

New BaFin Guidance Notice Related to UCITS Notifications under UCITS IV

The German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin*) published an updated guidance notice on 5 July 2011 with regard to the public distribution of foreign UCITS in Germany, reflecting changes to Directive 2009/65/EC ("UCITS Directive") introduced by the enactment of the UCITS IV Directive. The guidance notice sets forth the administrative practice of the BaFin with regard to:

- Any initial notification of UCITS for public distribution in Germany.
- Notifications of any amendments related to such initial notification.
- Notifications of the de-registration of UCITS or sub-funds of UCITS in Germany.

Notification for Public Distribution

For any initial notification of public distribution, a UCITS is required to prepare a notification letter, in the form set out in Annex 1 of Commission Regulation (EU) No. 584/2010. The notification is to be sent to the competent home state regulator, which in turn will forward the notification to the designated e-mail address of the BaFin.

The notification can be filed either by the UCITS or by a person acting on the basis of a power of attorney, such as the legal adviser of the UCITS.

The notification can be filed in a language customary in international finance (e.g., English). The BaFin did not enter into any agreement in accordance with Article 93

Para. 4 of Council Directive 2009/65/EC (which allows home state and host state regulators to agree that notification letters and UCITS attestations can be provided in an official language of the Member States of the respective regulators).

The notification letter is divided into three parts: A (general information about the UCITS), B (specific information in relation to the marketing of the UCITS in the host Member State) and C (confirmation by the UCITS as to the accuracy of the information and documents provided within the notification). No specific information with regard to Germany is required for parts A and C. The following information needs to be included in part B.

Arrangements Made for Marketing of Units of UCITS in Germany

Information must be provided regarding the distribution of the UCITS units in Germany, and must cover all intended distribution channels. The potential channels can include distribution by: (i) the management company that manages the UCITS; (ii) any other management company authorized under Directive 2009/65/EC; (iii) credit institutions; (iv) authorized investment firms or advisors; or (v) other entities including financial advisors exempted pursuant to Sec. 2 Para. 6 Sent. 1 No. 8 of the German Banking Act, i.e., persons that provide investment brokerage, contract brokerage and investment advice in respect of funds (such as foreign UCITS) that are registered for public distribution in Germany, provided such persons do not receive or hold money or shares from or for investors.

Arrangements for the Provision of Facilities to Unit Holders in Germany According to Article 92 of Directive 2009/65/EC

According to Article 92 of the UCITS Directive, a UCITS shall, in accordance with the laws, regulations and administrative provisions in force in the Member State where its units are marketed, take measures necessary to ensure that facilities are available in that Member State for making payments to unit holders, repurchasing or redeeming units and making available the information that the UCITS is required to provide.

- **Paying Agent.** Information must be provided as to the name, legal form, registered office and address of each domestic credit institution, and domestic branch of a foreign credit institution, through which payments to investors can be processed and redemptions (and, if applicable) conversions of units can be settled. It should be noted, however, that appointment of a German paying agent is required only if the UCITS issues physical share certificates. If physical share certificates are not issued, this should be explicitly indicated in the applicable section of part B of the notification letter, so that the BaFin does not raise queries regarding the absence of a paying agent.
- **Information Agent.** Information is required regarding the name and address of any person or entity in Germany from whom investors may obtain information and documents regarding the UCITS.
- **Publication of Price Information.** Information must be provided as to where the issue, sale, redemption and repurchase prices for units of the UCITS will be published.

Other Information Required by the BaFin

The BaFin charges an administrative fee of €500 per fund (and per sub-fund where the UCITS is an umbrella fund) for the processing of the notification. The UCITS must furnish evidence of payment of this processing fee, which can be accomplished by, for instance, providing a scanned copy of the wire transfer.

Prerequisites for Public Distribution of UCITS

Paying and Information Agents

- **Paying Agent.** As noted above, the appointment of a German bank or a domestic

branch of a foreign bank as paying agent is only required where the UCITS issues physical certificates with regard to its investment units. In cases where appointment of a paying agent is not required, however, the UCITS must ensure that it is able to process payments to the investors in and that the investment units can be redeemed within Germany. The prospectus distributed in Germany must contain information with regard to such payments and redemptions.

Since the activities related to payments and redemptions of units are likely to be considered to be regulated activities in Germany, it currently seems that even though the appointment of a bank acting as a paying agent would not be required for most UCITS (due to the absence of physical share certificates), the obligation of the UCITS to ensure that payments and redemptions can be made within Germany, as a practical matter, will force the UCITS to appoint a regulated entity such as a bank.

- **Information Agent.** A domestic information agent must be appointed.

Publication of Information to Investors in Germany

The following documents and information regarding the UCITS must be published in Germany, in a permissible publication medium:

- the key investor information document (published in the German language);
- the annual report;
- the semi-annual report and, if applicable, quarterly reports;
- the sales prospectus;
- the articles of association;
- the issue and redemption prices; and
- such other documents and information as need to be published pursuant to the rules of the home state regulator of the UCITS (published either in German or in a language customary in international finance).

Permissible Publication Media

The BaFin allows the following publication media to be used for the publication of the issue and redemption prices and for the publication of such other documents and information as is required to be published pursuant to the rules of the home state

regulator of the UCITS (such as notices to investors):

- Newspapers that are published in Germany.
- Durable media (i.e., in paper form or subject to certain conditions by way of electronic communication, such as e-mail).
- The German electronic federal gazette.
- Furthermore, it is now permitted to also use other electronic information media addressed to investors in Germany, such as the website of the UCITS or the management company or a third-party publication platform.

Note, however, that other than with respect to issue and redemption prices, it is not possible to publish notices addressed to investors in Germany on an internet platform run by a third-party information provider. It is also important to note that if information is published on the website of the UCITS or the management company, the website must not contain any information related to funds that are not admitted to be publicly offered in Germany.

- With regard to certain documents (such as copies of agreements and copies of applicable legal provisions) that investors in the home state of the UCITS are allowed to inspect at an address in the home state specified in the prospectus, it is sufficient that the same documents are made available to investors in Germany at the information agent; such documents do not need to be published.

Regarding the following material events, the applicable information needs to be provided to investors in Germany through one of the above mentioned publication media and in addition through a durable medium:

- The suspension of the redemption of units of the UCITS.
- The termination of the management of an investment fund or its liquidation.
- Changes to the fund's rules or articles of association that: are not compliant with the fund's current investment policies; affect material rights of investors; or affect the fees and costs that are charged to the fund. The publication must also describe, in an easily understandable manner, the reasons for such changes as well as the rights of the investors, and it must disclose how further information may be obtained.

- The merger of investment funds.
- The conversion of an investment fund into a feeder fund, or amendments to a master fund within a master-feeder structure.

Requirements with Regard to the Sales Documents Used in Germany

The key investor information document for investors in Germany must be translated into the German language. All further documents and information provided in Germany must be either in the German language or in a language customary in international finance. If such a document is published in both German and another language, the German translation will prevail.

A change of the language into which the sales documents are translated or in which they are drafted triggers a duty to notify an amendment to the BaFin.

A prospectus that is intended to be distributed in Germany must contain the following specific information for investors in Germany:

- Where a paying agent has been appointed in Germany, the prospectus must indicate: the name and the address of such paying agent; where requests for redemption may be submitted; and, in the case of an umbrella UCITS, where requests for conversion may be submitted with respect to those sub-funds that are admitted for public distribution in Germany. The prospectus must also state that any payments to investors in Germany may be made through the German paying agent.
- The prospectus must include the name and address of the information agent in Germany, as well as a statement that the following documents and information is available free of charge from the information agent: the sales prospectus; the key investor information document; the articles of association; the annual and semi-annual reports and, if applicable, the quarterly reports; the issue and redemption prices and, if applicable, conversion prices; and any other information and documents as are required to be published by the UCITS fund in its home state.
- The prospectus must set forth the articles of association, or indicate where in Germany the articles of association are available free of charge to investors in Germany. The prospectus must also disclose the publication media for the following information for investors in Germany: the issue and

redemption prices and, if applicable, conversion prices; and any other document or information that needs to be published in the home state of the UCITS. If the UCITS publishes the information through a durable medium, an additional medium needs to be disclosed through which the investors will be informed regarding the above-mentioned material events.

Special Requirements with Regard to Umbrella Funds

With regard to umbrella funds, if only some of the sub-funds are registered for public distribution in Germany, the sales documents must contain a highlighted disclaimer that the distribution of the remaining sub-funds was not notified to the BaFin and that the shares or units of these remaining sub-funds may not be offered to investors in Germany.

In these cases, the sales documents for umbrella funds need to be amended as follows:

- **Sales Prospectus.** The disclaimer must be included in the specific information for investors in Germany.
- **Key Investor Information Document.** No amendment is required.
- **Articles of Association.** The disclaimer must be included in the articles, but only if the articles contain references to the sub-funds that are not registered for public distribution in Germany, and where such references are not limited to the names of the sub-funds.
- **Annual and Semi-Annual Reports.** The disclaimer must be included in the financial reports, but only if the reports contain information with regard to the sub-funds that are not registered for public distribution in Germany.

Notification of Updating of Sales Documents and Changes to Initial Notification Letter

The BaFin needs to be informed, without undue delay, regarding modifications to the sales documents. Changes to certain information provided in the initial notification letter must be submitted to the BaFin before they enter into force.

The following types of amendments need to be notified to the BaFin:

- **Updating of documents.** Any change to, or updating of, the sales documents must be submitted to the BaFin via e-mail to the following e-mail address: UCITS-Update@bafin.de. The e-mail must set forth: the full name of the sender and its function within the UCITS; the BaFin ID of the UCITS; and the name of the UCITS or the management company. The e-mail must also indicate where the amended documents are available to the BaFin in an electronic format—this requirement creates a *de facto* need to arrange for the publication of the sales documents on the internet, on a website of either the UCITS or a third-party service provider.

The amended documents must be attached to the e-mail or the amendments must be specified. The e-mail notification must also include a statement that the amendments were made in accordance with the rules of the home state of the UCITS and that they were approved, noted or filed with the competent authority. If the amendment of the sales documents relates to a change, within the initial notification, of the arrangements for the marketing of the UCITS units, this must be disclosed and the e-mail must refer to the initial notification.

- **Changes in the marketing arrangements for the UCITS units or changes with regard to the share classes offered in Germany.** Any amendment with regard to the marketing arrangements or the share classes offered must be notified to the BaFin before the changes enter into force. Where such changes involve amendments to the sales documents, the amended sales documents can be either filed with BaFin according to the procedure explained above or can be attached to the notification of the changes, as described in this paragraph. Notification to the BaFin can be made by standard mail or by e-mail. Any e-mail notification should be sent to: UCITS-Update@bafin.de. The full name of the sender and its function within the UCITS needs to be disclosed, as well as the BaFin ID of the UCITS and the name of the UCITS or the management company.

Termination of Public Distribution in Germany

The method of termination of the public distribution in Germany of a UCITS, or a sub-fund of an umbrella UCITS, depends on whether the entire fund or all of the existing sub-funds will cease to be distributed in Germany, or whether some sub-funds will continue to be offered in Germany.

Termination of the Distribution of the Entire Fund or All of its Sub-funds

The BaFin must be sent an e-mail notification containing evidence of the publication, in the German electronic federal gazette, of termination of the public distribution of the fund. The e-mail must be sent to: UCITS-Update@bafin.de. The full name of the sender and its function within the UCITS funds or within the management company must be disclosed, as well as the BaFin ID and name of the investment fund.

The De-registration of Certain Sub-funds of an Umbrella Fund

The de-registration of a number of sub-funds is possible, as long as updated documents are provided to the BaFin, containing the disclaimer described above under “Special requirements with regard to umbrella funds”. Furthermore, the de-registration depends on the payment of the de-registration fee to BaFin, as well as sending the BaFin an e-mail notification containing a copy of the publication, in the German electronic federal gazette, that the respective sub-funds will no longer be publicly offered in Germany. The e-mail notification must be sent to UCITS-Update@bafin.de. The e-mail must be accompanied by evidence of payment of the de-registration fee, and must disclose the full name of the sender and

its function within the UCITS, as well as the BaFin ID and name of the UCITS fund.

Conclusion

The new notification regime is designed to streamline the process involving cross-border marketing of UCITS. Analysis of the new guidance notice published by the BaFin shows only little difference from the former marketing requirements in Germany. The main differences are clearly the new ability to make electronic filings, and the abandonment of the obligation to translate the sales documents into German (with the exception of the key investor information document). It remains to be seen whether the use of sales materials drafted only in English is a realistic option for UCITS, or whether in many cases translations will be required in order to avoid liability risks arising from retail investors who are not sufficiently familiar with the English language. Also, the new notification procedure creates *de facto* duties such as the necessity to make the sales documents available on a website, which was not required under the former regime.



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