

Guidance Notice (2013)

on the marketing of units or shares of EU AIFs or domestic AIFs managed by an AIF management company to professional investors in other member states of the European Union or in signatories to the Agreement on the European Economic Area pursuant to section 331 of the Investment Code (Kapitalanlagegesetzbuch – KAGB)

“outgoing AIF notification”
and
“outgoing AIF update”

- I. **Member state:** Germany
- II. **Last updated:** 01 October 2021
- III. **General description of the electronic notification procedure pursuant to section 331 of the KAGB**

The electronic notification procedure provided in section 331 of the KAGB for marketing EU AIFs or domestic AIFs to professional investors in other member states of the European Union or in signatories to the Agreement on the European Economic Area is set up on an inter-agency basis. The domestic AIF management company submits the notification letter including the information and documents required for the **notification (“outgoing AIF notification”)** about the intended marketing to the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*) in a language customary in the sphere of international finance via **BaFin's reporting and publishing system (“MVP”)**. If there are no indications that the 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 the KAGB or Directive 2011/61/EU, BaFin will, no later than 20 working days after the date of receipt of the complete notification file, transmit the complete notification file to the competent authorities of the other member states of the European Union or of the signatories to the Agreement on the European Economic Area in which the notified AIF is to be marketed to professional investors (section 331 (4) of the KAGB) and will immediately notify the AIF management company of the transmission of the notification file (section 331 (5) of the KAGB). The AIF management company is then entitled to begin marketing the notified AIF to professional investors in the relevant member state of the European Union or in the signatory to the Agreement on the European Economic Area from the date on which

BaFin communicated this (section 331 (5) of the KAGB).

This Guidance Notice provides explanatory notes on BaFin's model notification letter and describes the submission arrangements under item VII.

Section 331 (7) to (9) of the KAGB also provides for an inter-agency procedure for reporting material changes in the information and documents contained in the notification letter (**notification of change, "outgoing AIF update"**).

The AIF management company must notify BaFin of these changes in text form in a notification of change pursuant to section 331 (7) of the KAGB. BaFin is to be notified of planned changes at least one month before they are made and is to be notified of unplanned changes immediately after they have occurred. If there are no indications that the AIF management company or the management of the notified AIF do not or will not in future comply with the provisions of the KAGB or Directive 2011/61/EU, BaFin will inform the competent authorities of the host country of the AIF management company of these changes within one month in accordance with section 331 (9) of the KAGB. If following examination BaFin concludes that the proposed change would lead to the AIF management company or the management of the particular AIF by the AIF management company then being in breach of the provisions of the KAGB or provisions enacted on the basis of the KAGB, BaFin will inform the AIF management company within 15 working days of receiving all of the information referred to in the notification of change that it may not implement the change. In such case, BaFin will immediately notify the competent authorities in the host country of the AIF management company accordingly. If an AIF management company makes a proposed change in spite of the notification addressed to it by BaFin, or if a change brought about by unforeseeable circumstances leads to the AIF management company or the management of the particular AIF by the AIF management company then being in breach of the provisions of the KAGB, BaFin will take suitable measures, including prohibiting the marketing of the particular AIF, and will immediately notify the competent authorities in the host country of the AIF management company accordingly (see section 331 (7) to (9) of the KAGB).

Further details on the notification of change process can be found under item VI. no. 2 and item VII. no. 8 of this Guidance Notice.

IV. Legal basis of the notification procedure

1. European legal basis:

- Article 32 and Article 32a of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment

Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 as amended by Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings.

- Implementing technical standards as provided in Article 32(8) of Directive 2011/61/EU have not yet been developed by ESMA.

2. National legal basis:

- sections 293, 295 (6) of the KAGB;
- section 331 of the KAGB;
- section 331 (2) sentences 2 and 3 of the KAGB in conjunction with the "Regulation on the electronic notification procedure for domestic investment funds and EU investment funds under the German Investment Code (*Verordnung zum elektronischen Anzeigeverfahren für inländische Investmentvermögen und EU-Investmentvermögen nach dem Kapitalanlagegesetzbuch – EAKAV*)" issued by BaFin; and
- section 331a of the KAGB.

v. Home member state of the AIF management company

Federal Republic of Germany

VI. Information on electronic submission

1. Submission using the outgoing AIF notification via the MVP

Section 331 (2) of the KAGB provides that the notification letter including the information and documents included in the notification letter are to be transmitted via the MVP. The provisions of the EAKAV are also to be observed. The Regulation (only available in German) can be accessed on the BaFin website (www.bafin.de).

2. Submission using the outgoing AIF update

The AIF management company is required to notify BaFin in text form of changes in a notification of change. BaFin understands text form to mean that the notification of the change can be made by normal post or e-mail. It is also possible to transmit the notification of change via the MVP (marked as update).

If the notification is made by e-mail, then it is to be sent to this e-mail address

AIF-update@bafin.de

The following technical conditions apply:

- a) The e-mail must not be larger than **20 MB**; the attachments may be packaged in a zip file. If necessary, the contents should be divided between several e-mails; this should be made clear in the subject line (see c)).
- b) The permissible **file formats** for attachments are pdf, doc and docx.

The following information is to be included in the **subject line** of the e-mail:

- P 331_(if available) the eight-digit **BaFin ID**¹;
 - the name of the AIF management company; and- a sequence number if the notification is sent using several e-mails (see a) above).
- c) The full **name of the sender** and his/her role within the AIF management company must be clear from the notification of change.
 - d) If the notification is sent by an **authorised representative**, the information under c) applies *mutatis mutandis*. A certificate of authorisation is to be attached to the notification unless reference is made to an authorisation which

¹ The BaFin ID of a domestic AIF investment fund is allocated to the companies as part of the notification or approval procedure.

has already been submitted. In particular, the certificate is to specify whether and, if applicable, to what extent the authorised representative – whose name and position are to be indicated – is authorised to provide affirmations for the AIF. The certificate is to be signed by the manager(s) with power of representation of the AIF management company or of the self-managed AIF and the names and positions of the signatories are to be indicated.

VII. Notification procedure under section 331 (1) of the KAGB (“outgoing AIF notification”)

1. Notification letter/cross-reference table

The notification letter model “Notification letter on the basis of section 331 of the KAGB” which BaFin has made available online is to be used for the notification. The cross-reference table model “Cross-reference table on the basis of section 331 of the KAGB” is to be used as well. The templates can be accessed on BaFin's website (www.bafin.de).

2. Language

All necessary information and documents (notification letter etc.) are to be made available in a language customary in the sphere of international finance in compliance with the requirement in section 331 (1) sentence 1 of the KAGB.

3. Information about completing the notification letter

The notification letter is based on section 331 of the KAGB and is designed especially for the notification procedure for marketing EU AIFs or domestic AIFs to professional investors in other EU member states and EEA signatory states.

The information to be provided is based on the requirements of Annex IV in conjunction with Article 23 of Directive 2011/61/EU as amended by Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings.

Please refer to item VII. no. 4 of this Guidance Notice in relation to the information to be provided in accordance with point (h) of Annex IV of Directive 2011/61/EU as amended by Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU.

In addition, point (i) of Annex IV of Directive 2011/61/EU as amended by Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU requires certain information to be provided for invoicing by BaFin in accordance with Article 9(2) of Regulation (EU) 2019/1156. A contact person for invoicing purposes must be nominated for each investment fund, and the following information must be included:

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

The fields relating to the facilities available to retail investors need only be completed in the event of notification of the cross-border distribution of ELTIFs to retail investors as well.

The field "Additional information about the AIFM/self-managed AIF (if necessary)" in the notification letter is intended for information which is to be made available to the competent authorities of the host member state, if applicable on the basis of the national legislation there. Other information which the host member state requires or reference to any attached certificates, e.g. proof of the transfer of the fee, may be entered here. The AIF management company is responsible for finding out about any existing fee obligation payable to the competent authority of the member state in which the AIF is to be marketed for processing the notification in accordance with Article 32 of Directive 2011/61/EU.

4. Information and arrangements regarding marketing:

Information is to be provided about who is to market the units or shares of the notified AIF.

Pursuant to Article 32(5) of Directive 2011/61/EU, special requirements for the arrangements made for marketing and the arrangements established to prevent units or shares of the notified AIF from being marketed to retail investors are governed by the laws and supervision of the host member state of the AIF. The AIF management company must independently familiarise itself with the host member state's requirements before submitting the notification of marketing intention.

5. Signature/affirmation

The notification letter shall be signed by an authorised signatory of the AIF management company or of the self-managed AIF or by a third person who

has been authorised in writing to act in the name of the notified AIF in such a way that his/her actions will be accepted by the competent authorities of the host member state with regard to the certification of documents. The signatory shall indicate his/her full name and position and ensure that the affirmation is dated. Moreover, it will be affirmed, *inter alia*, that the documents attached to the notification letter contain all the relevant information specified in Directive 2011/61/EU.

The requirements of the EAKAV apply *mutatis mutandis*.

6. Documents to be attached

The notification letter must, among other things, contain the latest version of the information and documents listed in section 331 (1) sentence 2 of the KAGB in conjunction with section 321 (1) sentence 2 of the KAGB.

7. Fees

For processing the notification, BaFin charges a fee in the following amount:

Examining the notification in accordance with section 331 (1) of the KAGB; in the case of umbrella schemes, separately for each investment compartment	€1,641.00
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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.²

Following the administrative procedure, BaFin issues a fee notice for the processing fee in accordance with section 331 of the KAGB, which is sent together with payment details to the AIF management company.

The AIF management company is responsible for finding out about any existing fee obligation payable to the competent authority of the host member state in which the AIF is to be marketed for processing the notification in accordance with Article 32 of Directive 2011/61/EU.

² <https://www.bafin.de/dok/16411256>

8. Updating documents and notifications of changes (“outgoing AIF update”)

The AIF management company must inform BaFin in text form and in a language customary in the sphere of international finance of planned material changes to the information and documents contained in the notification letter in accordance with section 331 (7) of the KAGB at least one month prior to making the change or inform it of unplanned changes immediately, i.e. without undue delay, after they have occurred (see item VII. no. 2).

9. De-notification of marketing arrangements

A notification letter in accordance with section 331a (3) of the KAGB must be sent to BaFin (by post or e-mail) in order to de-notify the arrangements made for marketing an AIF to professional investors in the host member state. It is also possible to send the notification letter to de-notify the marketing arrangements via the MVP.

The notification shall include information relating to the conditions set forth in section 331a (1) nos. 1 to 3 of the KAGB.

In order to demonstrate fulfilment of the conditions under section 331a (1) no. 1 of the KAGB, 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.

In order to demonstrate fulfilment of the conditions under section 331a (1) no. 2 of the KAGB, 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 331a (1) no. 3 of the KAGB, 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.

In accordance with section 331a (5) of the KAGB, the AIF management company shall not engage in pre-marketing of units in the country named in the notification or engage in similar investment strategies or investment ideas for a period of 36 months from the date of de-notification. The requirements for pre-marketing set forth in section 306b of the KAGB remain unaffected.

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

If the marketing arrangements for an EU AIF or domestic AIF in other member states of the European Union are de-notified, the AIF management company shall, in accordance with section 331a (6) of the KAGB, provide the remaining German investors and BaFin 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.

In accordance with section 331a (7) of the KAGB, section 331 (7) of the KAGB in conjunction with section 321 (4) of the KAGB apply *mutatis mutandis* from the date of de-notification for as long as there remain investors in the AIF in Germany. The AIF management company is not be released from this obligation until all investors resident or domiciled in the Federal Republic of Germany have ended their investment in the AIF. In light of this, a notification of change must be submitted to BaFin as soon as there are no longer any investors in the AIF who are resident of or domiciled in the Federal Republic of Germany.