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INTERNATIONAL FUNDS CLIENT ALERT

NOTIFICATION PROCEDURE AND MARKETING OF FOREIGN UCITS IN GERMANY

UCITS: REGULATORY UPDATE & OUTLOOK

INTRODUCTION TO THE SERIES

The UCITS Directive requires the host regulatory authority to recognize the UCITS authorization conferred by the home authorities. The UCITS passport is widely used, however, operating the notification procedure can in some instances still be characterized by complication and uncertainty as residual powers for the host regulatory authority allow for verifying marketing arrangements for the UCITS and require filing of a set of documents with the host authorities. The following series will give an update and outlook on legal and regulatory developments with respect to the notification procedure and the marketing of UCITS in select core countries for European distribution strategies.

EDITION I - Notification Procedure and Marketing of Foreign UCITS in Germany

This edition reviews the latest guidelines from BaFin, the German Federal Financial Supervisory Authority, and upcoming new legislation relating to the notification procedure and the marketing of foreign UCITS in Germany.

INTRODUCTION: NOTIFICATION PROCEDURE AND MARKETING OF FOREIGN UCITS IN GERMANY

BaFin, the German Federal Financial Supervisory Authority, has recently issued updated guidelines relating to the notification procedure for the marketing (public distribution (*öffentlicher Vertrieb*)) of foreign UCITS in Germany pursuant to sec. 132 of the German Investment Act (*Investmentgesetz*). Dated September 10, 2007, the revised guidelines are provided in accordance with Annex III of the Committee of European Securities Regulators' (CESR) June 2006 "guidelines to simplify the notification procedure of UCITS" (see: www.cesr.eu) and are available for download on BaFin's website (www.bafin.de) (German language only). Also, new legislation is expected to be enacted shortly, addressing both, the notification procedure for UCITS in Germany and its day-to-day marketing as the legislator will shed more light on the crucial distinction between private placement and public offering.

A foreign common fund, unit trust or investment company should carefully review these updates and legislative changes and, for the purpose of future notifications, should also note that BaFin has now provided a model notification letter (*Musteranzeige*) showing documents and information required to be submitted to BaFin in order to have permission to market (publicly offer) UCITS-compliant shares or investment units in Germany.

MODEL NOTIFICATION LETTER

Part A of BaFin's German language model notification letter titled "Harmonized Part" almost fully corresponds with Part A of the model notification letter as attached to CESR's June 2006 guidelines as Annex II. However, it's worthwhile noting that BaFin does not require a German language translation of the UCITS attestation granted by the competent home EU Member State authority. Part B of BaFin's model notification letter sets forth the documents and information according to German marketing rules and other specific German regulations (CESR, in its model notification letter, refers to Part B as the "national or non-harmonized annex" regarding the requirements that are in the national discretion of the host Member State).

Accordingly, the additional key documents BaFin requires to be submitted in Germany are (i) an original confirmation by the German paying agency, and (ii) a respective confirmation by the German information agency. Additional information to be provided to BaFin relate to (i) the German paying and information agents mandated by

the UCITS, (ii) newspaper(s) in Germany that contain up-to-date information on the UCITS for investors (here it should be noted that, whenever the home EU Member State requires certain information to be passed to shareholders by individual shareholder letters, this will also be required towards German investors), and (iii) means of and organizational measures of marketing of the UCITS in Germany. Furthermore, BaFin sets forth specific information to be addressed to German investors that will need to be included in the German language translation versions of the full and simplified prospectus.

CLARIFICATIONS

With its updated September 2007 guidance BaFin is also clarifying that:

- the notification and submission of documents to BaFin in electronic form is not permitted;
- the two month-period pursuant to sec. 133 para. 1 of the German Investment Act (given to BaFin to check the notification) cannot be shortened yet (however, see proposed legislation further below);
- the date of receipt of the complete notification is confirmed within one month (to inform the UCITS of the date of the start of the two-month period) and, in case the notification is incomplete, BaFin is requesting missing documents and information within the same one month period with a maximum submission period of six months then to be complied with by the UCITS;
- non-German language documents are required to be submitted with an exact German language translation (except for the UCITS attestation, as mentioned above), however, official certifications ("sworn as true") are not required;
- the notification letter itself is acceptable to BaFin *only* in the German language;
- appropriate (documented) evidence for the payment of the notification fee to BaFin (currently EUR 1,500 per (sub-) fund) needs to be enclosed to the notification letter.

MARKETING UCITS

BaFin stresses that any marketing in text form requires reference to the prospectuses and where and how these are available in Germany. Also, any marketing relating to the purchase of units or shares of an investment fund that, according to the fund rules or instruments of incorporation, builds on an acknowledged securities index, must contain a reference to the investment strategy. Where an investment

fund based on its compilation or techniques applied by management shows increased volatility, any marketing in text form must point this out. Generally, when marketing UCITS, the same rules applicable to German investment funds need to be considered, in particular the provisions of the German Act Against Unfair Competition (*UWG*).

BaFin still refrains from providing specific guidance as to conditions for interruption of the offering of units or shares, ending marketing and ending registration (de-registration) of UCITS in Germany (however, see upcoming new legislation further below).

MODIFICATIONS AND ON-GOING PROCESSES

BaFin expects foreign UCITS to keep their documents and information up-to-date and requests submission without delay after the documents and information have been first made available in the home Member State and without prejudice to the notification procedure for new (sub-) funds. As in the past, any amendments to the fund rules or the fund's instrument of incorporation, the addition of new share classes, change of names of (sub-) funds and any (corresponding) amendments to the full and/or simplified prospectuses have to be sent to BaFin. In addition, the latest published annual reports and semi-annual reports, both, original and German translation versions, have to be submitted. Concerning the latter, it should be noted that, in respect of sub-fund structures, BaFin does not require submission of separate (semi-) annual reports for each sub-fund but accepts a combined (consolidated) report comprising of all sub-funds in one document.

NEW LEGISLATION COMING INTO EFFECT

New legislation amending the German Investment Act shall come into effect shortly. New and amended provisions will, inter alia, affect the notification procedure and also the marketing of UCITS in Germany.

Shortening of the two-month period

Currently, BaFin has two months to check the contents of the notification after it has received the complete notification. Marketing may start immediately after the two-month period has expired unless there has been any communication to the contrary from BaFin. So far, regulatory practice shows that approaching BaFin for shortening usually results in BaFin referring to the two months period, irrespective of whether internally they have completed the check already before expiry. Under the new regime, BaFin will be expressly entitled to shorten the two-

month period where appropriate. However, whether BaFin in fact will be prepared to make use of such future flexibility when handling notifications remains uncertain.

Publication of the ending of the public offering (marketing)

In the future, the ending of public offering (marketing) activities of UCITS (in total or individual sub-funds only) in Germany will need to be published immediately in the German electronic Federal Gazette (*Bundesanzeiger*) and in further publication means in Germany as determined and communicated by the UCITS in its prospectuses (German language only). Documented evidence is required to be sent to BaFin afterwards.

Private placement vs. public offering

As regards foreign investment funds, the German Investment Act is applicable only when shares, units or interests in such funds are (i) intended to be, or (ii) in fact are publicly offered or marketed in Germany. With currently neither the German legislator nor BaFin providing for detailed rules, the distinction between public distribution and private placement can be difficult in practice. Section 2 (11) of the German Investment Act briefly defines "public distribution" (*öffentlicher Vertrieb*) as "distribution that takes place via public offering, public marketing or in a similar way". Because of the missing of detailed rules, public distribution/offering/marketing so far is rather broadly interpreted in practice, one may even argue "beyond reasonable investor protection needs". At the moment, but as an indication only, distribution through public media or bulk mailing should qualify as public distribution. However, unless a foreign investment fund is listed on a German regulated market and thus required to publish, inter alia, prices, even the mere publication of prices in German newspapers or in the internet may already constitute public distribution. If, on the other hand, the offer is exclusively directed to persons with whom there is a pre-existing business relationship in the context of which the investor can expect to receive unsolicited investment recommendations, the offer is likely to be considered a private placement. Upcoming legislation will now address this key but problematic issue and will, at least, bring some clarification by excluding, inter alia, the following from public offering/marketing:

- offering/marketing to institutional investors;
- solely the mentioning of an investment fund's name;
- solely the publication of prices of shares or units;

- information on non-registered sub-funds contained within the sales material of an umbrella fund as long as such non-registration is pointed out expressly;
- publication of tax information relating to a fund;
- any information required to be published due to a listing of a fund.

CONCLUSION

Whereas the administrative changes in BaFin's regulation set forth above are already applicable, it currently looks like the revised German Investment Act, including the changes set forth above, will be effective as of mid-December this year already. Although the administrative and legislative changes may not fulfill all desires of the industry and, in its entirety, may not be considered as tremendous and fundamental, clearly another step forward can be seen towards harmonization and less complication and uncertainty on national level in Germany. In particular, the clarifications regarding the distinction between private placement and public offering and also the "soft opening" of the two-month period should be helpful and appreciated.

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ABOUT CURTIS

CURTIS is headquartered in New York, with branch offices in Frankfurt, Houston, Istanbul, London, Mexico City, Milan, Muscat, Paris, Stamford and Washington, D.C. Curtis' core practices of International Corporate Law, Finance and Litigation are complemented by numerous specialty areas, including: Admiralty, Banking & Regulatory, Bankruptcy & Creditors' Rights, Environmental, Immigration, Intellectual Property, Investment Funds, Real Estate, Tax and Trust & Estates.

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