

# Fund Marketing in Germany—BaFin FAQ Receives an Update

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Shortly after implementation of the AIFMD Directive (Directive 2011/61/EU), the German Federal Financial Services Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin) published an FAQ paper providing guidance on their approach to the marketing provisions (the “FAQ Paper”). On 5 July 2022, in the wake of the Cross Border Distribution of Funds Directive (2019/1160/EU), the FAQ Paper received an overdue do-over.

As far as marketing to (semi-)professional investors is concerned, the updates are mainly concerned establishing the procedural aspects of pre-marketing notifications but also clarify certain aspects of fund marketing. Here are some key takeaways:

**Pre-Marketing, Brand Marketing and the Limits.** The FAQ Paper sets out guidance when pre-marketing begins. The information provided to prospective investors must be sufficiently specified to fall in the scope of pre-marketing. The fund manager steps over this threshold if it communicates investment strategies that have passed the internal vetting processes of the fund manager and have been cleared for introduction to prospective investors. Information only about the investment universe of the fund manager is not sufficiently specified.

BaFin has also for the first time, recognised the concept of brand marketing. The FAQ Paper clarifies that mere advertising for the fund manager is different from advertising for a specific fund and is not “marketing” for purposes of AIFMD.

BaFin also clarifies that a pre-marketing notification is needed also for the period after the marketing notification has been submitted but before marketing approval has been obtained. During this phase where marketing is not yet permitted, the fund manager can only carry out pre-marketing hence triggering the requirement for a pre-marketing notification. However, BaFin allows a combined marketing and pre-marketing notification.

**Reverse Solicitation.** The FAQ Paper confirms that reverse solicitation continues to be recognised (where the circumstances are met) and states that no marketing or pre-marketing occurs if the initiative for acquiring fund interests or establishing a fund comes from the investor (or a third-party broker that was not engaged by the fund manager).

**Negotiated Fund Terms.** The previous version of the FAQ Paper stated that funds are not marketed if they are offered to investors after the terms of the fund have been individually negotiated with those relevant investors. This language has been deleted. Nevertheless, we think that funds which are custom tailored for one or a specific group of investors upon those investors request, for example, after replying to a request for proposal, should still not be deemed to be marketed to those investors. In our view, that follows seamlessly from the concept of reverse solicitation.

**Material Change Notification.** Fund managers that are marketing their funds in Germany have to update BaFin if a material change to the information provided with their marketing filing has occurred (cf. Article 31 (4) AIFMD / Section 321 (4) KAGB). BaFin has now further specified which changes would be considered to be “material” and trigger the obligation of a material change notification. Changes to the investment terms are “material” if they are changes to the core fund information, e.g., the fund’s name or financial year, or the investment principles. BaFin clarifies that changes to costs clauses and investor rights are not deemed material in this context.

**Conclusions.** The updated FAQ Paper does not include any astonishing changes of administrative practice but does provide for some helpful clarifications around the edges.

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Please do not hesitate to contact us with any questions.

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