to UCITS

- Marketing communications from authorised AIFMs and UCITS must
 - be identifiable as such
 - describe the risks and rewards of purchasing shares in an equally prominent manner
 - include only information that is fair, clear and not misleading
 - not contradict/diminish other required information
- Applicable 24 months after date of entry into force
- ESMA required to have published marketing communication guidelines by that time

- Marketing communications
- Ex-ante verification of marketing communications
 - Applies 20 days after publication to authorised AIFMs marketing to retail investors and to UCITS management companies
 - NCAs can require, on a systematic or ad hoc basis, prior notification of all marketing communications to verify compliance with the Regulation and national law
 - NCA has up to 10 working days to request changes be made
 - Procedures must be published on website
 - Transparent and non-discriminatory treatment required regardless of the home Member State of the manager

Regulation

- Marketing communications
- Ex-ante verification of marketing communications
- Publication of national marketing requirements

Regulation

- Marketing communications
- Ex-ante verification of marketing communications
- Publication of national marketing requirements
- NCA fees and charges for cross border marketing

- Marketing communications
- Ex-ante verification of marketing communications
- Publication of national marketing requirements
- NCA fees and charges for cross border marketing
- ESMA databases

- Marketing communications
- Ex-ante verification of marketing communications
- Publication of national marketing requirements
- NCA fees and charges for cross border marketing
- ESMA databases
- Report on reverse solicitation

Contact



AIMA

Jennifer Wood

Managing Director, Global Head of Asset
Management Regulation & Sound Practices

jwood@aima.org

Disclaimer

This document is provided to and for AIMA members only. It is intended as indicative guidance only and is not to be taken or treated as a substitute for specific advice, whether legal advice or otherwise. All copyright in this document belongs to AIMA and reproduction of part or all of the contents is strictly prohibited unless prior permission is given in writing by AIMA.