

Chapter 8

Financial promotion and related activities

8.37 AIFMD Marketing

Introduction and purpose

8.37.1

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- (1) Part 6 (Marketing) of the *AIFMD UK regulation* contains restrictions on an *AIFM* or an *investment firm marketing an AIF*. Such a *person* may not *market* an *AIF* in the *UK* or *Gibraltar* unless the relevant conditions set out in the *AIFMD UK regulation* are met.
- (2) The purpose of this section is to give *guidance* on:
 - (a) the restrictions on an *AIFM* or *investment firm marketing an AIF* (■ PERG 8.37.2 G and ■ PERG 8.37.3 G);
 - (b) the circumstances in which an *AIFM* or an *investment firm markets an AIF* (■ PERG 8.37.4 G to ■ PERG 8.37.10 G);
 - (c) the exemptions from the *marketing* restrictions (■ PERG 8.37.11 G and ■ PERG 8.37.12 G);
 - (d) the penalties for breach of the *marketing* restrictions (■ PERG 8.37.13 G);
 - (e) the application of the *financial promotion* and *scheme promotion* restrictions (■ PERG 8.37.14 G); and
 - (f) the interaction between the *marketing* of an *AIF* and the *Prospectus Regulation* (see ■ PERG 8.37.15G);

This section is not intended to have a more general application and, therefore, where *guidance* is given this should be interpreted as being limited to the *marketing* of *AIF* under the *AIFMD UK regulation*.
- (3) [deleted]
- (4) References to regulations in this section are to regulations of the *AIFMD UK regulation*.

Restrictions on an AIFM marketing an AIF

8.37.2

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- Regulations 49 and 50 place restrictions on an *AIFM marketing an AIF*. These regulations provide that the following types of *AIFM* may not *market* the following types of an *AIF* in the *UK* unless the conditions summarised below are met.
- (1) The conditions that need to be met vary depending on whether the *AIF* falls within regulation 57(1) or not. An *AIF* falls within this regulation if it is:

- (a) a *feeder AIF* that is a *UK AIF*, a *Gibraltar AIF* or an *EEA AIF*, the master *AIF* of which is either managed by a *non-UK AIFM* or is a *non-UK AIF*, and where the *feeder AIF* is managed by a *full-scope UK AIFM* or a *full-scope Gibraltar AIFM*; or
 - (b) [deleted]
 - (b) a *non-UK AIF* which is managed by a *full-scope UK AIFM* or a *full-scope Gibraltar AIFM*.
- (2) Regulation 49 (Marketing by full scope AIFMs of certain AIFs) provides that a *full-scope Gibraltar AIFM* may not *market* an *AIF* that does not fall within regulation 57(1) in the *UK* unless:
- (a) when *marketing* to a *professional client*, the *FCA* has received a regulator's notice regarding the *marketing* of the *AIF*, in accordance with Schedule 3 to the *Act*, as it applies in relation to *Gibraltar AIFMs* and *Gibraltar AIFs*; or
 - (b) when *marketing* to a *retail client*:
 - (i) the *FCA* has received a regulator's notice regarding the *marketing* of the *AIF*, in accordance with Schedule 3 to the *Act*, as it applies in relation to *Gibraltar AIFMs* and *Gibraltar AIFs*; or
 - (ii) the *FCA* has approved the *marketing*, in accordance with regulation 54 (*FCA approval for marketing*) (see ■ FUND 3.12 (*Marketing in the home Member State of the AIFM*)) and has not suspended or revoked that approval.
- (3) Regulation 50 (Marketing by AIFMs of other AIFs) provides that:
- (a) a *full-scope UK AIFM* may not *market* an *AIF* that does not fall within regulation 57(1) in the *UK* unless the *FCA* has approved the *marketing* in accordance with regulation 54; and
 - (b) the following types of *AIFM* may not *market* the following types of *AIF* unless the *AIFM* has complied with the national private placement provisions set out in chapter 3 (National private placement) of Part 6 of the *AIFMD UK regulation* (see FUND 10.5 (National private placement)):
 - (i) a *full-scope UK AIFM* of an *AIF* falling within regulation 57(1);
 - (ii) a *full-scope Gibraltar AIFM* of an *AIF* falling within regulation 57(1); and
 - (iii) a *non-UK AIFM* (ie a *small non-UK AIFM* or an *above-threshold non-UK AIFM*) of a *UK AIF*, or a *non-UK AIF*.

Restrictions on an investment firm marketing an AIF

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Regulation 51 (Marketing of AIFs by investment firms) places a restriction on an investment firm marketing an AIF. This provides that where regulation 49 or 50 requires a condition to be met before an *AIFM* may *market* an *AIF*, an *investment firm* may not *market* that *AIF* unless that condition is met. However, as explained in ■ PERG 8.37.4G (1)(b), an *investment firm* only *markets* an *AIF* if it does so at the initiative of, or on behalf of, the *AIFM* of that *AIF*.

The circumstances in which an AIFM or an investment firm markets an AIF

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- (1) Regulation 45 (References in this part to an AIFM or an investment firm marketing an AIF) provides that:
- (a) an *AIFM markets an AIF* when the *AIFM* makes a direct or indirect offering or placement of *units or shares* of an *AIF* managed by it to an investor domiciled or with a registered office in the *United Kingdom or Gibraltar*, or when another *person* makes such an offering or placement at the initiative of, or on behalf of, the *AIFM*; and
 - (b) an *investment firm markets an AIF* when it makes a direct or indirect offering or placement of *units or shares* of the *AIF* to an investor domiciled or with a registered office in the *United Kingdom or Gibraltar* at the initiative of, or on behalf of, the *AIFM* of that *AIF*.
- (2) *Marketing*, therefore, has a specific meaning in the context of the *AIFMD UK regulation* which is, in some respects, different from the ordinary meaning of the term.

The meaning of an offering or placement

8.37.5

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- (1) The terms 'offering' or 'placement' are not defined in the *AIFMD UK regulation* but, in our view, an offering or placement takes place for the purposes of the *AIFMD UK regulation* when a *person* seeks to raise capital by making a *unit of share* of an *AIF* available for purchase by a potential investor. This includes situations which constitute a contractual offer that can be accepted by a potential investor in order to make the investment and form a binding contract, and situations which constitute an invitation to the investor to make an offer to subscribe for the investment.
- (2) An 'offering' includes situations where the *units or shares* of an *AIF* are made available to the general public and a 'placement' includes situations where the *units or shares* of an *AIF* are only made available to a more limited group of potential investors.
- (3) However, an 'offering' or 'placement' does not include secondary trading in the *units or shares* of an *AIF*, because this does not relate to the capital raising in that *AIF*, except in situations where there is an indirect offering or placement (see ■ PERG 8.37.7 G). Similarly, the listing of the units or shares of an *AIF* on the official list maintained by the *FCA* in accordance with section 74(1) of the *Act* will not in and of itself constitute an offering or placement, although it may be accompanied by such an offering or placement.

Communications with investors in relation to draft documentation

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- (1) Under the *UK* provisions which implemented article 31 *AIFMD*, an *AIFM* is required to submit the documentation and information set out in the law that implemented Annex III to *AIFMD* with its application for permission to *market* an *AIF* managed by it and to notify the *FCA* of any material changes to this documentation and information. Therefore, the prescribed documentation and

information should be in materially final form before the *AIFM* may apply for permission to *market* an *AIF*. Any communications relating to this draft documentation do not, in our view, fall within the meaning of an 'offer' or 'placement' for the purposes of the law that relates to the regulation of *AIFMs* in the *United Kingdom*, as the *AIFM* cannot apply for permission to *market* the *AIF* at this point. For example, a promotional presentation or a pathfinder version of the private placement memorandum would not constitute an offer or placement, provided such documents cannot be used by a potential investor to make an investment in the *AIF*. However, a *unit* or *share* of the *AIF* should not be made available for purchase as part of the capital raising of the *AIF* on the basis of draft documentation in order to circumvent the *marketing* restriction.

- (2) In our view, the position for draft documentation set out in (1) should apply to *marketing* under the national private placement provisions.
- (3) Regard should be had to national law in relation to a communication which does not amount to an offering or a placement. In the *UK*, consideration needs to be given to whether such a communication is a *financial promotion* (see ■ PERG 8.37.14 G).

The meaning of indirect offering or placement

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- (1) Marketing may take place by a direct or indirect offering or placement of *units* or *shares* of an *AIF*. The reference to indirect offering or placement would include situations where an *AIFM* distributes *units* or *shares* of an *AIF* through a chain of intermediaries.
- (2) For example, if the *units* or *shares* of an *AIF* are temporarily purchased by a third party (eg, an underwriter or placement agent) with the objective of distributing them to a wider investor base, this could be an indirect offering or placement when those *units* or *shares* are made available for purchase by investors, if the third party is acting at the initiative of, or on behalf of, the *AIFM*.

The meaning of a unit or share of an AIF

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The terms 'unit' and 'share' in the *AIFMD UK regulation* are generic and can be interpreted as encompassing all forms of equity of, or other rights in, an *AIF*. As such, the terms are not limited to *AIFs* which are structured as companies or unitised funds and may include other forms of collective investment undertakings, such as partnerships or non-unitised trusts.

The meaning of investor

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- (1) The reference to 'investor' in the *AIFMD UK regulation* should be regarded as a reference to the *person* who will make the decision to invest in the *AIF*. Where that *person* acts on its own behalf and subscribes directly to an *AIF*, the investor should be considered to be the *person* who subscribes to the *unit* or *share* of the *AIF*.
- (2) However, where that *person* engages another *person* to subscribe to the *AIF* on its behalf, including, for example, where:
 - (a) a nominee company will subscribe as bare trustee for an underlying beneficiary; or

(b) a custodian will subscribe on behalf of an underlying investor, the *AIFM* or *investment firm* that is marketing the *AIF* should 'look through' the subscriber to find the underlying investor who will make the decision to invest in the *AIF* and that *person* should be regarded as the investor.

(3) Where a discretionary manager subscribes, or arranges for another *person* to subscribe, on behalf of an underlying investor to the *AIF* and the discretionary manager makes the decision to invest in the *AIF* on that investor's behalf without reference to the investor, it is not necessary to 'look through' the structure and the discretionary manager should be considered to be the investor for the purposes of the *AIFMD UK regulation*.

Territorial scope of the marketing restrictions

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(1) The restrictions on the *marketing* of an *AIF* in regulations 49 to 51 only apply to *marketing* that takes place in the *UK*. In addition, under regulation 45, an *AIFM* or an *investment firm* only *markets* an *AIF* if the investor is domiciled in the *United Kingdom* or *Gibraltar* or has its registered office in the *United Kingdom* or *Gibraltar*.

(2) Under regulation 2(2)(a) (Interpretation), the reference to 'domicile' should be construed in line with its meaning in *AIFMD*. This may be different to the domicile of an investor for tax purposes.

[Note: see section 6 of the *EUWA*]

Marketing at the initiative of the investor

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(1) Regulation 47 (Marketing at the initiative of the investor) states that regulations 49 to 51 do not apply to an offering or placement of *units* or *shares* of an *AIF* to an investor made at the initiative of that investor.

(2) A confirmation from the investor that the offering or placement of *units* or *shares* of the *AIF* was made at its initiative, should normally be sufficient to demonstrate that this is the case, provided this is obtained before the offer or placement takes place. However, *AIFMs* and *investment firms* should not be able to rely upon such confirmation if this has been obtained to circumvent the requirements of the legislation that implemented *AIFMD*.

Marketing under the designation "SEF" and "RVECA"

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Regulation 48 (Marketing under the designation "SEF" and "RVECA") provides that regulations 49 to 51 do not apply to the *marketing* of an *AIF* under the designation "SEF" and "RVECA". To be designated as such the *AIFM* of the *AIF* is required to apply for registration of the *AIF* with its *Home State* under the *EuSEF regulation* or the *EuVECA regulation* (and in the *UK* make a notification under regulation 14 (Notification of new funds under the *EuSEF Regulation* or the *EuVECA Regulation*)). Where the *AIFM* is established in the *UK*, it must also register as a *small registered UK AIFM* under regulation 10. The *AIFM* of an *AIF* is then entitled to *market* the *AIF* to *professional clients* and certain categories of *retail clients* (see article 6 of the *EuSEF regulation* and article 6 the *EuVECA regulation*) under those regulations.

Contravention of the marketing restrictions

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An *AIFM* or an *investment firm* that acts in contravention of the *marketing* restrictions in regulations 49 to 51, or an *AIFM* that acts in contravention of a provision of the *SEF regulation* or the *RVECA regulation*, is deemed to have been carrying out "unlawful marketing" under regulations 52 and 53. The consequences of carrying out unlawful marketing vary, depending on whether the *AIFM* or *investment firm* concerned is an *authorised person* or an *unauthorised person*.

- (1) If the *AIFM* or *investment firm* is an *unauthorised person*, regulation 52 (Contravention by an unauthorised person) provides that:
 - (a) section 25 of the *Act* (contravention of section 21) applies to the unlawful marketing as it applies to the contravention of section 21(1) of the *Act* (although under regulation 52(3) the reference in section 25(1)(a) to imprisonment for a term not exceeding six months is to be read as a reference to imprisonment for a term not exceeding three months);
 - (b) section 168 of the *Act* (appointment of persons to carry out investigations in particular cases) applies as if the reference at section 168(2)(c) to a contravention of section 21 of the *Act* included reference to unlawful marketing; and
 - (c) section 30 of the *Act* (enforceability of agreements resulting from unlawful communications) applies in relation to:
 - (i) controlled agreements entered into in consequence of unlawful marketing, as it applies in relation to controlled agreements entered into in consequence of an unlawful communication; and
 - (ii) the exercise of rights conferred by a *controlled investment* in consequence of unlawful marketing, as it applies in relation to the exercise of such rights in consequence of an unlawful communication.
- (2) If the *AIFM* or *investment firm* is an *authorised person*, regulation 53 (Contravention by an authorised person) provides that:
 - (a) unlawful marketing is actionable at the suit of a private person who suffers loss as a result of such *marketing*, subject to the defences and other incidents applying to actions for breach of statutory duty; and
 - (b) section 168 of the *Act* (appointment of persons to carry out investigations in particular cases) applies as if the reference at section 168(2)(c) to a contravention of section 238 of the *Act* included reference to unlawful marketing.

Application of the financial promotion and scheme promotion restrictions

8.37.14

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- (1) Regulation 46 (Application of the financial promotion and scheme promotion restrictions) provides that where a *person* may *market* an *AIF* under regulation 49, 50 or 51:
 - (a) to the extent that such *marketing* falls within section 21(1) (restrictions on financial promotion) or 238(1) (restrictions on promotion) of the *Act*, the *person* may *market* the *AIF* to a *retail*

client only if the *person* does so without breaching the restriction in that section; and

- (b) to the extent that any activity falling within section 21(1) or 238(1) of the *Act* does not amount to *marketing* by an *AIFM* or an *investment firm* for the purposes of Part 6 of the *AIFMD UK regulations*, the restriction in that section applies to the *person*.
- (2) The effect of the provision referred to at (1)(a) is to require an *AIFM* or an *investment firm* that *markets* an *AIF* to a *retail client* to comply with the *financial promotion* and scheme promotion restrictions in relation to that *marketing*. The provision referred to at (b) is designed to clarify that the *financial promotion* and scheme promotion restrictions continue to apply to communications by an *AIFM* or an *investment firm* that do not constitute *marketing*.
- (3) In addition, the *AIFMD UK regulation* has made amendments to article 29 (Communications required or authorised by enactments) of the *Financial Promotion Order* and article 16 (Communications required or authorised by enactments) of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (SI 2001/2157). The effect of which is to exempt communications to *professional clients* which are approved by the *FCA* under regulation 49 or 50 of the *AIFMD UK regulation* from the *financial promotion* and scheme promotion restrictions.
- (4) There is likely to be a considerable overlap between *marketing* and *financial promotion*, and in the case of *marketing* to retail clients, this can only be done if a *financial promotion* can be made to that investor, but the two concepts are not the same. In particular, it is possible for a *person* to make a *financial promotion* without *marketing* an *AIF*. For example, an *AIFM* that makes a communication in relation to an *AIF* would be making a *financial promotion* if that communication was a significant step in the chain of events leading to an agreement to engage in investment activity (see ■ PERG 8.4.7 G (Inducements)), but would not be *marketing* an *AIF* if this communication was in relation to draft documentation (see ■ PERG 8.37.6 G).

The interaction between marketing and the prospectus directive

8.37.15

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- (1) The *UK* provisions which implemented the *prospectus directive* were not amended by the *UK* provisions which implemented the *AIFMD* and closed-ended *AIFs* that are making an offer of securities to the public as defined in the *prospectus directive* need to comply with the requirements under the *UK* provisions which implemented both Directives.
- (2) However, where the *AIF* is required to publish a *prospectus* under section 85 of the *Act*, only information referred to in ■ FUND 3.2.2 R and ■ FUND 3.2.3 R that is additional to that contained in the *prospectus* needs to be disclosed, either separately or as additional information in the *prospectus*.