

Review of marketing materials

ANNEX

PART 1

Change in the procedure for reviewing marketing materials relating to structured debt securities marketed in France to retail clients (*department with responsibility for issuers*)

FAQ

PART 2

Change in the prior review procedure for marketing materials relating to undertakings for collective investment (excluding structured funds, covered in part 3) distributed in France (*department with responsibility for asset management*)

PART 3

Change in the procedure for reviewing marketing materials for structured funds (*department with responsibility for asset management*)

PART 1

Change in the procedure for reviewing marketing materials relating to structured debt securities marketed in France to retail clients (*department with responsibility for issuers*)

The department with responsibility for issuers is updating its procedure for reviewing marketing materials relating to structured debt securities. Article 212-28 of the AMF General Regulation requires issuers to file all marketing materials used for marketing purposes in connection with a public offering and/or admission to trading on a regulated market with the AMF, irrespective of form and method of dissemination. Up to now, all documents filed with the AMF have been reviewed before being disseminated by the relevant departments. Under this approach, carried out by the department with responsibility for issuers, more than 740 marketing documents were reviewed in 2017.

The AMF notes that this approach has enabled high marketing standards to be developed in the French market for structured products, ensuring that retail clients have access to comprehensive, high-quality information. The AMF also observes that operators have gradually taken on board the regulator's expectations, resulting in a steady reduction in the number of observations per document, which is now, on the whole, limited. Lastly, the AMF notes that the regulatory framework in relation to marketing has been strengthened considerably. Examples include the entry into force of MiFID II and PRIIPS, which, combined with the development of issuers' compliance functions, ensures high standards as regards compliance with existing provisions covering the marketing of these financial instruments.

For a period of 12 months starting 2 November 2018, the AMF proposes to test an updated approach under which marketing materials will no longer be systematically reviewed prior to dissemination; rather, sample-based reviews will be undertaken after materials have been disseminated.

This new approach is intended to achieve three key objectives:

- Make better use of the AMF's resources by adopting a risk-based approach
- Allow market participants to be more agile when launching marketing campaigns
- Maintain an equivalent level of protection for retail investors to that which exists today

This new approach does not mean the AMF will be less vigilant in relation to marketing materials disseminated to retail clients. The AMF will continue to pay close attention to the quality of information disseminated and to compliance with its policy. When ex-post reviews of marketing materials reveal anomalies, the AMF will respond in a manner commensurate with the severity of those anomalies. Its response may take a variety of forms, ranging from a simple reminder to immediate suspension of marketing materials in accordance with Article L.621-8-2 of the Monetary and Financial Code and, where applicable, suspension of the offering pursuant to Article L.621-8-1 of the Monetary and Financial Code. Finally, AMF staff may also propose, if necessary, that an investigation be opened or an inspection initiated. The AMF also reserves the option of immediately switching back to a systematic prior review approach, for a period of three months, where an issuer disseminates documents that fail to comply with applicable rules.

The technical details are set out in the FAQ that follows.

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FAQ – New procedure used by the department with responsibility for issuers to review marketing materials relating to structured debt securities:

1. Must issuers always file their marketing materials relating to structured products with the AMF in the event of a public offering or admission to trading on a regulated market?

Yes. The requirement to file documents with the AMF pursuant to Article 212-28-I of the AMF General Regulation continues to apply to all marketing materials relating to a public offering or admission to trading on a regulated market, including marketing materials relating to structured debt securities subject to the new review process.

2. How should marketing materials relating to structured debt securities be filed with the AMF pursuant to Article 212-28 of the General Regulation?

Issuers should send the final version of all marketing materials to the generic e-mail address depotdoc-commerciale@amf-france.org. The version filed must be strictly identical to the version disseminated and/or distributed to retail clients. Only marketing materials relating to structured debt securities should be sent to this dedicated e-mail address (see question 4).

To be valid, the e-mail should include the following information:

- The final version of the marketing materials
- The name and contact details (phone number, e-mail and postal address) of a contact person at the issuer, in case of need
- The name and contact details (phone number, e-mail and postal address) of the issuer's compliance officer
- The total amount of the corresponding issue or, at the very least, an estimate of the total amount that may be marketed
- Where applicable, a copy of the final terms of the associated base prospectus
- Where applicable, if the debt security carries a risk of capital loss in excess of 10%, reference to the structure used from Annex 3 of AMF Position 2010-05 or a copy of advance confirmation from the AMF of the number of different mechanisms included in the product

3. Once marketing materials, together with the required information, have been sent to the dedicated e-mail address, should issuers await AMF approval before disseminating and/or distributing them in connection with the offering?

No: the AMF will no longer systematically review materials before they are disseminated. The Authority will instead review a random sample of materials after they have been disseminated. Marketing materials may thus be disseminated/distributed as soon as they have been submitted to the generic e-mail address.

4. Exactly which marketing materials are covered by this new approach?

The new approach applies to all marketing materials, regardless of their form and dissemination method, relating to debt securities issued by banks (including listed products) and offered to the public in France.

As such, marketing materials relating to debt securities issued by other types of issuers, and those relating to equity securities (e.g. in connection with an initial public offering), will continue to be systematically reviewed before prior to dissemination.

5. Where a product or vehicle includes highly innovative elements, will it still be possible to contact the AMF ahead of time?

Yes. The AMF will remain available to discuss with issuers, at product design phase, key points that should, in its opinion, be covered by warnings or specific wording within marketing materials. However, marketing materials will not be formally reviewed by the AMF.

6. Will foreign issuers marketing structured debt securities in France (including listed products) be subject to this new procedure?

Yes. Any issuer carrying out a public offering in France and/or an admission to trading on the French regulated market is subject to this procedure and will have to fully comply with it.

7. How can issuers find out what the AMF expects as regards marketing of structured debt securities and the content of marketing materials?

To help market participants better understand its expectations, the AMF has published three key documents on the marketing of structured debt securities:

- Position AMF 2010-05 setting out rules on the complexity of structures and underlying indices
- AMF Position/Recommendation 2013-13 setting out the AMF's expectations as to how structured debt securities should be presented in marketing materials
- AMF Position 2013-12 aimed at safeguarding against the risk of inappropriate marketing of structured or "guaranteed" UCITS and AIFs, as well as structured debt securities depending on the quality of the guarantor

These policies are without prejudice to any other regulatory provisions to which the issuer and/or the distributor may be subject.

The AMF will continue to refine its policy in this area to reflect innovations and support market participants.

PART 2

Change in the prior review procedure for marketing materials relating to undertakings for collective investment (excluding structured funds, covered in Annex 3) distributed in France (*department with responsibility for asset management*)

Currently, whether at the request of the department with responsibility for asset management or at their own initiative, many market participants submit draft marketing materials that they wish to use in France to the AMF for prior compliance review. Similarly, the department with responsibility for asset management regularly requires foreign market participants wishing to market their undertakings for collective investment in France to submit their marketing materials for prior review to ensure that they comply with domestic regulations. Over the past few years, the AMF has observed an improvement in the quality of materials submitted to it in advance. For example, promotional messages appear to be more balanced, with risks routinely highlighted alongside the potential benefits offered by the products being marketed.

The department with responsibility for asset management now wishes to focus its activities on **those products that carry the highest risk of being inappropriately marketed**. As such, it will reserve the right not to review, prior to their dissemination, marketing materials relating to funds distributed entirely in unit-linked form, structured funds (see below), “vanilla” strategy funds, “other AIFs” and funds where investment is clearly restricted to professional investors. Instructions DOC-2011-19, DOC-2011-20, DOC-2011-21, DOC-2011-22 and DOC-2011-23 will be updated accordingly in the near future.

However, marketing materials relating to the following products, the unusual nature of which may give rise to a higher risk of inappropriate marketing to the general public, will continue to be submitted to the department with responsibility for asset management and systematically reviewed before prior to dissemination:

- Employee investment undertakings (FCPEs) invested in listed and unlisted corporate securities
- Retail venture capital funds and “tax” funds (retail private equity investment funds [FCPRs], retail local investment funds [FIPs], retail innovation investment funds [FCPIs] and companies providing funding for the film and audiovisual sector [SOFICAs])
- retail real estate collective investment undertakings (OPCIs)

At the same time, the department with responsibility for asset management will undertake tighter monitoring to ensure that any marketing materials likely to be in breach of French regulations are identified as quickly as possible, with proportionate corrective action taken by the AMF.

In accordance with the provisions of Article 314-6 of the AMF General Regulation, the department with responsibility for asset management may also, when it deems necessary, decide to require marketing materials relating to a fund to once again be submitted to it prior to dissemination. For example, the department in question may ask market participants to submit their marketing materials for prior review if the AMF identifies an innovative theme that may carry a risk of inappropriate marketing.

Lastly, the AMF will continue to support asset management companies and distributors by publishing regular updates to its Position/Recommendation DOC-2011-24, “Guide to drafting CIS marketing materials and distributing CIS”, so as to clarify its interpretation of regulations as regards marketing communications.

Procedure: To enable the AMF to monitor the quality of marketing materials relating to undertakings for collective investment distributed in France, French asset management companies will have to submit all marketing materials to the AMF’s GECO database. To do this, they will need to log onto their GECO extranet and go to Electronic submission > Submit a document > Marketing materials. Foreign asset management companies will need to submit the aforementioned documents to the AMF by e-mailing them to gio@amf-france.org¹.

¹ Instructions DOC-2011-19, DOC-2011-20, DOC-2011-21, DOC-2011-22 and DOC-2011-23 will be updated accordingly.

PART 3

Change in the procedure for reviewing marketing materials for structured funds (*department with responsibility for asset management*):

The department with responsibility for asset management (whose remit includes instructions for and monitoring of French structured funds) has systematically been conducting prior reviews of structured fund marketing materials since 2002, as well as publishing monthly bulletin COB 374, "Regulation of structured UCITS". In the latter bulletin, the AMF affirmed its right to require marketing materials to be submitted to it for prior review and its desire to initiate an ex-ante or ex-post review of such materials. These ex-ante compliance reviews have led to a significant improvement in the quality of structured fund marketing materials.

Consequently, and to ensure that supervisory practice is harmonised with issuers of structured debt securities, the department with responsibility for asset management will henceforth no longer be carrying out systematic prior reviews of structured fund marketing materials. As such, applications for authorisation for such funds submitted to the department with responsibility for asset management may no longer include draft marketing materials, unless requested in advance by the AMF.

It should also be noted that this new approach in no way affects the responsibility of producers and distributors of structured funds, who remain liable for ensuring that materials made available to the public comply with applicable regulations. However, the department will be tightening its monitoring of the quality of information disseminated and of compliance with AMF policy on the marketing of structured funds to the general public in France. The Authority reserves the right to take whatever action it deems necessary if it finds that regulations have been breached.

Procedure: To enable the AMF to monitor the quality of marketing materials relating to structured funds distributed in France, French asset management companies will have to submit all marketing materials to the AMF's GECO database. To do this, they will need to log onto their GECO extranet and go to Electronic submission > Submit a document > Marketing materials. Foreign asset management companies will need to submit the aforementioned documents to the AMF by e-mailing them to gio@amf-france.org².

² Instructions DOC-2011-19, DOC-2011-20, DOC-2011-21, DOC-2011-22 and DOC-2011-23 will be updated accordingly.