

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:** 27 May 2013
- III. General description of the electronic notification procedure pursuant to section 331 of the KAGB**

The electronic notification procedure provided in section 331 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 financial via BaFin's MVP reporting and publishing system. 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, the Federal Financial Supervisory Authority (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) in conjunction with section 321 (4) 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 writing in a notification of change pursuant to section 331 (7) in conjunction with section 321 (4) 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 immediately inform the competent authorities of the host member state of the AIF of these changes. If following examination BaFin concludes that the change is not admissible, it is entitled to undertake all measures necessary under section 5 of the KAGB including expressly prohibiting marketing (see section 331 (7) of the KAGB in conjunction with section 321 (4) 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 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.
- 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;
- and
- 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.

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 can be accessed on the BaFin website (www.bafin.de) under "Daten & Dokumente">> "Alle Dokumente". (The Regulation is only available in German.)

2. Submission using the outgoing AIF update

The AIF management company is required to notify BaFin in writing of changes in a notification of change. BaFin understands writing to mean that the notification of the change can be made by normal post or e-mail.

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 **30 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 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

The notification letter model dated 17.07.2013 which BaFin has made available online is to be used for the notification. The title of the document is “Notification letter on the basis of section 331 of the Investment Code (*Kapitalanlagegesetzbuch* – KAGB) for the electronic notification procedure for marketing 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 KAGB.” The template can be accessed on BaFin's website (www.bafin.de) under “Data

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

& Documents" >> "All Documents" so that it can be saved and filled in locally on your PC.

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.

Items I. to V. and VIII. of the notification letter are based on the requirements of Annex IV in conjunction with Article 23 of Directive 2011/61/EU.

In conjunction with item V. of the notification letter, please refer to item VII. no. 4 of this Guidance Notice.

The field in item VI. of the notification letter ("Miscellaneous/additional information") 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.

Further information on item VII. of the notification letter ("Signature/affirmation") can be found in item VII. no. 5 of the Guidance Notice and further information on item VIII. of the notification letter ("Attachments") can be found in item VII. no. 6 of the Guidance Notice.

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 AIFM 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.

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 accordance with section 2 (1) of the Regulation on the Imposition of Fees and the Allocation of Costs Pursuant to the FinDAG (*Verordnung über die Erhebung von Gebühren und die Umlegung von Kosten nach dem Finanzdienstleistungsaufsichtsgesetz – FinDAGKostV*) and no. 4.1.10.2.9.1 of the fee schedule of this Regulation 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	€ 1,532
--------------------------------------------------------------------------------------------------------------------------------------------------------	---------

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.

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

The AIF management company must inform BaFin in writing (by post or e-mail) 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) in conjunction with section 321 (4) 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. The procedure described under item VI. no. 2 and item VII. no. 8 of this Guidance Notice applies.

9. Discontinuation of marketing in the host member state

The notification of discontinuation of marketing for an AIF to professional investors in the host member state is, like the notification of change, to be submitted to BaFin in writing (by post or e-mail). The procedure described under item VI. no. 2 and item VII. no. 8 of this Guidance Notice applies *mutatis mutandis*.

10. Transitional provisions

The following transitional provisions apply:

Section 345 (10) of the KAGB:

AIF management companies, which, upon entry into force of the Investment Code, will from 22 July 2013 be entitled to market an AIF which is covered by the notification requirement under section 331 to professional investors in another member state of the European Union or in another signatory to the Agreement on the European Economic Area may not market this AIF there after 21 July 2014 unless they have been granted a new right to market in accordance with section 331 (5) sentence 2. Differing time limits in the member state of the European Union or in the other signatory to the Agreement on the European Economic Area in which

the AIF has to date been authorised for marketing to professional investors remain unaffected. The time limits pursuant to section 331 (3) and (4) commence as soon as BaFin has granted the AIF management company authorisation under section 22 and the changes to the fund rules have entered into force.

Section 353 (8) of the KAGB:

Section 331 shall not apply to the marketing of units or shares of domestic AIFs or EU AIFs that are the subject of a current public offer using a prospectus which was drawn up and published in accordance with the Securities Prospectus Act (*Wertpapierprospektgesetz*) or Directive 2003/71/EC prior to 22 July 2013 for the duration of validity of that prospectus.

VIII. Guidance Notice last updated

27 May 2013