

## New rules for “pre-marketing” funds – effect on Guernsey and Jersey AIFMs

Service area / [Investment Funds](#)

Location / [Guernsey and Jersey](#)

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The Cross Border Distribution Directive (“Pre-Marketing Directive”) amends the Alternative Investment Fund Managers Directive (“AIFMD”). Member States have until 2 August 2021 to amend their legislation to include the new rules.

The Pre-Marketing Directive provides for a uniform approach to the “pre-marketing” of alternative investment funds (“AIFs”) within EU Member States. Member States do not currently have a uniform approach as to what constitutes “marketing” under the AIFMD. What one Member State construes as “pre-marketing” might be “marketing” in another Member State. Consequently, the point at which the AIFMD rules on “marketing” are triggered currently differs across Member States. This has meant that AIFMs have ruled out certain jurisdictions for test marketing. Historically, managers have not wanted to incur the cost of making regulatory filings to market AIFs, if they have not had a chance to gauge the level of investor interest in a prospective fund.

### What is “pre-marketing”?

“Pre-marketing” under the Pre-Marketing Directive is the provision of information or communication on investment strategies or ideas to potential professional investors in the EU to test their interest in an AIF or potential AIF. Whilst the exact scope of information permissible beyond the provision to prospective investors of investment strategies or ideas under “pre-marketing” is uncertain, any such materials must be insufficient (i) to allow potential investors to commit to the investment, (ii) to amount to subscription documentation (whether draft or final) or (iii) to amount to constitutional documents, a prospectus or offering document.

### New filings

An EU AIFM will be obliged to notify its home member state regulator of any pre-marketing within two weeks of its commencement. For jurisdictions like the UK, which currently permit pre-marketing without any regulatory filings, this creates much more regulatory formality.

### No reverse solicitation if pre-marketing has occurred?

Where a subscription takes place within 18 months of the AIFM beginning pre-marketing, the subscription will be deemed to have been the result of marketing, which then requires a marketing filing to be made in the relevant EU Member State. This means that an AIFM cannot rely on reverse solicitation for a period of 18 months from pre-marketing. This also represents a significant change to the existing AIFMD requirements which do not restrict professional investors who wish to invest in an AIF on their own initiative. Any reverse solicitation has historically not required any filings in Member States.

### What now for non-EU AIFMs, such as Channel Island AIFMs?

In attempting to unify the interpretation of pre-marketing activities, the EU imposes on its AIFMs further formality, cost and red-tape. The Pre-Marketing Directive does not apply to non-EU AIFMs (such as Guernsey or Jersey managers) marketing funds into the EU under the national private placement regimes. However, the Pre-Marketing Directive states that the new rules should not put EU AIFMs at a

disadvantage to non-EU AIFMs. It will be up to the competent authority of each EU Member State to determine whether to extend the pre-marketing rules to non-EU AIFMs under the national private placement regimes.

## Timing

The new regime is to be implemented on 2 August 2021. Guernsey and Jersey managers planning fund-raising should factor this into their timetable to facilitate fund raisings before the end of July 2021.

It is notable that the transition period for Brexit will have expired by the time compliance with the Pre-Marketing Directive is required: it will be of interest to see how the UK might decide to diverge from the EU approach to marketing and pre-marketing initiatives.



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### FIND US

Carey Olsen (Guernsey) LLP  
PO Box 98  
Carey House  
Les Banques  
St Peter Port  
Guernsey GY1 4BZ  
Channel Islands

T +44 (0)1481 727272

E [guernsey@careyolsen.com](mailto:guernsey@careyolsen.com)

Carey Olsen Jersey LLP  
47 Esplanade  
St Helier  
Jersey JE1 0BD  
Channel Islands

T +44 (0)1534 888900

E [jerseyco@careyolsen.com](mailto:jerseyco@careyolsen.com)



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