

BaFin updates the Marketing FAQs

October 28, 2021

The German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, “BaFin”) published a draft of the revised Marketing FAQs for consultation on August 12, 2021. These amendments serve to adapt the Marketing FAQs to the changed legal framework following the entry into force of the Act to Promote Germany as a Fund Jurisdiction (Gesetz zur Stärkung des Fondsstandorts Deutschland, “Fund Jurisdiction Act”). In our following newsletter, we would like to present to you the draft of the amended Marketing FAQs.

Initial Situation

The amendment of the FAQ is based on the changes in the German Investment Code, which had to be implemented due to the new [article 30a of the AIFM Directive](#). The requirements of the AIFM Directive were incorporated into the new Section 306b of the German Investment Code. In doing so, the legislature did not overshoot the mark and the regulations adopted from [Article 4\(1\) aea](#) and [Article 30a of the AIFM Directive](#) were no stricter than absolutely necessary. For German capital management companies, the possible declaration pursuant to Section 306b (3) sentence 2 number 5 of the German Investment Code has been added. Said provision ensures compliance with the restrictions pursuant to the new Section 295a (3) of the German Investment Code ([Article 32a \(3\) subparagraph 3 of the AIFM Directive](#): lock-up period for pre-marketing following de-notification of arrangements made for the marketing).

The implementation of the new provisions of the AIFM Directive ended the previous flexibility in launching new AIFs for institutional investors. We highlighted and discussed the topic at our German-Luxembourg Fund talks in the year before the Corona pandemic (see our [beinformed](#) of April 25, 2019), and with the [beleuchtet](#) dated December 15, 2020 (only available in German), we had already pointed out the new regulation resulting from the Fund Jurisdiction Act. As a result, fund sponsors can no longer negotiate the set-up of a fund with potential investors without triggering the pre-marketing disclosure requirement (see Section 306b (3) of the German Investment Code). In principle, it is also no longer allowed to subscribe for shares in an individually negotiated AIF without reporting the AIF for marketing (see Section 306b (2) of the German Investment Code).

Podcast to beinformed:





Reverse Solicitation

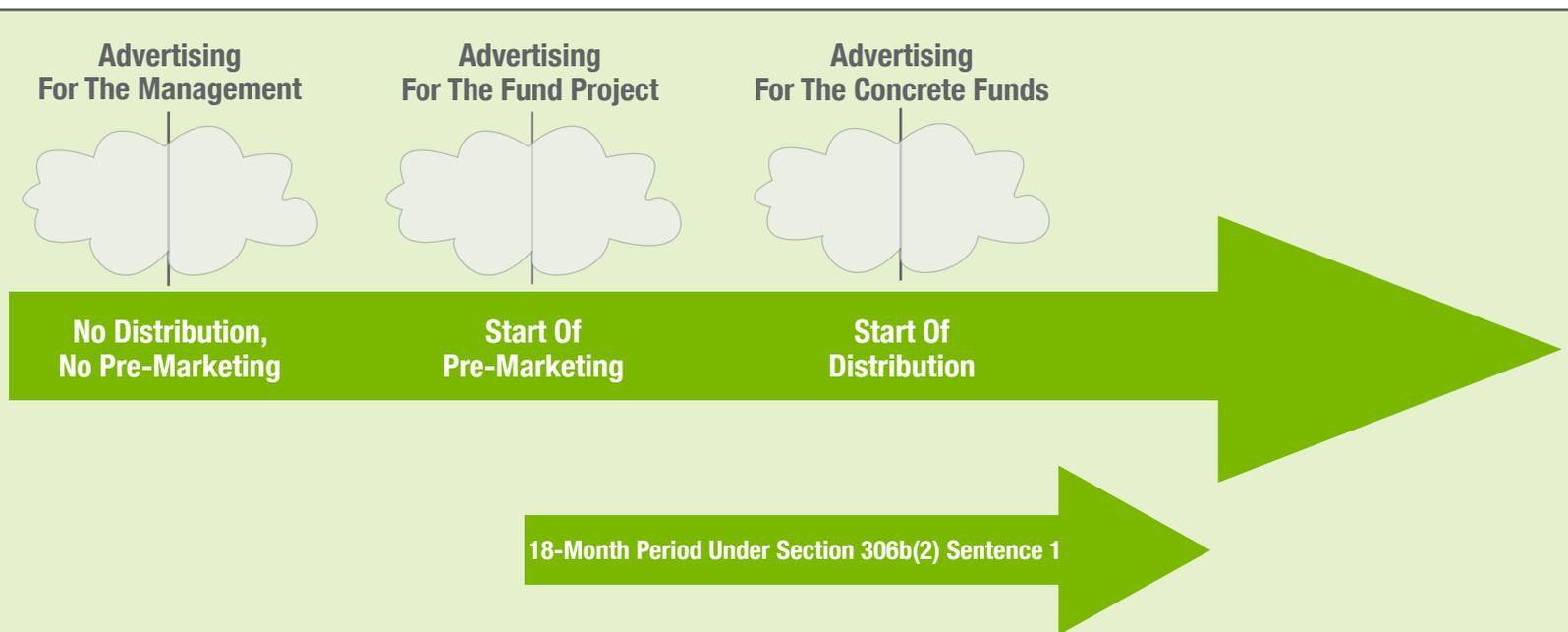
If the initiative to acquire shares in a fund comes from the potential investor (so-called reverse solicitation), this is neither marketing nor pre-marketing, as confirmed in the explanatory memorandum to the Fund Jurisdiction Act (see Bundestagsdrucksache 19/27631, page 87). Nothing to the contrary can be found in the FAQs; in its draft, the BaFin has included the statements made in the explanatory memorandum (section 1.4 of the Draft FAQs).

Therefore, neither pre-marketing nor marketing need be reported with respect to an investor-initiated single-investor fund. In contrast to the previous legal situation, the investor's initiative must be developed before the start of pre-marketing, i.e., the investor's initiative must already be aimed at the establishment of the fund. However, as soon as pre-marketing vis-à-vis additional investors takes place, section 306b (2) sentence 2 of the German Investment Code must be observed, also with regard to an investor who has approached the AIFM on his own initiative. Any subscription within 18 months of the start of pre-marketing, without exception, triggers the reporting/notification requirement for pre-marketing.

Where Does Pre-Marketing End, Where Does Marketing Begin?

The new Section 1.1 of the Draft FAQs addresses the distinction between pre-marketing and marketing. At this point, the Draft FAQs do not go beyond the legal definition of pre-marketing set forth in Section 1 (9) no. 29a of the German Investment Code. Legally, the distinction and demarcation will depend on the application and interpretation of Section 306b (1) of the German Investment Code. Section 1.1 of the FAQs should include more practical guidance over time, in particular which information may be provided in pre-marketing.

The BaFin's explanations in Section 1.3 relating to offering and placing an investment fund - are unchanged. The BaFin has deleted the statement that model investment terms and conditions, which still include sections that need to be negotiated, are insufficient for the existence of marketing (i.e., no marketable product available). The new version merely clarifies that the use of model investment terms with sections to be negotiated may trigger the obligation to report pre-marketing.





The statement that the use of a specific fund name indicates marketing activity is deleted from the Draft FAQs. However, we assume that, from BaFin's perspective, a named fund is still „closer“ to marketing than a fund which is as yet unnamed. It must still be determined whether marketing is taking place, because in such an event the obligation to report marketing must be observed.

The examples on the distinction between marketing and non-marketing are deleted from Section 1.4. Said deletion is logical since the activities in connection with an unfinished fund project are now regulated as pre-marketing and the demarcation is regulated by law. Section 306b (2) of the German Investment Code, no longer exempts special funds, which were individually negotiated between the sponsor and the investor(s), from the marketing reporting requirement, unless the initiative to set up the fund and acquire the units comes from the potential investor (please see Reverse Solicitation above).

Who May Report?

In Section 1.2 of the Draft FAQs relating to the submission of pre-marketing notices, the BaFin points out the reporting responsibility of the AIFM, i.e., third parties are neither obligated nor authorized to report the pre-marketing to the competent authorities.

However, the BaFin's statement that it accepts reporting only from domestic capital management companies is too brief and incorrect as third-country AIFMs are also obliged to report to the BaFin.

Conclusion

The update of the FAQs currently reflects only the changes in the legal provisions. They will have to be supplemented with the questions and answers arising from the ongoing application of the legal provisions.

 **in touch: Any questions? Please do not hesitate to contact us!**



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