

Presidency of the Council Weighs in on Proposed Rules for Pre-Marketing and Reverse Solicitation

14 June 2018

As we reported in our March [client update](#), the European Commission proposal to define “marketing” and “pre-marketing” for the purposes of the Alternative Investment Fund Managers Directive has raised serious concerns in the private funds industry. The proposed new rules would make marketing more difficult in practice, especially for closed-ended private funds. And, although currently only aimed at authorised EU AIFMs, it seems likely that both non-EU and sub-threshold EU managers could also be affected by the change.

**Debevoise
& Plimpton**

However, changes to the Commission proposal that are currently being discussed by the Council offer some hope that the final rules will be better than the Commission’s opening salvo had suggested: compromise text put forward by the Council Presidency includes several helpful changes. Although this compromise text is not yet signed off on by all Member States, let alone the Commission and the Parliament, it is a very positive development.

Broader Scope of Pre-Marketing. As defined in the original Commission proposal, “pre-marketing” would only be permitted for Alternative Investment Funds (AIFs) that had not yet been established and, even then, would not permit distribution of PPMs, constitutional documents, other offering documents, or subscription forms, **whether in draft or final form**. This broad interpretation of “marketing” would considerably restrict the scope for registration and permission-free “pre-marketing” as understood in most EU member states at the moment. It would require authorised EU AIFMs to register for the marketing passport far earlier in the distribution process.

On the other hand, the rules contemplated by the compromise text published last week would only prohibit distribution of **final form** documents. Pre-marketing an AIF would remain possible, even if already established, and the distribution of **draft** PPMs, constitutional documents and offering documents would be permitted, provided they were marked as drafts and made clear that they were subject to change and that no offer to subscribe was being made. However, the compromise text says that any draft documents could not include “all relevant information allowing investors to make an investment decision”.

Although it is not entirely clear what is meant by “all relevant information”, this proposal seems to be broadly in line with the rules on pre-marketing as currently established in some EU member states, including (for example) the United Kingdom and Germany.

Reverse Solicitation. The original Commission proposal suggested that fund managers would no longer be able to rely on reverse solicitation for any AIF that was similar to the one discussed as regards any investor that had been the subject of pre-marketing. The Presidency compromise also seems to suggest that any subscription as a consequence of pre-marketing cannot be deemed to be reverse solicitation. However, given that the pre-marketing definition is broader, it seems reasonable to take the view that any subscription by an investor based upon such pre-marketing activities could not be said to have been at the initiative of the investor.

Next Steps. The European legislative process is at an early stage. The Council still has to agree on the compromise text. Furthermore, the European Parliament has not published its view of the Commission proposal and the negotiations between the legislative bodies will follow that.

Comment. The changes proposed in the Presidency’s compromise text are welcome. They would give far greater legal certainty to the whole marketing exercise and make the filing process more manageable. Draft constitutional documents could be distributed and negotiated with investors. Material amendments following those negotiations could be made before filing for a marketing passport avoiding another approval procedure (triggering a one-month approval period) just before closing. Even though the proposal only relates to European AIFs, many expect that regulators will adopt the same interpretation of pre-marketing for non-EU funds.

* * *

Please do not hesitate to contact us with any questions.

LONDON

Patricia Volhard
pvolhard@debevoise.com

Simon Witney
switney@debevoise.com

Eric Olmesdahl
eolmesdahl@debevoise.com

Philip Orange
porange@debevoise.com

FRANKFURT

Jin-Hyuk Jang
jhjang@debevoise.com

Johanna Waber
jwaber@debevoise.com