



STATUTORY INSTRUMENTS.

S.I. No. 414 of 2021



EUROPEAN UNION (ALTERNATIVE INVESTMENT FUND
MANAGERS) (AMENDMENT) REGULATIONS 2021

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I, PASCHAL DONOHOE, Minister for Finance, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving further effect to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011¹, as amended by Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019², hereby make the following regulations:

Citation and Commencement

1. (1) These Regulations may be cited as the European Union (Alternative Investment Fund Managers) (Amendment) Regulations 2021.

(2) These Regulations come into operation on 6 August 2021.

Definition

2. In these Regulations, “Principal Regulations” means the European Union (Alternative Investment Fund Managers) Regulations 2013 (S.I. No. 257 of 2013).

Amendment of Regulation 5 of Principal Regulations

3. Regulation 5 of the Principal Regulations is amended, in paragraph (1), by the insertion of the following definitions:

“ ‘Directive’ means Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011³, as amended by—

- (a) Directive 2013/14/EU of the European Parliament and of the Council of 21 May 2013⁴,
- (b) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014⁵,
- (c) Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016⁶,
- (d) Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017⁷, and

¹ OJ No. L. 174, 1.7.2011, p. 1.

² OJ No. L. 188, 12.7.2019, p. 106.

³ OJ No. L. 174, 1.7.2011, p. 1.

⁴ OJ No. L. 145, 31.5.2013, p. 1.

⁵ OJ No. L. 173, 12.6.2014, p. 349.

⁶ OJ No. L. 354, 23.12.2016, p. 37.

⁷ OJ No. L. 347, 28.12.2017, p. 35.

- (e) Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019⁸;

‘Irish alternative investment fund manager’ or ‘Irish AIFM’ means an AIFM which is established in the State;

‘pre-marketing’ means 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 European Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with Article 31 or 32 of the Directive, in that Member State where 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;”.

Amendment of Regulation 26 of Principal Regulations

4. Regulation 26 of the Principal Regulations is amended, in paragraph (3), by the substitution of “Regulation 54” for “Regulation 49”.

Conditions for pre-marketing in European Union by EU AIFM

5. The Principal Regulations are amended by the insertion of the following Regulation after Regulation 31:

- “31A. (1) An EU AIFM may engage in pre-marketing in the European Union, except where the information presented to potential professional investors—
- (a) is sufficient to allow investors to commit to acquiring units or shares of a particular AIF,
 - (b) amounts to subscription forms or similar documents whether in a draft or a final form, or
 - (c) amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.
- (2) Where a draft prospectus or offering documents are provided by an EU AIFM, they shall not contain information sufficient to allow investors to take an investment decision and shall clearly state that—
- (a) they do not constitute an offer or an invitation to subscribe to units or shares of an AIF, and
 - (b) the information presented therein should not be relied upon because it is incomplete and may be subject to change.

⁸ OJ No. L. 188, 12.7.2019, p. 106.

- (3) An EU AIFM is not required to notify the Bank of the content or of the addressees of pre-marketing, or to fulfil any conditions or requirements other than those set out in this Regulation, before it engages in pre-marketing.
- (4) An EU AIFM shall ensure that—
 - (a) investors do not acquire units or shares in an AIF through pre-marketing, and
 - (b) investors contacted as part of pre-marketing may only acquire units or shares in that AIF through marketing permitted in accordance with Article 31 or 32 of the Directive.
- (5) Any subscription by professional investors, within 18 months of the EU AIFM having begun pre-marketing, to units or shares of an AIF referred to in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, shall be considered to be the result of marketing and shall be subject to notification procedures in accordance with Article 31 or 32, as the case may be, of the Directive.
- (6) An Irish AIFM shall send, within two weeks of it having begun pre-marketing, an informal letter, in paper form or by electronic means, to the Bank.
- (7) The letter referred to in paragraph (6) shall specify—
 - (a) the Member States in which, and the periods during which, the pre-marketing is taking or has taken place,
 - (b) a brief description of the pre-marketing, including information on the investment strategies presented, and
 - (c) where relevant, a list of the AIFs and compartments of AIFs which are or were the subject of pre-marketing.
- (8) The Bank shall promptly inform the competent authorities of the Member States in which the Irish AIFM is or was engaged in pre-marketing.
- (9) Where pre-marketing by an EU AIFM is taking or has taken place in the State, the Bank may request the competent authorities of the home Member State of the EU AIFM to provide further information on the pre-marketing that is taking or has taken place in the State.
- (10) An EU AIFM shall ensure that a third party shall not engage in pre-marketing on behalf of the EU AIFM unless the third party—

- (a) is authorised as an investment firm in accordance with Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014⁹,
 - (b) is authorised as a credit institution in accordance with Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013¹⁰,
 - (c) is authorised as a UCITS management company in accordance with Directive 2009/65/EC of 13 July 2009¹¹,
 - (d) is authorised as an AIFM in accordance with the Directive, or
 - (e) acts as a tied agent in accordance with Directive 2014/65/EU.
- (11) An EU AIFM shall ensure that pre-marketing is adequately documented.
- (12) Paragraphs (1) to (8) and (11) shall apply to a third party referred to in paragraph (10), subject to the modification that a reference in those paragraphs to an AIFM shall be construed as a reference to such a third party.”.

Amendment of Regulation 33 of Principal Regulations

6. Regulation 33 of the Principal Regulations is amended, in paragraph (7)—

- (a) by the substitution of the following subparagraph for subparagraph (b):
 - “(b) If, pursuant to a planned change, the Irish AIFM’s management of the AIF would no longer comply with these Regulations or the Irish AIFM would otherwise no longer comply with these Regulations, the Bank shall—
 - (i) inform the Irish AIFM within 15 working days of receipt of all the information referred to in subparagraph (a) that it is not to implement the change, and
 - (ii) notify the competent authorities of the host Member State of the Irish AIFM accordingly.”,
- (b) by the substitution of the following subparagraph for subparagraph (c):
 - “(c) If, notwithstanding the requirements of subparagraphs (a) and (b), a planned change is implemented, or if an unplanned change has taken place pursuant to which the

⁹ OJ No. L 173, 12.6.2014, p. 349.

¹⁰ OJ No. L 176, 27.6.2013, p. 338.

¹¹ OJ No. L 302, 17.11.2009, p. 32.

Irish AIFM's management of the AIF would no longer comply with these Regulations or the Irish AIFM otherwise would no longer comply with these Regulations, the Bank shall take all due measures in accordance with Regulations 48 and 49, including, if necessary, the express prohibition of marketing of the AIF and shall notify the competent authorities of the host Member State of the Irish AIFM accordingly without undue delay.”, and

(c) by the substitution of the following subparagraph for subparagraph (d):

“(d) If the changes do not affect the compliance of the Irish AIFM's management of the AIF with these Regulations, or the compliance by the Irish AIFM with these Regulations otherwise, the Bank shall within one month inform the competent authorities of the host Member State of the Irish AIFM of those changes.”.

De-notification of arrangements made for marketing of units or shares of some or all EU AIFs in Member States other than in home Member State of the AIFM

7. The Principal Regulations are amended by the insertion of the following Regulation after Regulation 33:

“33A. (1) An Irish AIFM may de-notify arrangements made for marketing as regards units or shares of some or all of its AIFs in a Member State in respect of which it has made a notification in accordance with Regulation 33, where all the following conditions are fulfilled:

- (a) except in the case of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015¹², a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such AIF units or shares held by investors in that Member State, is publicly available for at least 30 working days, and is addressed, directly or through financial intermediaries, individually to all investors in that Member State whose identity is known;
- (b) the intention to terminate arrangements made for marketing units or shares of some or all of its AIFs in that Member State is made public by means of a publicly available medium, including

¹² OJ No. L. 123, 19.5.2015, p. 98.

by electronic means, which is customary for marketing AIFs and suitable for a typical AIF investor;

- (c) any contractual arrangements with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of the units or shares identified in the notification referred to in paragraph (3).
- (2) As of the date referred to in paragraph (1)(c), the Irish AIFM shall cease any new or further, direct or indirect, offering or placement of units or shares of the EU AIF it manages in the Member State in respect of which it has submitted a notification in accordance with paragraph (3).
- (3) An Irish AIFM shall submit a notification to the Bank containing the information referred to in subparagraphs (a), (b) and (c) of paragraph (1).
- (4) The Bank shall verify whether the notification submitted by the Irish AIFM in accordance with paragraph (3) is complete.
- (5) The Bank shall, no later than 15 working days from the receipt of a complete notification, transmit that notification to the competent authorities of the Member State identified in the notification referred to in paragraph (3) and to ESMA.
- (6) Upon transmission of the notification pursuant to paragraph (5), the Bank shall promptly notify the Irish AIFM of that transmission.
- (7) For a period of 36 months from the date referred to in paragraph (1)(c), the Irish AIFM shall not engage in pre-marketing of units or shares of the EU AIFs referred to in the notification, or in respect of similar investment strategies or investment ideas, in the Member State identified in the notification referred to in paragraph (3).
- (8) The Irish AIFM shall provide investors who remain invested in the EU AIF as well as the Bank with the information required under Regulations 23 and 24.
- (9) The Bank shall transmit, to the competent authorities of the Member State identified in the notification referred to in paragraph (3), information on any changes to the documentation and information referred to in paragraphs (b) to (f) of Schedule 4.
- (10) Where the Bank receives a notification from the competent authority of a Member State in accordance

with Article 32a(3) of the Directive, the Bank shall have the same rights and obligations as it has under Regulation 46 where the State is the host Member State of the AIFM.

- (11) Without prejudice to other supervisory powers referred to in Regulation 46(3), as from the date of transmission under paragraph (9), the Bank shall not require the Irish AIFM concerned to demonstrate compliance with national laws and administrative provisions governing marketing requirements as referred to in Article 5 of Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019¹³.
- (12) An Irish AIFM may, for the purposes of paragraph (8), use any electronic or other distance communication means.”.

Amendment of Regulation 34 of Principal Regulations

8. Regulation 34 of the Principal Regulations is amended, in paragraph (6)—

- (a) by the substitution of the following subparagraph for subparagraph (b):
 - “(b) If, pursuant to a planned change, the Irish AIFM’s management of the EU AIF would no longer comply with these Regulations or the Irish AIFM would otherwise no longer comply with these Regulations, the Bank shall inform the Irish AIFM within 15 working days of receipt of all the information referred to in subparagraph (a) that it is not to implement the change.”,
 - and
- (b) by the substitution of the following subparagraph for subparagraph (c):
 - “(c) If, notwithstanding the requirements of subparagraphs (a) and (b), a planned change is implemented or if an unplanned change has taken place pursuant to which the Irish AIFM’s management of the EU AIF would no longer comply with these Regulations or the Irish AIFM otherwise would no longer comply with these Regulations, the Bank shall take all due measures in accordance with Regulations 48 and 49 and shall notify accordingly the competent authorities of the host Member State of the Irish AIFM without undue delay.”.

Facilities available to retail investors

¹³ OJ No. L. 188, 12.7.2019, p. 55.

9. The Principal Regulations are amended by the insertion of the following Regulation after Regulation 44:

- “44A. (1) Without prejudice to Article 26 of Regulation (EU) 2015/760, where an AIFM intends to market units or shares of an AIF to retail investors in the State, it shall make available, in the State, facilities to perform the following tasks:
- (a) process investors’ subscription, payment, repurchase and redemption orders relating to the units or shares of the AIF, in accordance with the conditions set out in the AIF’s documents;
 - (b) provide investors with information on how orders referred to in subparagraph (a) can be made and how repurchase and redemption proceeds are paid;
 - (c) facilitate the handling of information relating to the exercise of investors’ rights arising from their investment in the AIF in the State;
 - (d) make the information and documents required pursuant to Regulations 23 and 24 available to investors for the purposes of inspection and obtaining copies thereof;
 - (e) provide investors with information relevant to the tasks that the facilities perform in a durable medium as defined in point (m) of Article 2(1) of Directive 2009/65/EC;
 - (f) act as a contact point for communicating with the competent authorities.
- (2) An AIFM, other than an Irish AIFM, is not required to have a physical presence in the State or to appoint a third party for the purposes of paragraph (1).
- (3) An AIFM shall ensure that the facilities to perform the tasks referred to in paragraph (1), including electronically, are provided—
- (a) in one of the official languages of the State or in a language approved by the Bank, and
 - (b) by the AIFM itself, by a third party which is subject to regulation and supervision governing the tasks to be performed, or by both.
- (4) For the purposes of paragraph (3)(b), where the tasks are to be performed by a third party, the appointment of that third party shall be evidenced by a written contract, which shall—

- (a) specify which of the tasks referred to in paragraph (1) are not to be performed by the AIFM, and
- (b) provide that the third party will receive all the relevant information and documents from the AIFM.”.

Amendment of Schedule 4 of Principal Regulations

10. Schedule 4 to the Principal Regulations is amended—

- (a) in paragraph (h), by the substitution of “in respect of the AIF;” for “in respect of the AIF.”, and
- (b) by the insertion of the following paragraphs after paragraph (h):
 - “(i) the details necessary, including the address, for the invoicing or for the communication of any applicable regulatory fees or charges by the competent authorities of the host Member State;
 - (j) information on the facilities for performing the tasks referred to in Article 43A.”.



GIVEN under my Official Seal,
4 August, 2021.

PASCHAL DONOHOE,
Minister for Finance.

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