

**AMF public consultation on the communication of promotional literature in the social media by  
asset management companies and debt securities issuers<sup>1</sup>**

## **1. Introduction**

The advent of the social media in the 2000s led to a disruption in the ways in which information is transmitted. Communication and marketing professionals were quick to understand the powerful penetration and distribution of information that these media allowed, and at a lower cost. The social media also led to the appearance of new product distribution modes blending interactivity, responsiveness and the possibility of creating “bespoke” content, most often to the detriment of “conventional” communication media such as the written press. The online retail and entertainment industries naturally lost no time in appropriating the social media, while the world of banking and finance soon organised to keep in step with the trend. Some banks have for several years now proposed apps for mobile devices such as telephones and tablets. As a result, the processing of the financial information communicated via these new media has become a major regulatory issue in terms of investor protection. The issue also goes beyond French borders, with some international regulators, among them the FCA, having already ruled on the subject. The European Commission recently included the topic in its consultations on the Capital Markets Union. Lastly, a number of professional organisations have already published recommendations for their members, including the French Asset Management Association (AFG) in June 2014<sup>2</sup>.

Consequently, the Autorité des Marchés Financiers (AMF) has in the last two years closely observed the increasing presence on these new media of French asset management companies and debt securities issuers (notably banks) as well as foreign asset management companies and debt securities issuers operating in France. These players use the social media to interact with their clients and partners (notably distributors), share their financial analysis and vision of the market, and to promote their products.

On French territory, the rules applying to marketing information are set out in the Financial and Monetary Code and the AMF General Regulation and detailed through position papers and specific recommendations<sup>3</sup>. These same texts also include obligations applying to the production and dissemination of investment recommendations of a general nature and financial analyses of financial instruments admitted to trading on a regulated market that were clarified in the AMF Position-Recommendation DOC-2013-25<sup>4</sup>.

The departments of the AMF regularly receive questions from professionals faced with a two-fold constraint when drafting their marketing publications for these media, namely that they are obliged both to respect the codes of use of these new media (in particular, concise messages) and the rules applying to financial advertising.

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<sup>1</sup> The debt securities referred to here are “structured” debt securities (including so-called “stock market products”) and do not include ordinary warrants.

<sup>2</sup> Professional guide entitled “Impact de la directive MIF sur les documents d’information des OPCVM et FIA à destination des clients non professionnels” (Impact of the MIF Directive on the information documents of OPCVM and FIA funds for non-professional clients).

<sup>3</sup> Position-Recommendation DOC-2011-24, Position DOC-2013-13, Position DOC-2010-05, Position-Recommendation DOC-2009-15.

<sup>4</sup> In which the social media are described as constituting a “distribution channel” in the meaning of the financial analysis definition as set out in Article L. 544-1 of the Monetary and Financial Code.

As such, the AMF is launching a public consultation on the subject.

## **2. Consultation objectives and practical information**

### **2.1. Objectives of the consultation**

As part of its 2013-2016 strategic plan aimed notably at “rebuilding investor confidence”, the AMF has reaffirmed the fact that the principles of Directive 2004/39/EC on markets in financial instruments (MiFID), and particularly those establishing that marketing information must be “fair, clear and not misleading” (for investment services providers) or “accurate, precise and fair” (for debt securities issuers) where intended for investors categorised as “non-professionals”<sup>5</sup>, can also be applied to the information disseminated by players working in the distribution of financial instruments. Committed to supporting financial institutions operating on French territory, while creating a fair and harmonised competitive framework, the AMF is launching a consultation to clarify its approach to regulation on communication on these new media. The initiative, open to all, is part of the consultations that the AMF leads regularly with professionals.

This consultation document contains ten proposals classified into six topics. Participants are asked to respond and provide comments so as to nourish debate and thinking at the AMF departments.

### **2.2. Scope of the consultation**

This consultation exclusively concerns communication for promotional ends by asset management companies as well as distributors of collective investment schemes and distributors and issuers of debt securities (notably banks). The AMF has already produced a specific recommendation on the financial communication of listed companies on their websites and the social media<sup>6</sup>. This consultation does not address the dissemination of investment recommendations of a general nature and financial analyses of financial instruments listed on a regulated market, on which has already been clarified.

### **2.3. Who does the consultation address?**

This consultation is chiefly intended for professionals, including:

- asset management companies
- distributors (financial investment advisers, banking networks, etc.)
- debt securities issuers (“plain vanilla” and structured<sup>7</sup>)

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<sup>5</sup> Under the meaning of MiFID.

<sup>6</sup> Recommendation DOC-2014-15 of 9 December 2014.

<sup>7</sup> By structured debt securities we mean (i) complex debt securities under the meaning of AMF Position 2010-05 (including “market product” debt securities) excluding ordinary warrants, (ii) debt securities offering capital protection at maturity of at least 90% of the capital invested, and (iii) debt securities backed by other assets or linked to the performance of other assets. However, securitisation transactions are not included.

- third-party marketers
- professional organisations
- consumer organisations
- law firms, particularly those working in the financial industry

It may also be of interest to **private investors**.

The principles issuing from this consultation will apply to all the players involved in communication on French territory. As such, **foreign players** having notified their products with a view to marketing them in France and seeking to communicate on French territory are also asked to take part.

#### **2.4. Practical information and response deadlines**

This consultation will conclude on 13 November 2015. Participants are asked to send their responses to the following address: [directiondelacommunication@amf-france.org](mailto:directiondelacommunication@amf-france.org)

The AMF will use the responses, comments and proposals drafted as part of the consultation to review the opportunity of changing or supplementing prevailing texts, referred to in this document as the “texts concerned”.

Subject to the responses received and should it consider necessary, the AMF may update or add to its policy. However, **this consultation is not aimed at creating a new framework of rules. Its objective is to review the application guidelines of current rules in light of the development of these new means of communication.**

### **3. Content of the consultation**

To begin with, it should be noted that the prevailing regulatory texts already contain rules applicable by extension to communication of a promotional nature published in the social media. Consequently, all such communication made by investment services providers must respect the provisions of the first part of Article L. 533-12 of the Monetary and Financial Code, i.e. the presentation of “fair, clear and non-misleading content”, regardless of the media used. Where they address non-professional clients or are likely to reach such recipients, this communication must also respect the provisions of Articles 314-10 to 314-17 of the AMF General Regulation on clear and non-misleading information for clients.

Moreover, Articles 212-28 and 212-29 of the AMF General Regulation notably transposing the Prospectus Directive point out in particular that “Communication of a promotional nature relating to a ‘public offering or admission to trading on a regulated market’, regardless of form or method of dissemination, shall be submitted to the AMF before being disseminated”<sup>8</sup>.

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<sup>8</sup> Article 212-28 of the AMF General Regulation.

It should also be noted that investment recommendations of a general nature and financial analyses of financial instruments listed on a regulated market are subject to the provision of Section 1 of Chapter V of Book III of the AMF General Regulation.

As part of this consultation, a distinction is made between the “social media” and the term “social networks” generally used in the public sphere.

In this document, the “social media” are taken to mean all the technologies used for social interaction and collaborative content creation on the Internet. The social media include:

- special personal sites such as blogs;
- the social networks, used for dialogue and the dissemination of content among users (Facebook, Twitter, LinkedIn, Viadeo, Google+, YouTube, Instagram, Vine, Pinterest, Twitch.tv, etc.) ;
- discussion forums.

This list is not exhaustive.

### **3.1. Type of investors concerned**

#### **3.1.1. Background**

One of the characteristics of the social media is the almost boundless visibility that they offer. This can make it difficult for an asset management company or debt securities issuer to select a target public and segment it by investor type (“professional” or “non-professional” investor as determined by MiFID). The messages published on these media may also be visible in countries for which they are not intended.

As a result, their widespread use may appear ill-compatible with some MiFID requirements. This raises the question of the need to inform the players involved as regards the match to be respected between the type of message disseminated, the chosen dissemination channel – and notably whether the information is simply made available to potential investors or sent actively to them, for example as part of messages addressing a list of subscribers – and any restrictions regarding the dissemination of the message.

Furthermore, under the applicable provisions<sup>9</sup>, an asset management company or debt securities issuer may not produce information addressing private investors presenting an unbalanced marketing message. An example of this last may consist in including the earnings prospects of a financial product in one tweet and the corresponding risks in another, separate, tweet or on the website of an asset management company. The “favourable” message concerning the product could be referred to or relayed by a third party without the other message concerning the risks involved in the investment.

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<sup>9</sup> Excerpt from Position-Recommendation DOC-2011-24 and Position DOC-2013-13: “*When a financial product is being presented in several documents, no document shall present more specifically the benefits and then refer the investor to another document for the disadvantages. In that case, the information may be considered misleading. This does not preclude communicating short messages (an advertising poster or spot for instance) which would fail to present all the*

### **3.1.2. Texts concerned**

- AMF Position-Recommendation DOC-2011-24 for asset management companies.
- AMF Position DOC-2013-13 and Position-Recommendation DOC-2009-15 for debt securities issuers.

### **3.1.3. Proposals submitted for consultation**

It is proposed to stipulate in the “Guide to drafting CIS marketing materials and distributing CIS” (AMF Position-Recommendation DOC-2011-24), in the “Guide to drafting marketing materials for structured debt securities” (AMF Position DOC-2013-13) and in the “Guide to marketing bond issues to non-professional investors” (AMF Position-Recommendation DOC-2009-15) that all communication drafted on the initiative of an asset management company, a debt securities issuer or one of their distributors, taken individually and intended to be shared in the social media, must respect the provisions issuing from MiFID and Article L. 533-12 1° of the Monetary and Financial Code.

*The participants are asked to comment on this proposal.*

## **3.2. Archiving policy**

### **3.2.1. Background**

Information is disseminated rapidly when using the social media and relayed widely within a short period of time. In this respect it should be noted that a policy of recording and conserving, on the part of the investment services providers, the data relative to portfolio transactions is already provided for by Articles 313-48 to 313-53 of the AMF General Regulation.

Given the specific risks relating to the speed and relative anonymity of the transmission of information on the Internet, an asset management company responsible for the dissemination of an item of marketing information in the social media should avail itself of the resources and procedures allowing it to retrace and archive all of its publications in the social media. In addition, as most of these media offer the possibility of dialoguing confidentially with users (e.g. private messages), such communication should also be conserved. These provisions serve both to prevent the dissemination via these media of information considered as constituting market abuse (e.g. insider dealing) and allow the control functions of the service providers and the AMF to retrace any incorrect marketing of a financial product. These provisions should also apply to debt securities issuers.

Consequently, as part of the conservation procedure of all the information published by the asset management company, this last should conserve in its archives all the messages it publishes, even those that may have been withdrawn later from the social media (the case, for example, with short-term display media such as the Snapchat app).

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*features of the product, as soon as regulatory provisions, and notably the principle of balance, are being complied*

### **3.2.2. Texts concerned**

- AMF Position DOC-2012-19 for asset management companies.
- AMF Position DOC-2013-13 for debt securities issuers.

### **3.2.3. Proposals submitted to consultation**

It is proposed that each asset management company or debt securities issuer registered on a social media should adopt a policy and the technical means required for recording the history of all its public and private communication (for example, via private messages with a user) in this network.

It is also recommended to adopt an archiving policy that is harmonious, stable over time, organised by type of information, and with an archiving period of sufficient length for investors.

*The participants are asked to comment on this proposal.*

## **3.3. The treatment of third-party publications**

### **3.3.1. Background**

A key characteristic of the social media is the possibility of interacting with other users. Some media offer the possibility of relaying content published by third parties (e.g. retweeting on Twitter). This practice may engage the responsibility of the asset management company or debt securities issuer if the message fails to comply with regulation, since by relaying the message it may be considered that the asset management company or debt securities issuer fully endorses its content.

### **3.3.2. Texts concerned**

- AMF Position-Recommendation DOC-2011-24 for asset management companies.
- AMF Position DOC-2013-13 and Position-Recommendation DOC-2009-15 for debt securities issuers.

### **3.3.3. Proposals submitted for consultation**

It is proposed to stipulate in the “Guide to drafting CIS marketing materials and distributing CIS” (AMF Position-Recommendation DOC-2011-24), in the “Guide to drafting marketing materials for structured debt securities” (AMF Position DOC-2013-13) and in the “Guide to marketing bond issues to non-professional investors” (AMF Position-Recommendation DOC-2009-15) that all the content published in the social media and relayed by an asset management company or debt securities issuer engages its responsibility.

*The participants are asked to comment on this proposal.*

### **3.4. Opinion-posting on the Internet and social media**

#### **3.4.1. Background**

Savers and investors no longer think twice about using the Internet to find out about a company and its products before they make a purchase or investment. Asset management companies monitor the advertising made about them on the Internet by third parties, keeping informed of their e-reputation. It may be tempting for such a company to help that process along by posting anonymous recommendations in favour of its products or against those of its competitors. This process of buying or disseminating fictitious comments on the Internet is illegal on French territory as it is considered as disguised, and therefore misleading, advertising (see Article L. 121-1 of the French Consumer Code). Yet this does not prevent the practice from being rife in a number of activity sectors, including the hotel trade, the automotive industry and the provision of services (source: 22 July 2014 report by the French General Directorate for Competition Policy, Consumer Affairs and Fraud Control, DGCCRF). International players looking to market their products in France (and whose national rules are different) may not be aware that these practices are punishable by law in France.

#### **3.4.2. Texts concerned**

- AMF Position-Recommendation DOC-2011-24 for asset management companies.
- AMF Position DOC-2013-13 and Position-Recommendation DOC-2009-15 for debt securities issuers.

#### **3.4.3. Proposals submitted for consultation**

It is proposed to include in the “Guide to drafting CIS marketing materials and distributing CIS” (AMF Position-Recommendation DOC-2011-24), in the “Guide to drafting marketing materials for structured debt securities” (AMF Position DOC-2013-13) and in the “Guide to marketing bond issues to non-professional investors” (AMF Position-Recommendation DOC-2009-15) a warning to the effect that it is forbidden for an asset management company, a debt securities issuer or a distributor to publish or have published a recommendation or an opinion, be it positive or negative, in any social media (including discussion forums or the purchase of a “Like” on Facebook) addressing French investors in such a way that the marketing nature of the publication cannot be identified.

*The participants are asked to comment on this proposal.*

### **3.5. Internal organisation of asset management companies, debt securities issuers and their distributors**

#### **3.5.1. Background**

Asset management companies and debt securities issuers are required to clearly identify at internal level as well as with their distributors the persons authorised to communicate on their behalf. The publication of a marketing message (for example, not respecting regulation) by an unauthorised person is likely to carry a risk (legal or reputational) for the asset management company or debt securities issuer. For example, a social media user easily identifiable as the manager of an asset management company could post an unsuitable message on his personal account, and this message could be perceived as issuing from the asset management company.

### **3.5.2. Texts concerned**

- AMF Position DOC-2012-19 for asset management companies.
- AMF Position DOC-2013-13 for debt securities issuers.

### **3.5.3. Proposals submitted for consultation**

3.5.3.1. It is proposed to include in the “Guide to drafting the programme of activity required of investment management companies and self-managed collective investments” (AMF Position DOC-2012-19) and in the “Guide to drafting marketing materials for structured debt securities” (AMF Position DOC-2013-13) a recommendation encouraging asset management companies and debt securities issuers to clarify social media communication rules for their employees and partners.

*The participants are asked to comment on this proposal and provide a more detailed opinion by answering the questions below.*

3.5.3.2. What form could this clarification take? Would it suffice to include or append a charter governing the use of social media to the bylaws of the asset management company or debt securities issuer? Should a change to the company bylaws be envisioned?

3.5.3.3. Would it be a good idea to encourage asset management companies and debt securities issuers to modify the distribution contracts binding them to their marketing partners so as to provide for this clarification?

3.5.3.4. Would it be useful to recommend asset management companies and debt securities issuers to clearly identify at internal level the functions or persons authorised to communicate on their behalf?

3.5.3.5. Would it not be a good idea to systematically involve the head of compliance in the drafting of the editorial policy of the asset management company or debt securities issuer?

3.5.3.6. Would it also be possible to differentiate between the types of messages that should, systematically and prior to dissemination, be reviewed and approved by the head of compliance and those that do not require prior approval?

### **3.6. Other topics**

Do you think that the AMF should issue recommendations on other marketing techniques in the social media or on other topics?



## Appendix: recap of the topics and questions formulated in this consultation

### 1) Type of investors concerned

It is proposed to stipulate in the “Guide to drafting CIS marketing materials and distributing CIS” (AMF Position-Recommendation DOC-2011-24), in the “Guide to drafting marketing materials for structured debt securities” (AMF Position DOC-2013-13) and in the “Guide to marketing bond issues to non-professional investors” (AMF Position-Recommendation DOC-2009-15) that all communication drafted on the initiative of an asset management company, a debt securities issuer or one of their distributors, taken individually and intended to be shared in the social media, must respect the provisions issuing from the MIF Directive and Article L. 533-12 I° of the Monetary and Financial Code

### 2) Archiving policy

It is proposed that each asset management company, debt securities issuer or distributor registered on a social media should adopt a policy and the technical means required for recording the history of all its public and private communication (for example, via private messages with a user) in this network.

It is also recommended to adopt an archiving policy that is harmonious, stable over time, organised by type of information, and with an archiving period of sufficient length for investors.

### 3) The treatment of third-party publications

It is proposed to stipulate in the “Guide to drafting CIS marketing materials and distributing CIS” (AMF Position-Recommendation DOC-2011-24), in the “Guide to drafting marketing materials for structured debt securities” (AMF Position DOC-2013-13) and in the “Guide to marketing bond issues to non-professional investors” (AMF Position-Recommendation DOC-2009-15) that all the content published in the social media and relayed by an asset management company or debt securities issuer engages its responsibility.

### 4) Opinion-posting on the Internet and social media

It is proposed to include in the “Guide to drafting CIS marketing materials and distributing CIS” (AMF Position-Recommendation DOC-2011-24), in the “Guide to drafting marketing materials for structured debt securities” (AMF Position DOC-2013-13) and in the “Guide to marketing bond issues to non-professional investors” (AMF Position-Recommendation DOC-2009-15) a warning to the effect that it is forbidden for an asset management company, a debt securities issuer or a distributor to publish or have published a recommendation or an opinion, be it positive or negative, in any social media (including discussion forums or the purchase of a “Like” on Facebook) addressing French investors in such a way that the marketing nature of the publication cannot be identified.

5) Internal organisation of asset management companies, debt securities issuers and their distributors

5.1) It is proposed to include in the “Guide to drafting the programme of activity required of investment management companies and self-managed collective investments” (AMF Position DOC-2012-19) and in the “Guide to drafting marketing materials for structured debt securities” (AMF Position DOC-2013-13) a recommendation encouraging asset management companies and debt securities issuers to clarify social media communication rules for their employees and partners.

5.2) What form could this clarification take? Would it suffice to include or append a charter governing the use of social media to the bylaws of the asset management company or debt securities issuer? Should a change to the company bylaws be envisioned?

5.3) Would it be a good idea to encourage asset management companies and debt securities issuers to modify the distribution contracts binding them to their marketing partners so as to provide for this clarification?

5.4) Would it be useful to recommend asset management companies and debt securities issuers to clearly identify at internal level the functions or persons authorised to communicate on their behalf?

5.5) Would it not be a good idea to systematically involve the head of compliance in the drafting of the editorial policy of the asset management company or debt securities issuer?

5.6) Would it also be possible to differentiate between the types of messages that should, systematically and prior to dissemination, be reviewed and approved by the head of compliance and those that do not require prior approval?

6) Other topics

Do you think that the AMF should issue recommendations on other marketing techniques in the social media or on other topics?