

client alert

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BREAKING NEWS: THE AMF SOFTENS ITS POSITION REGARDING THE DEFINITION OF MARKETING OF UCITS AND AIFs IN FRANCE

Following the announced revision of the notion of marketing of UCITS and AIFs in France within the framework of the working group “FROG” (*French [Routes & Opportunities] Garden*), which aims to reinforce the competitiveness of the Paris market place for management of investment funds, on July 4, 2016, the AMF published a modified version of its position n° 2014-04 (the “**AMF Position**”).

CONFIRMATION OF CORE PRINCIPLES

The AMF Position does not modify the definition of marketing according to which “*the act of marketing units or shares of a UCITS or AIF consists in presenting them on the French territory by different means (advertising, direct marketing, advice...) with a view to encouraging an investor to subscribe to or purchase them*”.

As before, the AMF excludes from the scope of the AMF Position the following circumstances:

- when the investor itself solicits the subscription (“*reverse solicitation*”);
- the subscription of units or shares of a UCITS or an AIF when the prospect is an investment service provider acting under the terms of a third party discretionary portfolio management agreement;
- the subscription of units or shares of a UCITS or an AIF when the prospect is a management company managing UCITS or AIFs.

INTRODUCTION OF A PRE-MARKETING REGIME

Following the request of numerous professionals in the asset management industry, the AMF has broadened the scope of the exceptions to the concept of marketing by providing **five** new exceptions, summarized below:

- The most important one relates to the introduction into French law of a “pre-marketing” regime. On the basis of similar schemes adopted by other European countries, the AMF has introduced into French law the possibility for management companies, or third parties acting for their account, to conduct “surveys” with no more than 50 investors in order to assess their interest in a UCITS or a AIF prior to its launching, provided that:
 - the targeted investors are (i) professional investors or (ii) non-professional investors whose initial subscription would be equal to or above 100.000 euros (in relation to FIAs reserved for professional investors but allowing subscriptions from non-professional investors under certain conditions); and

- the management company or the third party acting for its account does not provide such targeted investors with a subscription pack and/or documentation with definitive information on the characteristics of the fund which would allow such investors to subscribe or commit to subscribe to the units or shares of the UCITS or the AIF.

The AMF has not provided any further detail as to what might constitute documentation with definitive information. Therefore it is not clear at this time whether it would be acceptable to provide a final PPM (so long as no fund governing documents (LPA) or subscription pack are distributed) or whether it would be preferable to provide a PPM, other presentation or teaser, in draft form only.

The AMF further indicates that any subscriptions which may subsequently be made by such surveyed investors will not be considered to be subscriptions resulting from reverse solicitation.

- The AMF also indicated that the transfer of units or shares of a UCITS or an AIF between two investors in a secondary transaction is not an act of marketing if it is not organised by the management company or a third party.

It is unclear what type of "third party" the AMF was referring to: the AMF may, in our view, have been referring to trading platforms, as opposed to placement agents hired by the seller or buyer as would typically be the case in secondary transactions, but the use of the broad term "third party" is confusing.

- The participation of a management company in a conference or the organisation of an investors' meeting at which the management company would provide information on market developments and trends or on the management company's activities is not considered to be an act of marketing to the extent that the conference or the investors' meeting is restricted to professional investors and that there is no solicitation to invest in a specific UCITS or AIF, nor any communication regarding a UCITS or AIF whose units or shares are available for subscription.
- The response by a management company to a tender offer with technical specifications, initiated by a legal entity qualifying as a professional investor, for the setting up of an OPCVM or an FIA, also falls outside the scope of the concept of marketing.
- Finally, the subscription of "carried interest" units or shares, or of units or shares of UCITS or AIFs managed by the management company, as part of the remuneration policies of such management company, is not considered to be an act of marketing.

These new exceptions are welcome and should facilitate the ability of management companies to access French investors. The AMF has clearly signalled its desire to promote a more flexible regulatory framework for the marketing of funds to institutional investors.

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