

Investment Management Advisory

It's All There: Post-AIFMD Fundraising Options in Germany

There is significant potential for alternative investment fund managers (AIFMs) to access Germany's large base of institutional investors. Despite the recent post-AIFMD challenges—including the abolition of Germany's pre-AIFMD private placement regime (NPPR) and BaFin's (the German supervisory authority) restrictive interpretation of reverse solicitation practices—Germany is far from the “impenetrable” jurisdiction for marketing purposes under AIFMD or the KAGB (*Kapitalanlagegesetzbuch*, the 2013 German implementing legislation) that many clients assume. Not only is it possible for a non-EU fund to become authorized for marketing in Germany to professional and semi-professional investors under the KAGB, it is in fact not as difficult as previously assumed.

Background

The KAGB, which implemented AIFMD and abolished the German NPPRs, now has authority over “any direct or indirect” offering or placement, or related advertising and marketing for such an investment undertaking. The KAGB has a broad definition of “marketing” for professionals (e.g., insurance companies, investment funds, etc.) and a slightly narrower interpretation for semi-professional investors (e.g., certain family offices and endowments), which leaves some room for “passive marketing” outside the scope of the KAGB.

Passive marketing, for the most part, has meant some form of reverse solicitation— i.e., prospective investors approach the sponsor rather than the other way around—whereby

sponsor/agent responsibilities included securing a signed confirmation about the contact process prior to distributing any subscription documents and maintaining a reverse solicitation database. However, the prohibitive approach to marketing under AIFMD represents a deliberate policy by BaFin to limit reverse solicitation and discourage broad marketing initiatives based on it. As a result, it is increasingly difficult for an AIF sponsor's marketing strategy to rely on reverse solicitation alone.

“Real Marketing”

With reverse solicitation an increasingly unviable option for the authorized marketing of non-EU funds in Germany to professional and semi-professional investors under the KAGB, the only realistic option to attract German LPs on a broader basis is to comply with the Notification Procedure under Sec. 330 KAGB. BaFin finally published guidelines on the Notification Procedure in August 2014, which were subsequently revised in late September 2014. This Sec. 330 notification procedure requires non-EU-resident managers to meet criteria including:

- Compliance with certain information requirements vis-à-vis BaFin.
- Adherence to special reporting requirements based on certain percentage thresholds of holdings in all unlisted portfolio companies (if the AIF qualifies as certain fund type).
- Appointment of a depositary for monitoring cash-flows, safekeeping/recordkeeping of assets and related oversight in accordance with AIFMD.
(Note: A “depositary lite” structure may be an option for certain fund types, including various categories of hedge, real estate and private equity funds, which significantly lessens the work and cost associated with non-EU based AIFMs, US GPs and US AIF sponsors looking to market to German investors.)
- Fulfillment of transparency requirements.
- Cooperation agreement between BaFin and the home state authority of the non-EU AIFM.
- Implementation of measures to prevent marketing of the AIF to retail investors.

In addition, the first version of the BaFin guidelines published in August 2014 listed a requirement for the non-EU AIFM to confirm that both the AIFM and the AIF are either registered with or have been authorized by their domestic supervisory authority, and that the domestic supervisory authority has respective information and examination rights. This additional – and controversial – confirmation was not required by Sec. 330 KAGB (or the AIFMD), and may in fact also not be a regulatory requirement of the home state in which the fund is located. The revised BaFin guidelines of 30 September 2014 now only contain a requirement that the non-EU AIFM confirms either (a) that the AIFM has filed its basic contact

details with its domestic supervisory authority, e.g., by means of a registration or authorization or (b) that the AIFM has filed its basic contact details with another registry that can be accessed by the domestic supervisory authority. In addition, the non-EU AIFM needs to confirm that the domestic supervisory authority has information access rights vis-à-vis the non-EU AIFM.

The KAGB Sec. 307 information requirements also call for applications to BaFin to include variants of already existing fund information, including a business plan pertaining to the applicable AIF; the investment conditions, articles of association/incorporation and partnership agreement of the AIF; summary information regarding the AIF's depository, a compliant quasi-PPM; and an undertaking from the non-EU AIFM to (i) submit an annual report; (ii) inform BaFin of all material changes; and (iii) provide information and submit documents to BaFin at its request.

When Can Marketing Begin?

Once all the respective information has been compiled and the required documents drafted and submitted to BaFin, turnaround time depends on the complexity of the fund and the quality of documentation provided to BaFin. While BaFin is entitled to rely on the statutory approval periods (see table below), considerably faster turnaround can be available in practice (depending on the circumstances).

Fund Type \ Investor	Professional Investor	Semi-Professional Investor
	<i>generally include insurance companies and pension funds</i>	<i>typically include certain endowments and certain family offices</i>
"Regular" Fund	2 Months	4 Months
Feeder with EU Master	3 Months	5 Months
Feeder with Foreign Master	4 Months	8 Months

Conclusion

The Notification Procedure under Sec. 330 KAGB constitutes a genuine and realistic, if largely neglected, fundraising alternative. Although a fair amount of information has to be provided, most of it can be extracted from existing fund documentation and reports, and most documents can furthermore be submitted in English.

Contact Us

Stephen Culhane

+1 212 836 7035

stephen.culhane@kayescholer.com

Simon Firth

+44 (0)20 7105 0583

simon.firth@kayescholer.com

Dr. Thomas A. Jesch, LLM

+49 69 25494 220

thomas.jesch@kayescholer.com

Daniel Lewin

+44 (0)20 7105 0580

daniel.lewin@kayescholer.com

Hartmut T. Renz

+49 69 25494 230

hartmut.renz@kayescholer.com

· Chicago · Los Angeles · Shanghai
· Frankfurt · New York · Washington, DC
· London · Palo Alto · West Palm Beach

KAYE | **SCHOLER**