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DES MARCHÉS FINANCIERS

AMF

AMF Position-recommendation DOC-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; Articles 325-3 and 325-4 of the AMF General Regulation

Except where recommendations are specifically identified, elements of policy included in this document are positions.

1. Scope of the status of financial investment adviser (FIA)

1.1. Is the status of FIA 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[1] must comply with the legislative and regulatory requirements that apply to the profession of FIA.
In application of the provisions of Article L. 573-9 of the Monetary and Financial Code, a person who provides financial investment advice in the normal course of business 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.
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 FIAs, 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. What investment services are FIAs allowed to provide?

According to Article L. 541-1 of the Monetary and Financial Code, a person with the status of FIA may provide investment advice, defined as the provision of personalised recommendations to a third party, either at the request of that third party or at the initiative of the firm providing the advice, in relation to one or more transactions involving financial instruments.
Under Article L. 541-1 II of the Monetary and Financial Code and Article 325-13 of the AMF General Regulation, a FIA may also receive and transmit orders on behalf of third parties, but only if (i) those orders relate to one or more units or shares of collective investment undertakings (comprehensively listed in Article L. 214-1 II. of the Monetary and Financial Code: UCITS, general purpose investment funds, general purpose professional funds, private equity funds, professional private equity funds, alternative funds of funds, specialised professional funds, employee savings funds, securitisation schemes, real estate investment companies, forestry investment companies, real estate collective investment schemes, professional real estate collective investment schemes and closed-ended investment companies) in relation to which the FIA has already provided advice to that client, and (ii) an agreement has been entered into with the client, before the service of receipt and transmission of orders commences, to clarify the obligations upon each party.
Consequently, a FIA is not allowed to receive and transmit orders independently of or prior to the provision of financial investment advice, or in financial securities other than units or shares of collective investment undertakings.

[1] In application of the provisions of Article L. 541-1 I. of the Monetary and Financial Code, FIAs 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".

1.3. Do real-estate evaluation services fall under the status of FIA?

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

1.4. Does employee savings advice fall under the status of FIA?

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 employee savings 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 fall under the status of FIA if a personalised recommendation relating to financial instruments is dispensed to them.

1.5. Does advice dispensed exclusively to clients residing abroad fall under the status of FIA?

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 foreign regulations, including in particular those of the country of residence of its client, likely to apply to its services.

1.6. Must providing advice on credit, for example in relation to mortgages and consumer credit, be a FIA?

Credit transactions are banking transactions within the meaning of Article L. 311-1 of the Monetary and Financial Code that can only be carried out by credit institutions. Deposit-taking for bank savings products is also a banking transaction.
Until the Banking and Financial Regulation Act entered into force, FIAs were allowed to provide advice on banking transactions.
Currently, except as allowed under Article L. 519-1 II of the Monetary and Financial Code, only intermediaries in banking transactions and payment services may present, propose or help conclude banking transactions in return for payment or any other form of economic benefit. This activity no longer falls within the scope of the regulations governing FIA.

2. Other activities that can be performed by FIAs

2.1. Can a FIA perform other regulated activities?

a) In principle, yes.

The status of FIA does not, in principle, prohibit the conduct of other regulated activities such as that of estate agent, insurance intermediary or intermediary in banking transactions and payment services. The same person may therefore simultaneously perform more than one activity as long as that person complies with the legislation governing each activity.
However, where activities involving the marketing of financial instruments or investment services are combined, it is essential under all circumstances to ensure that clients clearly understand the services offered to them and the different liability regimes that apply. Investors must be able to determine unambiguously the rules applicable to their circumstances and the prerogatives available to them. These rules and prerogatives vary depending on the marketing method used; two special cases can be identified.

b) Special cases

- Combining FIA status with the direct marketing of banking or financial services

A FIA can, by virtue of its status, market financial instruments by providing advice to potential investors. The client is protected by various formalities intended to ensure that he fully understands the service provided. These formalities are completed by the adviser, acting in its own name and on its own account.
This marketing method does not fall under the regime applicable to the direct marketing of banking or financial services, which is not a status but a body of rules aimed at providing specific protection for (i) clients receiving unsolicited approaches or (ii) clients who are approached, whether or not at their own request, on premises not intended for the marketing of financial products, instruments and services. These rules also include obligations upon direct marketers intended to protect clients. However, these rules are not exactly the same as those applicable to FIAs.
In accordance with Article L. 341-3 of the Monetary and Financial Code, a FIA may engage in direct marketing to existing or potential clients to propose its own advice services. However, where a FIA is commissioned by a third party under Article 341-4 of the Monetary and Financial Code to directly market that party's services, the combination, by the same professional vis-à-vis the same client and in relation to the same service, of the status of FIA with the direct marketing of banking or financial services would make it hard for the targeted investor to understand which regime applied to him, particularly in terms of liability. Such a situation would be likely to entail the risk of mis-selling or of conflicts of interest that run counter to the principle of client protection, as well as the risk that the FIA might not comply with the requirement to act honestly and fairly in the best interests of its clients (Article L. 541-8-1, Monetary and Financial Code).
When delivering a given service, a FIA may not therefore operate under both the regime applicable to the direct marketing of banking or financial services on behalf of a producer and the regime applicable to financial investment advice.
This approach does not affect the option for a FIA to directly market its own advice services to clients. In this situation, there is no risk of ambiguity (see point 6).

- Combining FIA status with tied agent status

As part of its activities as defined in Article L. 541-1 of the Monetary and Financial Code, a FIA acts on its own account. However, the adviser may provide investment advice and receive and transmit orders on behalf of third parties in units or shares of collective investment undertakings under the conditions laid down in regulations (see question 1.2). Under Article L. 541-3 of that same code, a FIA is required to take out an insurance policy to cover it against the financial consequences of its professional civil liability. FIAs must comply with the conduct of business rules laid down in Articles L. 541-8-1 of the Monetary and Financial Code and Articles 325-3 to 325-9 of the AMF General Regulation.
Under Article L. 545-2 of the Monetary and Financial Code, a tied agent is a person who acts on behalf a single investment services provider that remains fully and unconditionally liable for the acts carried out in its name and on its behalf. A tied agent may, on behalf of the investment services provider to which he is tied, provide the services of investment advice, receipt and transmission of orders on behalf of third parties, and guaranteed or non-guaranteed investment, under the conditions laid down in Article L. 545-1 of the Monetary and Financial Code. He must comply with the conduct of business rules that apply to his principal.
Given the differences between the two regimes, the distinct scope of activities permitted by each of the two statuses, and the obligation upon FIAs to act honestly and fairly in the best interests of their clients (Article L. 541-8-1 of the Monetary and Financial Code), a FIA may not combine its status with the status of tied agent.

The positions set out in this section 2.1.b) must be applied as soon as possible, and no later than six months after the publication of this position-recommendation.

2.2. Can a FIA 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.

2.3. Can a FIA who receives an enduring or posthumous power of attorney manage its principal's portfolio of financial instruments?

Discretionary portfolio management is an investment service. As such, it may only be offered in the normal course of business by investment services providers authorised for that service. All exceptions to this monopoly are listed in Article L. 531-2 of the Monetary and Financial Code. None of those exceptions allows for enduring or posthumous powers of attorney.
Consequently, a FIA cannot, simply by virtue of its status, manage its principal's portfolio of financial instruments in the normal course of business, including under an enduring or posthumous power of attorney.
Also, irrespective of the question of the eligibility of a FIA as agent under an enduring or posthumous power of attorney, if a FIA receives such powers of attorney in the normal course of business, it must entrust the management of the financial instrument portfolios in question to an investment services provider authorised to provide discretionary portfolio management services.

2.4. Must a FIA that performs other activities have a segregated bank account specific to its financial investment advice business?

According to Article L. 541-6 of the Monetary and Financial Code, a FIA can receive from its clients only the funds remitted to pay for its services. However, this restriction does not apply to other activities that may be carried out by a FIA (for example, under the status of insurance intermediary, under the conditions laid down in regulations).
In any event, the FIA must be able to demonstrate compliance with the requirements of Article L. 541-6 of the Monetary and Financial Code.

Recommendation
To this end, it is recommended, for example, that FIAs maintain a segregated bank account reserved for funds remitted by their clients in payment for their financial investment advice services.

3. FIA status: eligibility criteria and organisational requirements

3.1. Is FIA status subject to a requirement to be resident or established in France?

Yes. Regarding the conditions of access and practice relating to FIA status, Article L. 541-2 of the Monetary and Financial Code requires the latter to be "habitually resident, or established, in France".
In the case of a legal entity, this provision requires it to have its registered office in France. Having a branch in France is not sufficient to meet this requirement.

3.2. Can a legal entity authorised as a FIA be managed or administered by a legal entity?

Paragraph 1 of Article L. 541-2 of the Monetary and Financial Code, on the conditions of access and practice relating to FIA status as regards age, respectability and professional competence, refers only to "individuals who are FIAs" and "individuals empowered to manage or administer legal entities authorised to act as FIAs".
It follows from this provision that only individuals may manage or administer a legal entity authorised as a FIA and be listed in that capacity in the register of intermediaries maintained by ORIAS (the single register of insurance, banking and financial intermediaries), in accordance with Article 1 of the Order of 1 March 2012 on the sole register referred to in Article L. 512-1 of the Insurance Code and Article L. 546-1 of the Monetary and Financial Code.

3.3. Must FIAs be included on a public list?

According to Article L. 541-1-1 of the Monetary and Financial Code, FIAs must be registered in the sole register of financial intermediaries maintained by ORIAS.
The sole register may be consulted at www.orias.fr.

3.4. Once registered with ORIAS, how can a FIA amend incorrect information about it contained in the sole register of financial intermediaries?

The information published in the sole register of financial intermediaries maintained by ORIAS results from information provided by FIAs upon registration.
A FIA may amend this information either (i) by contacting ORIAS directly or (ii) via the association of which it is a member, providing supporting information where applicable.
The AMF is not authorised to record such changes of information in the sole register.
Where a FIA amends the information about it by contacting ORIAS directly, it must also notify the association to which it belongs within the month preceding the change or, where the change cannot be anticipated, within the following month.

3.5. Can a FIA commission a third party to perform its financial investment advice business in its name and on its behalf?

Except where expressly permitted by regulations, including in particular Article L. 541-1 III of the Monetary and Financial Code, investment advice as defined in Article D. 321-1 5° of the Monetary and Financial Code may be provided only by persons classed as investment services providers authorised to provide such advice, tied agents or FIAs.
There are no provisions allowing any person not having one of these three statuses to provide financial investment advice, even if such a person were acting for and on behalf of a person authorised to provide such a service under an agency agreement.
Any such person would be illegally acting as a FIA, and would therefore be exposed to the penalties laid down in Articles L. 573-9 et seq. of the Monetary and Financial Code.

4. Obligations for FIAs

4.1. When is a FIA 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 a new client upon establishing a relationship with that client, before any letter of engagement is signed, and even if no letter of engagement is subsequently signed.

4.2. At what point is a FIA 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 FIA 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 FIA 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 FIA to identify the institutions with which it seems to be in this situation.

4.3. What is the amount of the annual contribution payable by a FIA to the AMF?

Under Articles L. 621-5-3 II 4° and D. 621-29 of the Monetary and Financial Code, all FIAs must pay a contribution of €450 per annum to the AMF.
Contributions are not reduced on a time proportion basis: a professional acquiring (or giving up) FIA status in the course of a year must still pay the full amount of €450.

The contribution becomes payable in a given year when the individual or legal entity joins a professional association of FIAs and is registered as such in the sole register of financial intermediaries maintained by ORIAS.
This means that if, in the course of a given year:

- an individual authorised as a FIA becomes a legal entity authorised as a FIA, or
- a legal entity authorised as a FIA is absorbed by an organisation not authorised as a FIA and the absorbing entity continues to provide financial investment advice after itself adopting FIA status,

two distinct entities have been registered as FIAs in the course of the year. As such, each entity is liable for the fixed contribution of €450.
The invoice is sent out by registered post and payable to the AMF's accountant within 30 days of receipt.
In the event of non-payment within the stipulated timescales, the amount due may be increased in accordance with Article 621-5-4 of the Monetary and Financial Code.

4.4. Are FIAs subject to the rules on benefits and remuneration?

Yes. FIAs are subject to the provisions on benefits and remuneration laid down in Article 325-6 of the AMF General Regulation.
See also AMF Position-recommendation 2013-10, "Remuneration and benefits received as part of the marketing and discretionary management of financial instruments".

4.5. In order to fulfil its obligations relating to the prevention of money laundering and of terrorist financing, must the FIA 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 FIA 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 FIA 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 FIA 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 FIA 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 FIA's abovementioned due diligence requirements to be deemed to be fulfilled.

4.6. Can a FIA use the AMF's logo and/or claim to be authorised by the AMF?

FIAs are forbidden from using the AMF's logo on any medium, such as websites, headed stationery or marketing materials. Such use could mislead the public as to the relationship between the adviser in question and the AMF.
Furthermore, FIAs must not present themselves as being authorised by the AMF: although they are members of an AMF-authorised professional association, FIAs are not themselves authorised by the AMF.

5. Sanctions

5.1. What sanctions may be incurred by a FIA that fails to comply with its obligations? What sanctions may be incurred by a person illegally operating as a FIA?

Under Article L. 621-17 of the Monetary and Financial Code, the AMF may impose penalties upon FIAs for any violation of the laws, regulations and professional obligations that concern them.

In particular, the Enforcement Committee may issue a FIA with a warning, a reprimand, a temporary or permanent ban on operating as a FIA, or a financial penalty not exceeding €100 million or ten times the amount of any profits made.
Furthermore, any service provider providing financial investment advice services without meeting the eligibility criteria applicable to FIAs and any FIA that has received funds from its clients may incur the criminal sanctions referred to in Articles L. 573-9 et seq. of the Monetary and Financial Code, in particular five years in prison and a fine of €375,000.

6. FIAs and direct marketing of banking or financial products

6.1. Can a FIA 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 FIA in order to offer its advice services:
- the employees of the FIA,
- any natural person empowered for this purpose by the FIA,
- regarding FIAs established as legal entities, the natural persons empowered to manage or administrate this entity.

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

Furthermore, any individual appointed by a FIA to carry out direct marketing of banking or financial services in order to offer the advice services provided by the latter may not, under the terms of such appointment, himself provide advice services for and on behalf of the FIA (see question 3.5).

6.2. What are the obligations of the FIA, of its employees or of its representatives towards the prospect when they perform direct marketing for an advice service?

The FIA, 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[2]. This information must be provided before the service provision contract is signed with the client;

[2] 1º The name and business address of the individual engaged in direct marketing;
2º 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;
3º 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;
4º 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;

- attach to the contract a form facilitating the exercise of the right to withdraw within the 14-day cooling-off period.

6.3. Can the person appointed by a FIA for direct marketing for the advice activity sign the advice service provision contract with the prospect?

Before providing any advice, the FIA 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 FIA.

Bearing in mind the intuitu personae nature of the advice service, Article 325-4 of the AMF General Regulation does not authorise the FIA 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.

5º 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;
6º 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;
7º The law applicable to the pre-contractual relations and the contract, and the existence of any choice-of-jurisdiction clause.