

**AMF Position n° 2013-12**

**Requirement to offer a guarantee (of the formula and/or capital, as appropriate) for structured UCITS and AIFs, “guaranteed” UCITS and AIFs and structured debt securities issued by special purpose entities and marketed to the general public**

**Reference texts: Article 36 of Commission Regulation (EU) N°583/2010 of 1<sup>st</sup> July 2010 implementing Directive 2009/65/CE, Articles R.214-19 and R.214-32-28 of the Monetary and Financial Code.**

This AMF position draws the attention of investment services providers (including those acting via a tied agent), financial investment advisers and banking or financial direct marketers to the risks of mis-selling:  
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- **structured UCITS and FIAs** for which the formula is not guaranteed by an entity subject to prudential rules complying with French requirements (guarantee referred to in Article R. 214-19, II<sup>1</sup> and Article R. 214-32-28, II<sup>2</sup> of the Monetary and Financial Code);
- **guaranteed UCITS and FIAs** (total or partial capital guarantee) for which the guarantor is not an entity subject to prudential rules complying with French requirements (guarantee referred to in Article R. 214-19, II and Article R. 214-32-28, II of the Monetary and Financial Code);
- **structured debt securities issued by special purpose entities** having similar characteristics.<sup>3</sup>

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<sup>1</sup> By the terms of this article, a UCITS “may only receive guarantees if they are granted by an establishment having UCITS depository status, by a credit institution having its registered office in a Member State of the Organisation for Economic Cooperation and Development or by an investment company having its registered office in a European Union Member State or in another State that is a party to the European Economic Area agreement, and which is authorised to provide the service mentioned in Article L. 321-2, 1) [of the Monetary and Financial Code] and of which the amount of own funds, within the meaning of Directive 2000/12/EC of the European Parliament and Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, is equal to at least €3.8 million.”

<sup>2</sup> By the terms of this article, a general-purpose investment fund “may only receive guarantees if they are granted by an establishment having collective investment undertaking depository status, by a credit institution having its registered office in a Member State of the Organisation for Economic Cooperation and Development or by an investment company having its registered office in a European Union Member State or in another State that is a party to the European Economic Area agreement, and which is authorised to provide the service mentioned in Article L. 321-2, 1) [of the Monetary and Financial Code] and of which the amount of own funds, within the meaning of Directive 2000/12/EC of the European Parliament and Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, is equal to at least €3.8 million”.

<sup>3</sup> The obligation relating to the nature of the guarantor (an establishment or an enterprise referred to in Article R. 214-19, II or R. 214-32-28, II of the Monetary and Financial Code) does not apply to debt securities issued with a prospectus or base prospectus (drafted and published in accordance with Directive 2003/71/EC of 4 November 2003, as amended) that was valid and approved by the competent Authority prior to the publication of this position.

## 1. Scope of application of the AMF position

### 1.1. Financial instruments concerned

The AMF position applies to the following financial instruments:

- units or shares in French structured UCITS referred to in Article R. 214-28 of the Monetary and Financial Code;
- units or shares in French general-purpose AIFs referred to in Article (R. 214-32-39 of the Monetary and Financial Code)
- units or shares in equivalent foreign structured UCITS<sup>4</sup> or AIFs;
- units or shares in French or foreign UCITS and AIFs sold in France and whose capital is totally or partially guaranteed;
- structured debt securities<sup>5</sup> issued by special purpose entities<sup>6</sup>

### 1.2. Situations concerned

The AMF position concerns the act of marketing, defined as being the presentation of a financial instrument by different means (advertising, direct marketing, advice...) by an investment services provider,<sup>7</sup> a financial investment adviser or a banking or financial direct marketer<sup>8</sup> with a view to inciting a client to subscribe or buy it.

This position does not concern the subscription or purchase of financial instruments:

- in response to an unsolicited request from a client for a precisely-designated financial instrument, when such is allowed by the legislation and regulations in force;
- concluded within the framework of a contract for investment management for third parties, the service being provided in this case to the investment services provider, provided that such financial instruments are authorised for investment management for retail clients.

### 1.3. Persons concerned

The AMF position applies to marketing of the financial instruments in question on French territory. It therefore applies to banking and financial direct marketers (provided that the financial instruments may be marketed directly), to financial investment advisers and to all investment services providers,<sup>9</sup> including those operating by virtue of the freedom to provide services or the freedom of establishment whenever they market the financial instruments in question on French territory.

The AMF position does not apply to marketing of the financial instruments in question abroad, including when French investment services providers are acting by virtue of the freedom to provide services abroad.

Concerning particularly banking or financial direct marketers, you are reminded that they are required to comply with rules of good conduct relating to disclosure, and that the persons who appoint them (referred

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<sup>4</sup> Structured UCITS are referred to in Article 36 of Commission Regulation (EU) n° 583/2010 of 1<sup>st</sup> July 2010 implementing Directive 2009/65/EC.

<sup>5</sup> The terms “structured debt securities” refer to:

- (i) complex securities within the meaning of AMF position n°2010-05,
- (ii) structured debt securities offering capital protection at term of at least 90% of the capital invested,
- (iii) and debt securities based on other assets or linked to the performance of other assets.

Securitisation operations, however, are excluded from this position.

<sup>6</sup> Notably as defined by Regulation n° 99-07 (paragraph 10052) of the *Comité de la Réglementation Comptable* or by interpretation SIC 12 “Consolidation – Special Purpose Entities” (replaced by IFRS 10), without prejudice to the exhaustiveness of the situations referred to by these texts.

<sup>7</sup> Or, if applicable, via the intermediary of a tied agent. The tied agent must act in compliance with the legislative and regulatory provisions applicable to the investment services provider that has appointed it. Article L. 545-4 of the Monetary and Financial Code.

<sup>8</sup> For products authorised for direct marketing.

<sup>9</sup> Or via their tied agent(s).

to in Article L. 341-3 of the Monetary and Financial Code) are “legally liable for the actions of direct marketers acting in said capacity.”<sup>10</sup> In the event of a breach, these persons may also be the subject of sanctions pronounced by the AMF Enforcement Committee;<sup>11</sup>

As far as the investors are concerned, the position applies to retail clients.<sup>12</sup> It does not apply to marketing to professional clients and/or eligible counterparties.

## 2. On the risk of mis-selling

The financial instruments referred to in 1, a) guarantee the investor a specified result on expiry of a specified period or offer a total or partial capital guarantee.

If the guarantee of the formula result or the total or partial guarantee of the capital is not provided (personal collateral) to the UCITS/AIF or, for debt securities, to the benefit of holders of the securities issued by the entity, by an entity<sup>13</sup> authorised to give guarantees to UCITS and AIFs, these financial instruments present a risk of a retail client misunderstanding the risks involved.

Conversely, if investors benefit from a guarantee of the capital and/or formula<sup>14</sup> by an establishment or an enterprise referred to in R. 214-19, II or R. 214-32-28, II of the Monetary and Financial Code, these products may be marketed to retail clients without any specific warning, subject to compliance with the applicable rules.

**For financial instruments referred to in 1-a), if there is no guarantee (of the formula and/or capital) in the form of personal collateral given by an establishment or enterprise referred to in Article R. 214-19, II or Article R. 214-32-28, II of the Monetary and Financial Code, the AMF considers that the distribution of this type of financial instruments (as referred to in 1-a) to retail clients presents such a risk of mis-selling that it will be particularly difficult to comply with the legislative and regulatory provisions applicable in marketing matters.**

<sup>10</sup> Article L. 341-4-III of the Monetary and Financial Code.

<sup>11</sup> Article L. 621-15, II of the Monetary and Financial Code.

<sup>12</sup> Article L. 533-16 of the Monetary and Financial Code.

<sup>13</sup> Referred to in Articles R. 214-19 or R. 214-32-28 of the Monetary and Financial Code.

<sup>14</sup> A formula guarantee shall mean a guarantee of payment of the sums due by the issuer pursuant to the formula, by virtue of the applicable provisions of the prospectus or issue programme. It is specified that the only cases in which the guarantee may be restricted are any legislative or regulatory amendments that might occur, retroactively as the case may be, after the date of authorisation of the UCITS/AIF or of creation of the entity when it is not subject to authorisation, when such amendments result in a tax or another additional financial charge being owed by the UCITS/FIA or the entity.

**Example 1**

A UCITS marketed in France and offering a capital guarantee, delivered by a French or foreign investment management company.

→ The capital guarantee is offered by an entity **that is not** an establishment or an enterprise referred to in R.214-19 II) of the Monetary and Financial Code. It is difficult, or even impossible, for a retail client to measure the additional risk they are taking.

**Example 2**

Debt security issued by a foreign special purpose entity and offering a formula, without the performance of the said formula being guaranteed.

→ The formula guarantee **is not** offered. It is difficult, or even impossible, for a retail client to measure the additional risk they are taking.

### Annex I - Warnings concerning structured debt securities issued by special purpose entities

<i>Types of financial instruments</i>	<i>Structured debt securities issued by special purpose entities</i>
The product gives no formula guarantee.	<p><b><u>In clearly visible lettering:</u></b></p> <p>“This product is issued by [issuer name], a [issuer nationality] special purpose entity/securitisation entity. The formula is not guaranteed in any way whatsoever. Investors therefore have no guarantee of receiving the amounts provided by application of the formula presented in the official documentation. The AMF considers that this product presents excessively large risks for marketing to retail clients and therefore has not examined the marketing materials.”</p>
The product offers a <b>formula guarantee that is not given</b> by an establishment or an enterprise referred to in Article R.214-19, II or Article R. 214-32-28, II of the Monetary and Financial Code	<p><b><u>In clearly visible lettering:</u></b></p> <p>“This product is issued by [issuer name], a [issuer nationality] special purpose entity/securitisation entity. The formula is guaranteed by an establishment that is not subject to prudential rules complying with French requirements. Investors therefore have no guarantee of receiving the amounts provided by application of the formula presented in the official documentation. The AMF considers that this product presents excessively large risks for marketing to retail clients and therefore has not examined the marketing materials.”</p>
The product offers a formula guarantee <b>that is given</b> by an establishment or an enterprise referred to in Article R.214-19, II or Article R. 214-32-28, II of the Monetary and Financial Code	<p><b><u>In clearly visible lettering:</u></b></p> <p>“This product issued by [issuer name], a [issuer nationality] special purpose entity/securitisation entity offering a formula guarantee provided by [guarantor name], is subject to issuer and guarantor default risk.</p>

### Annex II - Warnings for UCITS/FIAs

Types of financial instruments	UCITS/AIF (excluding structured funds)	Structured UCITS/AIFs
The product offers no formula guarantee. The capital is not guaranteed.	<b>Use of the term “guaranteed” is not appropriate in marketing materials for a UCITS/AIF presenting a risk of loss of capital.</b>	NA
The product offers no formula guarantee. The capital is not guaranteed.	NA	<p><b><u>In clearly visible lettering:</u></b></p> <p><b>“The formula is not guaranteed in any way whatsoever. Investors therefore have no guarantee of receiving the amounts provided by application of the formula presented in the official documentation. The AMF considers that this product presents excessively large risks for marketing to retail clients and therefore has not examined the marketing materials.”</b></p>
The product offers a <b>capital guarantee that is not given</b> by an establishment or an enterprise referred to in Article R.214-19, II or Article R. 214-32-28, II of the Monetary and Financial Code	<p><b><u>In clearly visible lettering:</u></b></p> <p><b>“The capital is guaranteed by an establishment that is not subject to prudential rules complying with French requirements. Investors therefore have no guarantee of recovering their capital at term. The AMF considers that this product presents excessively large risks for marketing to retail clients and therefore has not examined the marketing materials.”</b></p>	NA
The product offers a <b>formula guarantee that is not given</b> by an establishment or an enterprise referred to in Article R.214-19, II or Article R. 214-32-28, II of	NA	<p><b><u>In clearly visible lettering:</u></b></p> <p><b>“The formula is guaranteed by an establishment that is not subject to prudential rules complying with French requirements. Investors therefore have no guarantee of receiving the amounts provided by application of the formula presented in the official documentation.</b></p>



<p>the Monetary and Financial Code</p>	<p><b>The AMF considers that this product presents excessively large risks for marketing to retail clients and therefore has not examined the marketing materials.”</b></p>
<p>The product offers a capital and/or formula guarantee (as applicable) <b>that is given</b> by an establishment or an enterprise referred to in Article R.214-19, II or Article R. 214-32-28, II of the Monetary and Financial Code</p> <p style="text-align: right;"><b>NA</b></p>	<p><b>NA</b></p>