Guidance Notice (2018)

on the marketing of units or shares in a foreign AIF or EU AIF managed by a foreign AIF management company to professional or semi-professional investors in the Federal Republic of Germany in accordance with section 330 of the Investment Code (Kapitalanlagegesetzbuch – KAGB)

Preliminary remark:

This Guidance Notice sets out the basic features of the notification procedure in accordance with section 330 of the Investment Code (Kapitalanlagegesetzbuch – KAGB) of 4 July 2013 (Federal Law Gazette I p. 1981), which was amended by Article 6 of the Act of 17 July 2017 (Federal Law Gazette I p. 2394), and explains the conditions for marketing units or shares in a foreign AIF or EU AIF managed by a foreign AIF management company to professional or semi-professional investors in the Federal Republic of Germany.

The right to make changes and amendments to this Guidance Notice – in particular also on short notice – is reserved.

The marketing of units or shares in foreign AIF or EU AIF managed by foreign AIF management companies to professional or semi-professional investors in the Federal Republic of Germany is governed by the provisions of the KAGB. In accordance with section 330 of the KAGB¹, the intended marketing of units and shares must be notified to the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin).

BaFin reviews whether the information and documentation transmitted are complete. If the notification is incomplete, BaFin will request the missing information and documentation to be provided within 20 workdays in accordance with section 330 in conjunction with section 321 (2) in the form of a supplementary notification. The

¹ Where the terms “section” or “sections” in the following are used without specific reference to legislation, these shall refer to sections of the KAGB
supplementary notification must be submitted to BaFin within six months from submission of the notification or the last supplementary notification; otherwise, commencement of marketing is prohibited (section 321 (2) sentences 4 and 5). A new notification may be made at any time.

Where a marketing exclusively to professional investors is planned, BaFin advises within two months of receipt of the complete notification documents as referred to in section 330 (4) in conjunction with section 316 (3) whether marketing of the AIF specified in the notification letter in the Federal Republic of Germany may be commenced. If marketing to semi-professional investors is (also) intended, a time limit of four months will apply. If the notified AIF is a feeder AIF, the time limit will be extended in line with section 330 (4) sentence 2 numbers 1.b) and 2.b). If the notifying foreign AIF management company has already notified an AIF for marketing to semi-professional investors in the Federal Republic of Germany in accordance with section 330 (2) sentence 1 and assures in the notification letter that with reference to the information provided in accordance with section 330 (2) sentence 3 numbers 1 and 3 no changes have occurred since the last notification, the time limits for marketing to semi-professional investors will be shortened by two months in each case.

BaFin may prohibit commencement of marketing within the time limits specified in section 330 (4) in conjunction with section 316 (3) if the AIF management company or the management of the notified AIF by the AIF management company violates the provisions of the KAGB. If BaFin raises such objections within the time limit specified in section 330 (4), the time limit will be interrupted and will resume upon submission of the amended information and documentation. If the objections have been removed and BaFin notifies this fact to the AIF management company, marketing of the notified AIF in the Federal Republic of Germany may be commenced as of the date of such notification.

**General remarks regarding notification procedure**

This chapter of the Guidance Notice deals with the information and documentation which as a rule are required for notifications relating to the intended marketing of units or shares in EU AIF or foreign AIF to professional and semi-professional investors in accordance with section 330. This does not exclude the possibility of additional information being provided by the AIF management company or of further information and documentation being requested by BaFin.

**Submission of notice/documentation**

The notifications must be submitted in writing. All documents must be submitted in the form of a single counterpart and affixed with original signature(s) to the extent such signature(s) is/are required.

The individual information must be identified according to the numbering and relevant key words of this Guidance Notice. Where individual items are not relevant, these shall nevertheless be included in the notification and identified by the words “not applicable”. The same applies where certain information in this Guidance Notice is stated to be not required in certain cases. In cases of doubt, a brief statement of grounds shall be provided together with the respective items. The documents to be submitted will be identified on the top right-hand corner by the appropriate number of the Guidance Notice.

If the information on one item are identical to the information on another item, a reference to this fact may be provided. The same applies with regard to the documents to be attached.
In the case of self-managing AIF, the information and documentation required below with reference to the AIF management company apply analogously to the AIF itself. Likewise, obligations imposed by the Guidance Notice and/or the KAGB shall be incumbent on the AIF itself in the absence of any external AIF management company.

The documents must be submitted in the most recent version in each case. Foreign-language documents must be submitted in the form of a German translation or in the English language. Where reference is made in the documents to be submitted to foreign legal provisions, these must be submitted on request.

Notification letters

Notification letters must be written in the German language. The notification must be signed at the end with legally binding effect in the name of the AIF management company by its authorised representatives stating the place and date of execution, with the names of the undersigned to be repeated in typescript. If the notification is submitted not by the AIF management company but by an authorised agent, a power of attorney evidencing the authorisation of the notifier to notify BaFin of the marketing intention and to make and receive all declarations required in this connection must be submitted. It must be stated whether and, if applicable, to what extent the authorised agent, whose name and position must be identified (i.e. at least a natural person), is authorised to make confirmations on behalf of the AIF management company. In particular, it must be stated whether the authorised agent is entitled to perform self-certifications. The power of attorney must be signed by the management vested with power of representation, with the names and titles of the undersigned being identified.

Notifications must be addressed to the following office of BaFin:

Bundesananstalt für Finanzdienstleistungsaufsicht
Marie-Curie-Straße 24-28
60439 Frankfurt

If the marketing of units in more than one AIF is to be notified, a separate notification must be submitted for each AIF and the fee pursuant to section 14 (1) and (2) of the Act Establishing the Federal Financial Supervisory Authority (Finanzdienstleistungsaufsichtsgesetz – FinDAG) in conjunction with section 2 (1) of the Regulation on the Imposition of Fees and Allocation of Costs Pursuant to the FinDAG (Verordnung über die Erhebung von Gebühren und die Umlegung von Kosten nach dem Finanzdienstleistungsaufsichtsgesetz – FinDAGKostV) and No. 4.1.7.2.5 of the Fee Schedule of this Regulation must be paid. In the case of an umbrella structure, the notification and fee obligation shall extend to each investment compartment. If the documents to be attached to the individual notifications are identical, they need to be submitted only when notifying an investment compartment; in all other respects reference is to be made to the notification to which the respective document is attached. If reference is made to the documents that were submitted in an earlier notification procedure of an investment compartment of the same umbrella structure, the respective investment

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compartment is to be designated by name. References are possible only when the
documents are up-to-date.

The fee pursuant to section 14 (1) and (2) of the FinDAG in conjunction with section 2 (1)
of the FinDAGKostV and No. 4.1.7.2.5 of the Fee Schedule of this Regulation in the amount
of 1,545.00 euros must be paid, stating the identifier

"BaFin, ... (name of AIF to which the notification refers), Notification Fee, section 330 KAGB",

to the following account:

Recipient: Bundeskasse Trier

deutsche Bundesbank Filiale Saarbrücken

IBAN: DE 81 5900 0000 0059 0010 20

BIC code: MARK DEF 1590

The name of the AIF must be stated in full in each case unless full reproduction of such
name is not possible due to technical restrictions, e.g. limited number of characters in the
reference line in the bank transfer form.

When making a transfer it must be ensured that the fee is credited in full and not reduced
by banking fees or other charges.

Specific requirements for umbrella structures

Simultaneous existence of investment compartments with and without authorisation for marketing

If, for umbrella structures with at least one investment compartment whose units or shares
may be marketed within the scope of the KAGB, sales documents also containing
information on additional compartment investments are used that, within the scope of the
KAGB, may not be marketed or marketed only to another investor group, it must be pointed
out in a conspicuous place in the sales documents, highlighted by means of printing
techniques, that the units or shares of the additional investment compartments may not
be marketed within the scope of the KAGB or, where they may be marketed only to a
specific investor group, to which investment group within the meaning of section 1 (19)
numbers 31 to 33 they may not be marketed; such additional investment compartments
must be designated by name. Such notices as a rule must be included in the documents
intended for the investors in Germany.

Deregistration of investment compartments

Investment compartments of an umbrella structure already having marketing
authorisation may be deregistered provided that amended information and
documentation in accordance with section 330 (2) in conjunction with section 321 (1)
sentence 2 is submitted to BaFin, giving due regard to section 293 (1) number 3.
Updating of documents and change notices

BaFin must be kept informed of all material changes in those circumstances stated with the marketing notification. Proof must be furnished for such change information.

Annual fee

A fee in the amount of 1,270.00 euros is payable annually pursuant to section 14 (1) and (2) of the FinDAG in conjunction with section 2 (1) of the FinDAGKostV and No. 4.1.7.2.6 of the Fee Schedule of this Regulation for the review of the information and documentation prescribed by section 330 (2) sentence 3 no. 2 a) and c) which must be submitted each year.

The amount of the fee is determined based on the number of investment funds (individual funds) and/or investment compartments (umbrella schemes) managed by the AIF management company in line with the AIFM Directive which are notified for marketing in the Federal Republic of Germany.

The reference date is 31 December of every year.

The fee is determined annually in a notice.

Obligation as required by section 330 (2) sentence 3 number 2

It is important to note that the obligations specified in the declaration as required by section 330 (2) sentence 3 number 2 do not end when marketing has been discontinued in the Federal Republic of Germany. The AIF management company is released from this obligation only when all investors residing and/or domiciled in the Federal Republic of Germany have ended their investment in the AIF.

Content of notification in accordance with section 330

I. Marketing to semi-professional and/or professional investors

1. Information

1.1. All material information regarding the management company of the notified AIF and its corporate bodies

a) Name or company name, legal form, registered office, address, contact/contact person with phone number, fax number and e-mail address

b) Names of the directors

c) Name of the country under whose laws the AIF management company was established

d) Name, registered office and address of the governmental authority to whose supervision the AIF management company is subject
1.2. Information regarding the AIF
   a) Name of the AIF
   b) ISIN
   c) Registered office of the AIF
   d) Name of the country under whose laws it was established
   e) Legal form of the AIF
   f) Date of launch
   g) Financial year
   h) Open-ended or closed-ended AIF
   i) AIF type (hedge fund, private equity, fund of funds, etc.)

1.3. All material information relating to the depositary of the notified AIF or the agents performing the tasks in accordance with Articles 21(7) to (9) of Directive 2011/61/EU
   a) Name or company name, legal form, registered office and address
   b) Principal activity
   c) Name of the country under whose laws it was established
   d) Date or time of assumption of function

1.4. Description of the notified AIF and all information available to the investors regarding the notified AIF

1.5. Information regarding the precautions taken to prevent units or shares of the notified AIF from being marketed to private investors, and/or – if the notification does not cover marketing to these – semi-professional investors

It must be stated in particular whether

- the AIF management company has taken internal precautions to ensure that units or shares in the notified AIF are neither offered to nor placed with the aforementioned investor groups and

- if marketing is also carried out online – separate sales portals exist for the respective investor groups which are password protected and

- if the AIF management company relies on independent companies for the provision of investment services for the notified AIF - the marketing agreements contain an obligation forbidding units or shares of the AIF that is notified for marketing from being offered to or placed with private investors, and/or – if the notification does not cover marketing to these –
semi-professional investors and requiring the aforementioned separate, password-protected sales portals to be established.

The prospectus and all other information documents, including marketing materials, must include a notice in accordance with section 293 (1) sentence 2 no. 3 in prominent print.

1.6. Statement as to whether marketing is performed through a branch of the AIF management company in the Federal Republic of Germany and, if so, statement of the address and directors of the branch (cf. section 54 (2) nos. 2 and 3 of the KAGB)

2. **Documentation**

2.1. Fund rules, articles or memorandum of association of the notified AIF

2.2. Information in accordance with section 307 (1) for the notified AIF

   a) Description of the investment strategy and the objectives of the AIF

   b) Description of the type of assets in which the AIF is permitted to invest and of the techniques that it may use as well as all risks associated therewith

   c) Description of any investment restrictions

   d) Information regarding the registered office of any master AIF and the registered office of the target investment fund if the AIF is an investment fund of funds

   e) Description of the circumstances in which the AIF may use leverage, types and sources of leverage permitted and all associated risks, description of any restrictions on the use of leverage as well as the maximum scope of leverage which the AIF management company may use for the account of the AIF, and of the management of reuse of collateral and assets

   f) Description of the procedures by which the AIF may change its investment strategy or investment policy or both

   g) Description of the main legal implications of the contractual relationship entered into for the purpose of investment, including information on jurisdiction, on the applicable law and on whether legal instruments exist that provide for the recognition and enforcement of judgments in the territory where the AIF is established

   h) Identity of the AIF management company, the AIF’s depositary, auditor and any other service providers and a description of their duties and the investors’ rights

   i) Description of how the AIF management company is complying with the requirements of section 25 (6) or of Article 9(7) of Directive 2011/61/EU
j) Description of any delegated management functions as referred to in Annex I of Directive 2011/61/EU by the AIF management company and of any safe-keeping function delegated by the depositary; the identification of the authorised agent as well as a description of any conflicts of interest that may arise from such delegations

k) Description of the AIF’s valuation procedure and of the pricing methodology for valuing assets, including the methods used in valuing hard-to-value assets in accordance with sections 278, 279, 286 or in accordance with Article 19 of Directive 2011/61/EU

l) Description of the AIF’s liquidity risk management, including the redemption rights both in normal and in exceptional circumstances, and the existing redemption arrangements with investors

m) Description of all fees, charges and expenses and of the maximum amounts thereof which are directly or indirectly borne by investors

n) Description of the way in which the AIF management company ensures a fair treatment of investors and, whenever an investor receives preferential treatment or the right to receive preferential treatment, a description

   (1) of that preferential treatment
   (2) of the type of investors who receive such preferential treatment and
   (3) where relevant, of their legal or economic links with the AIF or the AIF management company

o) Description of the procedure and conditions for the issue and sale of units or shares

p) Statement of the latest net asset value of the AIF or the latest market price of the unit or share of the AIF in accordance with sections 278 and 286 (1) or in accordance with Article 19 of Directive 2011/61/EU

q) Information on the historical performance of the AIF, where available

r) Identity of the prime broker, a description of all material arrangements of the AIF management company with its prime brokers including the statement of the way in which conflicts of interest in relation thereto are managed and the provision in the contract with the depositary on the possibility of transfer and reuse of AIF assets and information on any transfer of liability to the prime broker that may exist

s) Description of how and when the information required under section 308 (4) sentence 2 in conjunction with section 300 (1) to (3) or Articles 23(4) and (5) of Directive 2011/61/EU will be disclosed.

2.3. Declaration by the foreign AIF management company that it undertakes

- to submit to BaFin the annual report of the AIF, which must satisfy the requirements of Article 22 and, if applicable, of Article 29 of
Directive 2011/61/EU, no later than six months following the end of each financial year; the annual report must be issued with an auditor’s opinion

- to inform BaFin of all material changes in circumstances that have been stated with the marketing notification, and to furnish proof of these changes

- to provide BaFin with information on its business activity on request and to submit documents and where applicable to satisfy vis-à-vis BaFin the duties to report and inform arising from section 330 (1) sentence 1 number 1 or 2 of the KAGB

2.4. Annual report of the AIF which must satisfy the requirements of Article 22 and if applicable of Article 29 of Directive 2011/61/EU and be issued with an auditor’s opinion

2.5. Current confirmation by the depositary in accordance with section 80 and by the agent(s) performing the tasks in accordance with Art. 21(7) to (9) of Directive 2011/61/EU, regarding the assumption of such function

2.6. Proof of payment of the fee for the notification

2.7. Declaration by the AIF management company, for example in the form of a registration or authorisation (stating the respective registration number/ID if available), that it is registered with the competent supervisory authority with which BaFin has entered into an appropriate agreement within the meaning of section 330 (1) no. 3a of the KAGB or that it has been entered in another register to which the competent supervisory authority has access. Moreover, a declaration by the management company that the competent supervisory authority has the right to receive information relating to the AIF management company.

II. **Additional requirements for marketing (also) to semi-professional investors**

1. **Information**

1.1. Names of the holders of qualifying interests in the AIF management company as well as information on the level of their respective interest

1.2. Disclosure of those facts indicating a close link between the AIF management company and other natural or legal persons

1.3. Information on the remuneration policies and practices pursuant to section 37

1.4. Disclosures on outsourcing agreements in line with section 36

1.5. Name, registered office and address of the governmental authority responsible for supervision of the depositary stating in detail, in the event of the registered office being in a third country, the nature and scope of the supervision, in particular with regard to whether it is to be reviewed in accordance with the provisions relevant for supervision whether the administrative and management bodies (management) possess the
experience required for the function, whether the organisation necessary to perform the duties is being kept available and whether minimum capital requirements are prescribed.

2. **Documentation**

2.1. Proof of own funds

2.2. Documents on the assessment of the professional qualification and trustworthiness of the directors of the AIF management company

2.3. Documents on the assessment of the trustworthiness of the holders of qualifying interests

2.4. Programme of activity setting out the organisational structure of the AIF management company, including information on how the AIF management company intends to comply with its obligations under the KAGB

III. **Additional requirements if the notified AIF is a feeder AIF**

1. **Information**

1.1. All material information regarding the management company of the master AIF and its corporate bodies in accordance with I.1.1.

1.2. Information regarding the master AIF in accordance with I.1.2.

1.3. All material information relating to the depositary of the master AIF or the agents performing the tasks in accordance with Articles 21(7) to (9) of Directive 2011/61/EU in accordance with I.1.3.

1.4. Description of the notified master AIF and all information on the master AIF available to the investors

2. **Documentation**

2.1. Fund rules, articles or memorandum of association of the master AIF

2.2. The additional information for the master AIF specified in section 307 (1)

2.3. Declaration as referred to in I.2.3. also covering the master AIF and its management company

2.4. Current confirmation by the depositary of the Master AIF in line with section 80 and by the agent(s) performing the tasks in accordance with Art. 21(7) to (9) of Directive 2011/61/EU, regarding the assumption of such function

2.5. In the case of marketing also to semi-professional investors
Additionally, information and documentation as referred to in II. with reference to the foreign AIF management company of the master AIF (if the master AIF is managed by a foreign AIF management company),

or

Certification by the competent authority of the home Member State in the German or the English language that the EU AIF management company and the management of the master AIF by the latter satisfy Directive 2011/61/EU (if the master AIF is managed by an EU AIF management company).