

## AMF Position n° 2006-23

### Questions and answers on the rules that apply to financial investment advisers

Reference texts: article L. 541-1 of the Monetary and Financial Code and articles 325-3 and 325-4 of the AMF General Regulation

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#### 1. Scope of the status of financial investment adviser

##### 1.1. Is the status of financial investment adviser optional?

No. Any person whose normal business consists in providing financial investment advice as defined in article L. 541-1 I of the Monetary and Financial Code<sup>1</sup> must comply with the legislative and regulatory requirements that apply to the profession of financial investment adviser.

In application of the provisions of article L. 573-9 of the Monetary and Financial Code, a person who provides financial investment advice without complying with the conditions laid down by the law may face criminal sanctions identical to those incurred in cases of fraud. This would be the case, for example, of any person whose business consists in providing financial investment advice without fulfilling the conditions of age, reputation and competence, without belonging to a professional association approved by the AMF, without having taken out professional liability insurance, or without complying with the conduct of business rules.

<sup>1</sup> In application of the provisions of article L. 541-1 I. of the Monetary and Financial Code, financial investment advisers are “individuals and legal entities who/which provide the following services in the normal course of their business”:

1 The investment advice referred to in paragraph 5 of Article L. 321-1;

2 (Repealed)

3 The advice relating to the provision of investment services referred to in L. 321-1;

4 The advice relating to execution of the transactions in miscellaneous property described in Article L. 550-1. These activities are called “financial investment advice”.

However, in application of article L. 541-1 III of the Monetary and Financial Code, persons who provide investment advice on an ancillary basis and as part of a non-financial professional activity or in their capacity as a chartered accountant are not bound by the rules governing financial investment advisers, provided that this activity is governed by legislative or regulatory provisions or by a code of conduct approved by a public authority and that said provisions or code do not formally prohibit it.

**1.2. Do real-estate evaluation services fall under the status of financial investment adviser?**

No. Evaluation or valuation service provisions do not enter the scope of financial investment advice.

**1.3. Does employee savings advice fall under the status of financial investment adviser?**

No. Advice provided to companies wishing to set up a savings scheme for their employees does not fall within the scope of the activities listed in I of article L. 541-1 of the Monetary and Financial Code, although this advice may include selecting from a range of mutual funds in which employees can invest.

However, the advice dispensed to employees to help them choose between the various investment options proposed in an employee savings scheme may, as the case may be, fall under the status of financial investment adviser and/or direct marketer of banking or financial products.

**1.4. Does advice dispensed exclusively to clients residing abroad fall under the status of financial investment adviser?**

Subject to the appreciation of the courts on the question of the location of advice activity, the AMF considers that the French regulations should not apply when the advice is dispensed exclusively to persons residing abroad unless these persons come to French territory to receive aforesaid advice; except for this latter case, it is up to the adviser to comply with the regulations of the country of residence of its client.

**1.5. Can a financial investment adviser perform other regulated activities?**

Yes. The status of financial investment adviser does not prohibit the conduct of other regulated activities such as that of estate agent, direct marketer of banking or financial products, or insurance broker. A financial investment adviser may therefore simultaneously perform several activities provided it complies with the legislation governing each of them.

**1.6. Can a financial investment adviser manage institutional client accounts?**

No. The scope of financial investment advice does not include the management of portfolios of financial instruments on behalf of individual or institutional clients, which requires prior approval as an investment services provider when such activity is performed in the normal course of business.

**2. Obligations for financial investment advisers**

**2.1. In order to fulfil its obligations relating to the prevention of money laundering and of terrorist financing, must the financial investment adviser have each of its clients sign a document indicating their identity, the origin of the funds and the purpose of the transaction?**

In application of the provisions of articles L. 561-2 6, L. 561-5 and L. 561-6 of the Monetary and Financial Code, before entering in to a business relationship, the financial investment adviser must:

- identify its client, and where necessary the actual beneficiary, by all suitable means and verify this identification information;
- gather the information relating to the purpose and nature of the business relationship and any other relevant information about the client.

In the cases stipulated by article L. 561-10 of the Monetary and Financial Code, the financial investment adviser must apply further due diligence measures with regard to its client. Such cases apply, for example, when the client or his legal representative is not physically present for the purposes of identification.

In application of article L. 561-10-2 of the same code, it is up to the financial investment adviser to strengthen the measures referred to above when the risk of money laundering and terrorist financing presented by a client, a product or a transaction seems high, and to carry out a more thorough examination when the service provision relates to a particularly complex transaction or an unusually high amount or does not appear to have any economic justification or lawful purpose.

Although the financial investment adviser can ask its clients to sign a document indicating the identity of the actual beneficiary of the advice, the origin of the funds and the purpose of the transaction, such a document may not be sufficient for the financial investment adviser's abovementioned due diligence requirements to be deemed to be fulfilled.

**2.2. At what point is a financial investment adviser considered as having a material ownership or commercial interest in a direct marketing institution?**

When it enters into a relationship with a new client, the financial investment adviser must provide this client with the identity of the direct marketing institutions referred to in 1 of article L. 341-3 of the Monetary and Financial Code (credit institutions, investment firms, insurance companies, etc.) in which it has “a *material ownership or commercial interest*” (article 325-3, 4 of the AMF General Regulation).

A financial investment adviser has a material ownership or commercial interest in a direct marketer of financial products when it has a regular commercial relationship or material link likely to affect its independence towards the client.

It is up to the financial investment adviser to identify the institutions with which it seems to be in this situation.

**2.3. When is the financial investment adviser required to give the client the document establishing a relationship referred to in article 325-3 of the General Regulation?**

The document referred to in article 325-3 of the AMF General Regulation must be given to the client before the letter of engagement is signed.

**3. Financial investment advisers and direct marketing of banking or financial products**

**3.1. Can a financial investment adviser appoint a natural person or legal entity to market its advice activity?**

The following may perform direct marketing of banking or financial products on behalf of a financial investment adviser in order to offer its advice services:

- the employees of the financial investment adviser,
- any natural person empowered for this purpose by the financial investment adviser,
- regarding financial investment advisers established as legal entities, the natural persons empowered to manage or administrate this entity.

However, a financial investment adviser may not appoint a legal entity to perform direct marketing of banking or financial products on its behalf for its advice activity.

**3.2. What are the obligations of the financial investment adviser, of its employees or of its representatives towards the prospect when they perform direct marketing for an advice service?**

The financial investment adviser, its employees, its representatives or the directors or persons empowered to administrate a legal entity providing financial investment advice which performs direct marketing of banking or financial products for an advice service must:

- enquire about the financial situation of the prospect, his experience and his objectives in terms of investment or financing;
- clearly and accurately provide the prospect with the necessary information related to the advice service for which he is making a decision;
- provide the prospect with the information referred to in article L. 341-12 of the Monetary and Financial Code.<sup>2</sup> This information must be provided before the service provision contract is signed with the client;
- attach to the contract a form facilitating the exercise of the right to withdraw within the 14-day cooling-off period.

**3.3. Can the person appointed by a financial investment adviser for direct marketing for the advice activity sign the advice service provision contract with the prospect?**

Before providing any advice, the financial investment adviser must submit to its client a letter of engagement which must be signed by both parties and which has the purpose of defining the mission of the financial investment adviser.

Bearing in mind the *intuitu personae* nature of the advice service, article 325-4 of the AMF General Regulation does not authorise the financial investment adviser to delegate the drafting or signing of the aforementioned letter to any other person, including the direct marketer. This is also in line with the provisions of article L. 341-14 of the Monetary and Financial Code.

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<sup>2</sup> 1° The name and business address of the individual engaged in direct marketing;

2° The name, address and, where applicable, the registration number referred to in Article L. 546-1 of the Monetary and Financial Code, of the legal entity(ies) on whose behalf the direct marketing is carried out;

3° The name, address and, where applicable, the registration number referred to in Article L. 546-1 of the Monetary and Financial Code of the legal entity commissioned pursuant to paragraph I of Article L. 341-4, if the direct marketing is carried out on behalf of such a person;

4° The specific information sheets relating to the products, financial instruments and services offered as determined by the laws and regulations in force or, in the absence of such documents, a prospectus on each of the products, financial instruments and services offered, drafted under the responsibility of the person or institution commissioning the direct marketing and indicating the specific risks, if any, that the products offered might entail;

5° The terms of the contractual proposal, including the total cost actually payable by the person solicited, or, if an exact cost cannot be indicated, the basis of calculation of the cost, to enable the person solicited to verify it, and the terms and conditions under which the contract will be entered into, including the place and date of its signing;

6° Information relating to the existence or otherwise of the right to withdraw provided for in Article L. 121-20-15 of the Consumer Code or Article L. 341-16 of the Monetary and Financial Code, as well as the procedure for exercising it;

7° The law applicable to the pre-contractual relations and the contract, and the existence of any choice-of-jurisdiction clause.