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INTRODUCING ‘PRE-MARKETING’ INTO AIFMD

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After the Markets in Financial Instruments Directive II (“**MiFID II**”) and Packaged Retail Investment and Insurance Products (“**PRIIPs**”), the fund management sector will be turning its attention to the Alternative Investment Fund Manager Directive (“**AIFMD**”) in 2018. On 12 March 2018, the European Commission published a draft directive amending each of the AIFMD and Undertakings for Collective Investment in Transferable Securities (“**UCITS”**) Directive (“the **Proposed Directive**”).

The Proposed Directive’s amendments deal with the concept of ‘pre-marketing’ in relation to the AIFMD and UCITS. At present, the AIFMD does not contain a definition of “marketing” and there is no harmonised approach in the EU. This means local regulators have taken different approaches as to what ‘pre-marketing’ activity is permitted before a formal regulatory notification is needed under the AIFMD. For example, discussing fund strategy with potential investors before the fund is established may be allowed in certain EU states, but require regulatory notifications in other. The proposed amendments to the AIFMD are intended to solve this through a new definition of pre-marketing.

These regulatory changes could have a major impact on firms in the private equity and alternative investment space, though it must be noted that the Proposed Directive is unlikely to be adopted by EU Member States until 2021, and its adoption in the UK is dependent on when Brexit is expected to take effect.

The key areas of focus for the Proposed Directive in relation to pre-marketing are set out below.

	Key findings	Considerations

I. PROPOSED DIRECTIVE

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a) Pre-marketing	– it establishes a concept of ‘pre-marketing’, being ‘a direct or indirect provision of information on investment strategies or investment ideas by an AIFM or on its behalf to professional investors domiciled or registered in the Union in order to test their interest in an AIF which is not yet established’; – creates a right for an authorised EU AIFM to engage in pre-marketing in the EU, without any notification obligations; – the right falls away where the information presented to investors in the pre-marketing materials: ○ relates to ‘an established AIF’;	– the Proposed Directive does not specify what ‘an established AIF’ means. This could include the mere establishment of a vehicle or arrangement that will, in due course, be an AIF or the incorporation vehicle/arrangement that will eventually be the AIF (i.e. when it has raised capital, has multiple investors and has an investment policy) and is not in fact an AIF at the time of its establishment. If it is the latter, this would mean that simply incorporating a vehicle or

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	○ contains a reference to ‘an established AIF’; and ○ enables investors to commit to acquiring units/shares of a particular AIF; or amounts to a prospectus, constitutional documents of a not-yet-established AIF, offering documents, subscription forms or similar documents whether in a draft form or a final form allowing investors to take an investment decision, the “Carve Outs”.	registering a partnership would not be fatal to the ability to benefit from the pre-marketing right; – clarity over Carve Outs would also be necessary as pre-marketing already covers AIFs that are not yet established; and – clarification on the restriction on the use of drafts will be necessary to determine when information ‘amounts to’ a prospectus or offering memorandum.
b) Implication for marketing activity	In the UK, managers are free to provide information on investment strategies and investment ideas. The UK financial promotion regime is generally permissive of the promotion of specific units/shares in AIFs, provided that those promotional activities do not fall within the definition of ‘marketing’ under the AIFMD which, in the UK, is seen to relate to actual offers in relation to shares/units (and which then triggers AIFMD-driven filing formalities and compliance). In this case, the Proposed Directive is compatible with the UK’s existing approach to the promotion of investment strategies and investment ideas. In practical terms, the following would fall within the definition of pre-marketing under the Proposed Directive: – **offering memoranda:** providing information on an investment strategy that would underlie a would-be AIF that has not even been incorporated; and – **promotions when an AIF has been established:** providing information on an investment strategy that would underlie a would-be AIF that has already been incorporated. At present in the UK, the financial promotions regime is wide enough to permit that promotional activity and the use of the draft offering memorandum and the marketing presentation would not cause an AIFMD marketing application to have to be submitted.	Clarification over whether pre-marketing is ‘marketing’ within the meaning of the AIFMD is needed as this would lead to the requirements for complying with the AIFMD to be fulfilled earlier in fundraising efforts than is currently the case. This has the potential to create material issues because in order to obtain the marketing passport under the AIFMD, various final form fund documents need to be submitted to the competent authorities. Therefore, a sensible interpretation is required, one where promotion activity outside of the narrow definition of pre-marketing is not tantamount to full marketing under the AIFMD. The implication of the Proposed Directive in the EEA is also a welcome intervention as EU Member States currently consider pre-marketing activities to constitute ‘marketing’ within the meaning of AIFMD. This means that marketing procedures will no longer have to be front loaded in deal timetables and that test marketing may be possible.

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c)	**Application to non-EU AIFMs**	The Proposed Directive requires EU Member States to permit EU AIFMs to pre-market in their territories. It does not require that right to be extended to non-EU AIFMs. It may be that some EU Member States allow pre-marketing by non-EU AIFMs without going through the AIFMD notification procedures, but they are not compelled by the Proposed Directive to do so.	This should cause most EU Member States to consider whether ‘marketing’ under the AIFMD also include ‘pre-marketing’. These will now be identified at the level of the AIFMD as two clearly separate activities.
d)	**Complexity around reliance on ‘reverse solicitation’**	The Proposed Directive provides that subscription by a professional investor into an AIF that follows ‘pre-marketing in accordance with paragraph 1 or to the units or shares of a not-yet-established AIF with similar features shall be considered the result of marketing.’ This is likely to have a significant impact in relation to reverse solicitations.	The draft definition of pre-marketing is limited to the provision of information on investment strategies or investment ideas ‘in order to test their interest in an AIF which is not yet established’. Therefore, motive is an important determinant in deciding if pre-marketing has taken place. It may be that there is a bona fide presentation on strategies given at one time and then, later, an AIF running that strategy is created. It this case it may be that a view is taken that the reverse solicitation safe harbour is still available. It appears that this will be case-specific.

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e) Impact of Brexit	The Proposed Directive will only come into force after the UK has left the EU. If the UK will be considered a ‘third country’ under the AIFMD, then the right for UK AIFMs to pre-market in EU Member States will not be a given. Some EU countries may allow it, but the Proposed Directive would not oblige them to grant UK managers the right.	If the UK adopts the Proposed Directive in its current form (even after it had left the EU) it could only have either a neutral or a limiting impact on the ability of EU AIFMs to pre-market in the UK. The existing regime in the UK is already generally very permissive of promotions to investors in the UK. Implementing the Proposed Directive could, potentially, limit that existing permissiveness.

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CONTACT

EMMA CLEVELAND

Founder and Managing Director

+44.79.6387.8756
ecleveland@cleveland-co.com
www.cleveland-co.com

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