

## Guidance Notice (2013)

for marketing units or shares of EU AIFs or domestic special AIFs (*Spezial-AIF*) managed by an EU AIF management company to semi-professional and professional investors in the Federal Republic of Germany pursuant to section 323 of the Investment Code (*Kapitalanlagegesetzbuch – KAGB*)

- I. Member state: Germany
- II. Last updated: 15 December 2021
- III. General description of the electronic notification procedure pursuant to section 323 of the KAGB

If an EU AIF management company within the territorial scope of the Investment Code (*Kapitalanlagegesetzbuch – KAGB*) intends to market units or shares of EU AIFs or domestic special AIFs (*Spezial-AIF*) to semi-professional or professional investors in Germany and the EU AIF management company manages the EU AIF or domestic special AIF in Germany on a cross-border basis pursuant to section 54 of the KAGB, the EU AIF management company must notify the competent authority in its home member state of this. The notification procedure complies with the laws of the home member state in accordance with Article 32 of Directive 2011/61/EU.

If the aforementioned AIF is a feeder AIF, then there is only a right to market if the master AIF is also an EU AIF or a domestic AIF managed by an EU AIF management company or a domestic AIF management company.

The EU AIF management company must provide the competent authorities in its home member state with a notification letter for every EU AIF or domestic special AIF which it intends to market in the Federal Republic of Germany.

The notification letter is to be submitted in a language customary in the sphere of international finance and incorporates the documentation and information pursuant to Annex IV of Directive 2011/61/EU as amended by Directive (EU) 2019/1160.

In accordance with point (h) of Annex IV to Directive 2011/61/EU, the notification letter must include information about arrangements made for the marketing of the EU AIF or domestic special AIF in the Federal Republic of Germany and information on the arrangements established to prevent units or shares of the EU AIF or

domestic special AIF from being marketed to retail investors in the Federal Republic of Germany. This applies even if the EU AIF management company relies on activities of independent companies for marketing purposes. In addition, point (i) of Annex IV of Directive 2011/61/EU requires certain details to be provided for invoicing by BaFin in accordance with Article 9(2) of Regulation (EU) 2019/1156. The following details of a contact person must be provided:

- first name and surname and position within the company;
- address for correspondence;
- telephone number;
- e-mail address;

For further details about the content and form of the notification letter not included in this Guidance Notice, including the necessary documentation and information, please contact the competent authority in your home member state.

If there are no indications that the EU AIF management company or the management by the AIF management company of the notified AIF do not or will not in future comply with the provisions of Directive 2011/61/EU, the competent authority in the home member state will, no later than 20 working days after the date of receipt of the complete notification file, e-mail the Federal Financial Supervisory Authority (BaFin) the complete notification file together with a statement to the effect that the particular EU AIF management company is authorised to manage the particular EU AIF or domestic special AIF, and will immediately notify the EU AIF management company of the transmission of the notification file.

Marketing in the Federal Republic of Germany may commence as soon as the competent authorities in the EU AIF management company's home member state have notified the EU AIF management company that the notification file has been transmitted to BaFin.

#### IV. Completeness check by BaFin in accordance with section 323 (1) of the KAGB

In accordance with section 323 (1) of the KAGB, BaFin will check whether the notification file submitted by the competent authority in the home member state is complete, whether there is a corresponding statement for the EU AIF management company from the competent authority in the home member state and whether the documents have been submitted in a language customary in the sphere of international finance.

V. Arrangements regarding marketing pursuant to section 323 (2) sentence 3 of the KAGB

In accordance with section 323 (2) sentence 3 of the KAGB, BaFin also checks whether the arrangements made for marketing are suitable for preventing a breach of the marketing regulations of the KAGB, in particular for effectively preventing marketing to retail investors. Pursuant to Article 32 (5) of Directive 2011/61/EU, this check does not fall within the jurisdiction of the competent authority in the home member state, but rather within the jurisdiction of BaFin as the competent authority in the host member state.

1. General arrangements regarding marketing

In order to be able to check that the EU AIF management company can fulfil the marketing requirements of the KAGB, the EU AIF management company must state in the notification letter

- a) whether it has established internal arrangements to ensure that the duties to inform specified in sections 307 and 308 of the KAGB have been complied with (e.g. through relevant instructions and training for staff); and
- b) whether it has concluded agreements with all marketing partners acting on behalf of the EU AIF management company which compel these partners to comply with the duties to inform specified in section 307 of the KAGB.

2. Information regarding the arrangements to prevent marketing to retail investors

Regarding the arrangements to prevent marketing to retail investors, the EU AIF management company must state whether

- it has established internal arrangements to ensure that units or shares of the notified EU AIF or special AIF will not be offered to or placed with retail investors; and
- if the marketing is conducted via the Internet or other electronic systems, there are separate and access-protected access channels for each type of investor (retail, semi-professional and professional investors).

It must further state whether an agreement has been concluded with all marketing partners, according to which

- units or shares of the notified EU AIF or special AIF must not be offered to or placed with retail investors; and

- if the marketing is conducted via the Internet or other electronic systems, there are separate and access-protected access channels for each type of investor (retail, semi-professional and professional investors).

## VI. Proof of payment of the fee

For processing the notification, BaFin charges a fee amounting to €466 (in the case of umbrella schemes, each investment compartment is subject to the duty to pay fees).

Please refer to our publication according to Article 10 (1) of Regulation (EU) 2019/1156 for an overview over fees and charges levied by BaFin in relation to the cross-border activities of AIFMs, EuSEF managers, EuVECA managers and UCITS management companies.<sup>1</sup>

The fee is to be remitted to the following account:

Recipient: Bundeskasse Trier  
Deutsche Bundesbank Filiale Saarbrücken

IBAN: DE 81 5900 0000 0059 0010 20

BIC: MARK DEF 1590

stating the following reference

"BaFin, ... (name of the EU AIF or domestic special AIF to which the notification relates), AnzGeb."

The name is to be stated in full in each case provided that technical restrictions, e.g. limited number of characters in the reference field on the bank transfer form, do not prevent this. When making the transfer, please note that the fee is to be transferred in full and not reduced by bank charges or other costs.

Proof of the transfer of the fee, e.g. a scan of the transfer form, is to be attached to the notification as proof of payment.

## VII. Requirements to be met when marketing or purchasing units and shares:

When marketing or purchasing units and shares, the requirements specified in sections 293, 295, 307 and 308 of the KAGB are to be observed.

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<sup>1</sup> <https://www.bafin.de/dok/16411256>

Special provisions in the case of umbrella schemes:

In the case of EU AIFs having at least one investment compartment whose units may be marketed within the jurisdiction of the Investment Code and other investment compartments under the same umbrella for which no notification pursuant to section 323 of the Investment Code has been filed, the sales documentation shall include a prominent statement in prominent print indicating that no notification has been filed for the other investment compartments and that the units in such other investment compartments may not be marketed to investors within the jurisdiction of the Investment Code (section 293 (1) no. 3); such other investment compartments are to be identified by name.

VIII. Notifications of change, de-notification of marketing arrangements in Germany

Updates or changes to the information and documents contained in the notification letter, including de-notification of the arrangements made for marketing EU AIFs or domestic special AIFs or individual investment compartments of an EU AIF or domestic special AIF which are authorised for marketing, are to be notified to the competent authority in the home member state (de-notification of marketing arrangements; see also section 295a (6) sentence 1).

IX. De-notification of marketing arrangements in Germany

The competent authority of the home member state of the EU AIF must notify BaFin of the de-notification of marketing arrangements in accordance with section 295a (1) sentence 2 of the KAGB. The notification shall include information relating to the conditions set forth in section 295a (1) sentence 3 nos. 1 to 3 of the KAGB.

In order to demonstrate fulfilment of the conditions under section 295a (1) sentence 3 no. 1, the notification must state how the blanket offer was publicly available for at least 30 working days, and was addressed, directly or through financial intermediaries, individually to investors whose identity was known. "Making publicly available" specifically includes publishing the blanket offer on the website of the management company and of the financial intermediary, as well as publishing the offer in the Federal Gazette. This obligation to produce evidence does not apply in the case of closed-ended AIFs or AIFs governed by Regulation (EU) 2015/760.

In order to demonstrate fulfilment of the conditions under section 295a (1) sentence 3 no. 2, the notification must state the publicly available medium through which the intention to de-notify the marketing arrangements was made public (including electronic means), which is customary for marketing AIFs and suitable for a typical AIF investor.

Suitable means for publishing the intention to de-notify marketing arrangements specifically include publishing on the website of the management company and of the financial intermediary, as well as publishing in the Federal Gazette.

In order to demonstrate fulfilment of the conditions under section 295a (1) sentence 3 no. 3, the notification must state that any contractual arrangements with financial intermediaries or delegates were 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 relevant units or shares.

BaFin charges a fee for processing the de-notification amounting to €284 (in the case of umbrella schemes, each investment compartment is subject to the duty to pay fees).

Please refer to our publication according to Article 10 (1) of Regulation (EU) 2019/1156 for an overview over fees and charges levied by BaFin in relation to the cross-border activities of AIFMs, EuSEF managers, EuVECA managers and UCITS management companies.<sup>2</sup>

The fee is to be remitted to the aforementioned account stating the following reference:

"BaFin,... (name of the EU AIF or domestic special AIF to which the deregistration relates), DeRegGeb."

In each case, the full name of the undertaking is to be provided as far as technically possible, e.g. to the extent the number of characters provided for the payment reference on the transfer form allows. When remitting payment, please ensure that the fee is paid in full and that no bank or other charges are deducted.

Proof of the transfer of the fee, e.g. a scan of the transfer form, is to be attached to the notification as proof of payment.

The De-notification, if applicable the amended documents or the description of the amendments and proof of payment of the De-notification fee should be sent to the following e-mail address:

[AIF-Update@bafin.de](mailto:AIF-Update@bafin.de)

Please observe the instructions for filing by e-mail (section X.).

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<sup>2</sup> <https://www.bafin.de/dok/16411256>

### Duties to provide information following the de-notification of marketing arrangements

If the marketing arrangements for an EU AIF are de-notified, the AIF management company shall, in accordance with section 295 (3) of the KAGB, provide the remaining German investors with the information required under section 307 (1) and section 308 (1) and (3) sentence 1 of the KAGB from the date of the de-notification. The information may be provided to the remaining German investors via any electronic or other distance communication means.

### Information concerning change of the management company:

Should an EU AIF, which has already been notified for marketing, change its management company, it is solely sufficient to provide BaFin with an updated notification, and it is free of charge.

Notifications of amendments to the information and documents contained in the notification letter, including de-notification of the arrangements made for marketing EU AIFs or domestic special AIFs or individual investment compartments of an EU AIF or domestic special AIF which are authorised for marketing shall be submitted through the competent authority in its home member state to the following e-mail address:

[AIF-Update@bafin.de](mailto:AIF-Update@bafin.de)

Please observe the instructions for filing by e-mail (section X.).

For processing updates or changes to the information and documents concerning the arrangements made for marketing, BaFin charges a fee amounting to €952 (in the case of umbrella schemes, each investment compartment is subject to the duty to pay fees).

Please refer to our publication according to Article 10 (1) of Regulation (EU) 2019/1156 for an overview over fees and charges levied by BaFin in relation to the cross-border activities of AIFMs, EuSEF managers, EuVECA managers and UCITS management companies.<sup>3</sup>

The fee is to be remitted to the aforementioned account stating the following reference:

"BaFin, ... (name of the EU AIF or domestic special AIF to which the notification of change relates), ÄndGeb."

Proof of the transfer of the fee, e.g. a scan of the transfer form, is to be attached to the notification of change as proof of payment.

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<sup>3</sup> <https://www.bafin.de/dok/16411256>

Updates or changes to the information and documents not concerning the arrangements made for marketing are free of charge.

X. Instructions for filing by e-mail

- a) The size of the e-mail may not exceed 20 MB including all attachments; attachments may be included in a ZIP file. If necessary, the information should be broken down and sent in several separate e-mails, in which case this should be noted in the subject line (see c)).
- b) The following file types may be used for attachments: pdf, doc and docx.
- c) The subject line should include
  - the 8-digit BaFin ID number<sup>4</sup> (70XXXXXX),
  - the name of the AIF management company, as well as
  - a serial number in those cases where the notification is sent using several separate e-mails (see a) above).

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<sup>4</sup> The competent authority and the company will be informed of the EU AIFs BaFin ID number in the course of the notification process.