



French Regulator Clarifies Position with Respect to Marketing of Alternative Investment Funds in France

On June 30, the French Securities Regulator (the “AMF”) issued guidance in the form of Instruction DOC-2014-03¹ on the procedures for marketing shares and units of alternative investment funds (“AIFs”). In doing so, the AMF brings welcome clarity to the French position with respect to the marketing of AIFs, in particular in the wake of the implementation of the Alternative Investment Fund Managers Directive 2011/61/EU (“AIFMD”) into French law.

In publishing this guidance, the AMF sought to issue a consolidated document covering the marketing of various types of funds in various situations. This *Commentary* will not discuss the marketing of undertakings for collective investment in transferable securities (“UCITS”) to all types of investors or AIFs² based in the European Economic Area (“EEA”) to professional clients, as these are largely harmonized processes in Europe, with the French position displaying few peculiarities only. Instead, this *Commentary* focuses on the marketing of non-EEA AIFs, both to French professional investors and French retail clients.

Scope of AIFs

AIFs (including EEA or non-EEA AIFs) encompass all types of collective investment undertakings that raise capital from a number of investors, with a view to investing the capital in accordance with a defined investment policy for the benefit of those investors.

Definition of “Marketing”

“Marketing”—which triggers the filing or authorization requirements set out below—is defined under the AMF guidance as presentation through various means (advertising, solicitation, advice, etc.) with a view to encouraging a client to buy UCITS or AIFs.

Perhaps more importantly, the AMF sets out the following actions that do not qualify as marketing—and hence do not require filing or authorization for the purposes of marketing into France:

- Replying to a client’s unsolicited request to purchase a specifically identified UCITS or AIF, where

¹ Further clarified by Position paper DOC-2014-03.

² Two elements are, however, worth mentioning in respect of the intra-European marketing of AIFs on the basis of the AIFMD: (i) Marketing AIFs within the EEA should be performed on the basis of the marketing passport provided under the AIFMD only, which means that marketing in reliance on the Prospectus Directive is not permissible; and (ii) by way of exception, transitional provisions allow marketing of AIFs in reliance on the Prospectus Directive where a prospectus was issued and published prior to July 27, 2013, during the period of time of the validity of the prospectus.

allowed by the regulations in force. In this respect, the criterion relating to a “specifically identified UCITS or AIF” would not be fulfilled where an investor requests information about funds performing a given investment strategy (as opposed to a specifically designated fund). If an investor were to request information about a range of funds performing a given investment strategy, the manager would need to conform with the requirements set out below in order to be allowed to market a fund.

- Purchase or sale of UCITS or AIF made through a discretionary portfolio management agreement as long as the UCITS or AIF are admissible for a client’s portfolio. In this case, no marketing relationship is considered to exist between the entity that is marketing the funds and the clients of the portfolio manager.
- Same carve-out as above in respect of funds management, i.e., purchase or sale of UCITS or AIF as part of the investment policy of a UCITS or AIF as long as the UCITS or AIF may be invested by the UCITS or AIF in question.

The rules set out below are national rules in the sense that they may differ from one European jurisdiction to the other. In addition, no passport is available in the situations set out below; once the AIFs have been marketed into France on the basis of the regimes below, they may not be offered elsewhere within the EEA without compliance with additional local rules.

Marketing Non-EEA AIFs to French Professional Investors

The Manager of the AIF to be Marketed to French Professional Investors is Based Outside the EEA

The manager (also referred to in some jurisdictions as advisor) of the AIF is required to seek and obtain prior authorization from the AMF for marketing an AIF to French professional investors. By two months at the latest from receipt of a filing deemed complete by the AMF, the AMF has to state whether the manager may start marketing. To this effect, managers shall:

Ensure that appropriate cooperation arrangements have been entered into between the AMF and the supervisory authorities of the manager or the AIF. At present, such arrangement have been entered into in respect of the following

jurisdictions: Australia, Bermuda, Brazil, British Virgin Islands, Canada, Cayman Islands, Dubai, Egypt, Guernsey, Hong Kong, India, Isle of Man, Israel, Japan, Jersey, Morocco, New Zealand, Republic of Macedonia, Singapore, South Africa, Switzerland, the United Arab Emirates, and the United States.

Ensure that neither the AIF nor the manager are established in a country listed as noncooperative by the Financial Action Task Force.

Certify that the AIFM complies with French laws and regulations applicable to asset managers authorized under the AIFMD, which, according to AMF guidance, may be subdivided into three subcriteria:

- The manager is required to provide proof that it complies with each of the following provisions: (i) sufficient capital and own funds; (ii) good reputation and experience of persons who effectively conduct the business of the manager in the name of such persons; (iii) suitability of shareholders or members of the manager that have qualifying holdings to ensure the sound and prudent management of the manager; (iv) head office and the registered office of the manager should be located in the same state; (v) terms of operation: risk management, liquidity management where the AIF is open-ended, delegation of management function, investment if securitization position, valuation, and remuneration; and (iv) transparency requirements: annual report and disclosure to investors.
- The manager is required to provide proof that it has appointed one or several entities as depositaries (separate from the asset manager) entrusted with the same functions as those allocated to a depositary under the AIFMD (i.e., cash flow monitoring, custody of assets, and the verification of the compliance of certain transactions) and to inform the AMF of the identity of such depositary.
- The manager is required to ensure the AIF is compliant with obligations arising from the AIFMD (for example, disclosure obligations when the AIF acquires a certain stake in a non-listed company or issuer within the EEA).

Appoint a centralizing agent (i.e., a financial institution responsible for, among other functions, processing subscription and redemption requests, making coupon and dividend payments, and supplying information documents to local investors).

Set out information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including where the manager relies on activities of independent entities to provide investment services in respect of the AIF.

The Manager of the AIF to be Marketed to French Professional Investors is Based Within the EEA

The manager of the AIF to be marketed to French professional investors should comply with the conditions set out above (for managers based outside the EEA) except that they should seek and obtain authorization under the AIFMD from the AMF instead of proving to the AMF that they comply with comparable regulations.

Marketing Non-EEA AIFs to French Retail Clients

The manager (whether based inside or outside the EEA) of the non-EEA AIFs will need to seek prior authorization from the AMF to access retail investors, which is subject to the following conditions in addition to those applying to the marketing to professional investors:

- Two agreements for information exchange and mutual assistance in the area of third-party asset management must be in place (i) between the AMF and the supervisory authority of the AIF and (ii) between the AMF and the supervisory authority of the manager; to date, no such agreement has been entered into, which makes marketing to retail investors impossible for the time being;
- The AIF must meet the conditions set out in this mutual assistance agreement to be marketed to retail clients;
- The manager must either seek and obtain authorization under the AIFMD or satisfy conditions provided under the mutual recognition agreement.

By two months at the latest from receipt of a filing deemed complete by the AMF, the AMF has to state whether the manager may start marketing to French retail clients.

The above conditions to be satisfied when considering marketing to retail investors are more stringent than conditions to be fulfilled for marketing to professional investors, as conditions to be satisfied when considering marketing to retail investors relate to both the AIF and its manager.

The rules set out above may change in 2015 at the earliest, as the European Securities and Markets Authority is due to issue an opinion as to whether the passport regime currently applying to the intra-EEA marketing of AIFs should be extended to non-EEA AIFMs or AIFs. In the case of extension, this would mean that once non-EEA AIFs are admitted for marketing in one European jurisdiction, they could be offered in other European jurisdictions on the basis of the initial authorization.

Lawyer Contacts

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