



Key Changes in French Financial Regulations Resulting from Sapin II Law

On December 9, 2016, the French Law relating to Transparency, the Fight against Corruption and Modernization of Economic Life, informally named after the French Minister of Finance who promoted it, Michel Sapin (“Sapin II Law”), was enacted.

While the Sapin II Law mostly strengthens anticorruption rules, it amends a vast number of areas of law, including financial law. This *Commentary* briefly describes the main changes to financial law made by the Sapin II Law.

Most, but not all of the provisions of the law will be codified in the French Monetary and Financial Code (“Code”).

This *Commentary* does not cover key changes on bank resolution and financial netting, as such amendments are described in a related [Commentary](#).

Extension of Whistleblower Reported Activities in the Banking and Financial Area¹

The Sapin II Law clearly marks a major turning point in French anticorruption enforcement policy, with notably the setting up of a new anti-bribery agency. Please see a more detailed discussion of this reform, “[A New Era in French Anticorruption Enforcement: What](#)

[Companies Should Know About the Newly Enacted Sapin II Law](#),” prepared by Jones Day’s Investigations & White Collar Defense Practice.

As to financial institutions, the Sapin II Law extends the scope of intervention of whistleblowers to any noncomplying behavior or act, and not only to potential market abuse. This would involve either wrongdoing in banking activities, reporting being made to the *Autorité de contrôle prudentiel et de résolution*, or financial activities, suspicious reports being made to the *Autorité des marchés financiers*. Adequate immunity from any adverse action is provided to whistleblowers, on the basis of such report, by the employer (including relating to compensation), a supervisory authority, or a third party. However, successful whistleblowers are not anticipated to receive any form of compensation.

Enlargement of Scope of Settlement Procedure before AMF Enforcement Committee²

In 2010, French law introduced the “administrative settlement” before the French financial markets authority (“AMF”), which is an alternative to the traditional sanction procedure used notably when the breach is not considered significant. This administrative settlement allows an entity being prosecuted due to a failure to

comply with its professional obligation and the AMF to enter into an agreement. When such an agreement is entered into, and is approved by the AMF Enforcement Commission, the prosecution for such breach is dropped.

However, some entities supervised by the AMF and certain market abuses were excluded from the scope of the administrative settlement.

The Sapin II Law broadens such scope by:

- Allowing central securities depositories, central counterparties, and market operators to enter into an administrative settlement; and
- Allowing the AMF and an entity to enter into an administrative settlement relating to: (i) the failure to comply with European regulations that are in the scope of the AMF, and (ii) market abuses.

Strengthening of Sanctions

Criminal sanctions incurred in the case of market abuse are strengthened and may amount to 15 percent of the yearly turnover, consolidated or unconsolidated as the case may be. All breaches may be graduated depending on seriousness, financial capacity, and repeat violations.

Ban on Advertising of Unlisted CFDs³

The Sapin II Law bans the advertising by electronic means to retail investors relating to financial contracts (typically contracts for difference, “CFDs”) that are not listed on a regulated market or multilateral trading facility and in relation to which: (i) the maximum risk amount is unknown at the time of subscription; (ii) the risk of loss exceeds the initially subscribed amount; and (iii) the risk of loss is not easily understandable due to the nature of the financial contract. The AMF is mandated to determine the categories of financial contracts and types of advertising to be banned.

Implementation of Gates in UCITS and AIFs⁴

The Sapin II Law allows extension of the ability to introduce gates or restrictions on redemptions of shares or units, currently available to undertakings for collective investment in

transferable securities (“UCITS”) funds, alternative investment funds (“AIFs”), professional investment funds, and real estate collective investment undertakings, to other open-ended funds. The AMF General Regulation is required to determine the situations and conditions in which a fund's instruments of incorporation may provide for redemptions to be provisionally gated when warranted by exceptional circumstances, and whether this is in the best interest of holders or the public. The AMF has therefore held a public consultation to gain feedback on its proposed gating mechanisms.

Implementation of a Nascent Resolution Regime for Insurers⁵

The enforcement authority of the *Haut Conseil de Stabilité Financière*, which is a macro prudential supervisory body in charge of ensuring the overall financial soundness of the financial system (banks, broker-dealers, asset managers, or insurers in particular), has been enhanced with new capabilities to take early-intervention action against insurers. In particular, it may take the following measures upon the request of the Banking and Insurance supervisory authority:

- Temporarily restrict the exercise of certain transactions or activities, including the acceptance of premiums or payments;
- Temporarily restrict the free disposal of all or part of the assets;
- Temporarily limit, for all or part of the portfolio, the payment of the redemption values;
- Delay or temporarily limit, for all or part of the portfolio, the option of arbitrage or the payment of advances on a contract; and
- Temporarily restrict the distribution of a dividend to shareholders, remuneration for mutual or parity certificates, or remuneration of shares to members.

Distributed Ledger Technology for Issuing Nonlisted Securities

Currently, securities are issued by French issuers in dematerialized (book entry) form, which are centralized with the issuer (for registered securities) or central securities depositories (for bearer securities). In both cases, such securities are to be credited to a securities account. The Sapin II Law

allows the government to provide, by way of ordinance, for a new regime for representing and transferring securities that are not held with a central securities depository nor settled through a securities settlement system, based on a distributed ledger technology. The French Treasury should be in charge, with French supervisors (*Banque de France*, *Autorité de contrôle prudentiel et de résolution*, and *Autorité des marchés financiers*), to propose to the French Minister of the Economy a draft of ordinance in the coming months providing for the new regime and all amending provisions required for such regime to comply with existing rules and regulations.

Financing or Refinancing Authorization Extended to New French and Foreign Actors

The Sapin II Law allows the government to extend, by way of ordinance, the authorization for providing financing or refinancing to:

- Certain alternative investment funds dedicated to professional investors to provide financing to enterprises;
- Certain funds, their depositaries, and managers, when acquiring receivables while ensuring protection of investors; and
- Certain French or foreign investors in the finance sector (securitization vehicle or other types of SPVs) to acquire receivables generated from credit institutions or financing companies with non-retail customers.

Implementation of Various EU Directives

The Sapin II Law allows the government to implement under French law, by way of ordinance:

- Directive n° 2014/65 of May 15, 2014, on markets in financial instruments (MiFID 2) ;
- Directive n° 2015/2366 of November 25, 2015 on payment services in the internal market (PSD 2); and
- Directive 2014/92 of July 23, 2014, on the comparability of fees related to payment accounts, payment account

switching, and access to payment accounts with basic features.

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Endnotes

- 1 Articles 6 et seq. of the Sapin II Law.
- 2 Article 43 of the Sapin II Law amending Article L. 621-14-1 of the Code.
- 3 Articles 72 and 73 of the Sapin II Law respectively creating Article L. 533-12-7 of the Code and Article L. 541-9-1 of the Code.
- 4 Article 118 of the Sapin II Law amending Articles L. 214-7-4 and L. 214-8-7 of the Code.
- 5 Article 49 of the Sapin II Law amending Article L. 631-2-1 of the Code.

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