



NEW DANISH RULES ON PRE-MARKETING OF ALTERNATIVE INVESTMENT FUNDS

5 July 2021

Introduction

1 July 2021, provisions on pre-marketing activities by Alternative Investment Fund Managers (“AIFM”) entered into force in Denmark. While no definition of such pre-marketing activities previously existed in Danish, the new legislation transposes the definition and requirements of directive 2019/1160/EU into Danish law. Previously, pre-marketing of an Alternative Investment Fund (“AIF”) in Denmark was only permitted by the Danish FSA in cases where (1) the relevant AIF was not yet established, (2) no private placement memo, prospectus or similar had been prepared, and (3) it was not possible for the potential investors to commit to acquiring interests in the AIF during pre-marketing.

In this article, we look into the new provisions, the permitted activities, and the applicable requirements.

The Definition of Pre-Marketing

In accordance with the AIFM Directive, the Danish AIFM Act sets out strict requirements for the marketing of AIFs. In practice, the Danish FSA permitted limited pre-marketing activities, which, however, were restrictive and not always sufficient to test investor interest with respect to a contemplated AIF. Further, certain activities being permitted pre-marketing activities within one jurisdiction could be interpreted as non-permitted marketing within another jurisdiction. The directive-based introduction of a pre-marketing definition does thus not only constitute easier access to carry out such activities as such, but also provides greater predictability with respect to the legal treatment in case of cross-border activities.

The amendment to the Danish AIFM Act defines pre-marketing as the 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 with a registered office in the Union in order to test their interest in one of the following: (1) an AIF not yet been established, (2) a compartment not yet established, (3) an established AIF or compartment, which has not yet provided notice for marketing in the jurisdiction in which 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 potential investor to invest in the units or shares of that AIF or compartment.

Restrictions in Pre-Marketing Activities

Pre-marketing may first of all only be directed at professional investors.

Further, the AIFM may not present information to such potential investors, which (1) is sufficient to allow them to commit to acquiring interests in a particular AIF, (2) constitutes subscription forms or similar documents whether in a draft or a final form, or (3) constitutes constitutional documents, a prospectus or offering documents of an AIF not yet established in a final form.

An AIFM is permitted to provide a draft prospectus/offer document. However, the document in question must in such case clearly state that (1) it does not constitute an offer or an invitation to subscribe for interests in an AIF, and (2) the information presented therein should not be relied upon because it is incomplete and may be subject to change.

With the introduction of legislation on pre-marketing, only AIFMs having obtained a license in Denmark or another EEA country may carry out pre-marketing activities. Under the previous guidance-based regime, pre-marketing was also permitted for other AIFMs, such as AIFMs having obtained a registration only, but not a license (i.e. “sub-threshold AIFMs”

managing a maximum of EURm 500 or, if leveraged, a maximum of EURm 100) and non-EEA AIFMs. Also, pre-marketing directed at semi-professional investors is no longer permitted.

It should be noted that the AIFM is not obligated to inform the Danish FSA on the contents or the pre-marketing or the potential investors.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:



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