

## AMF position - recommendation

### A Guide to drafting CIS marketing materials and distributing CIS – DOC-2011-24

Background regulations: Article L.533-12 of the Monetary and Financial Code and Articles 314-10 to 314-17 and Article 319-5 of the AMF General Regulation

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**Unless recommendations are specifically identified as such, the doctrinal elements contained in this guide are positions.**

This guide does not aim at compiling all the applicable rules, positions and recommendations for creating marketing materials promoting collective investment schemes (CIS). It is the duty of the asset management companies to identify these rules in the applicable regulations and to make sure that they are being complied with.

A few years ago, the *Autorité des Marchés Financiers* (AMF) initiated a process aimed at identifying the practices governing the drafting of marketing materials promoting financial instruments. The AMF's final objective is to refocus its action on monitoring marketing.

In this context, this guide aims to specify how to interpret the regulation of all CIS approved for marketing in France (UCTS, AIFs, etc.), whether they be governed by French Law or European Law. Accordingly, this guide lists all the encountered practices considered incompatible with the regulation and those who contribute to improving the quality of information<sup>1</sup>.

For each encountered practice, it is stipulated whether the positions contained hereinafter are applicable to marketing materials aimed at non-professional customers, at professional customers as set forth in MIFID, or at both types of customers. The asset management companies will determine whether or not they need to apply the positions relating to non-professional customers to their professional customers.

The AMF recalls that the French Asset Management Association also wrote a guide on all the questions and answers about the impact of the Mifid directive on the information documents of UCITS and AIFs aimed at non-professional customers.

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<sup>1</sup> This guide is being completed on a regular basis.

### **1. Distributing a CIS (OPC) before it is granted approval (or a visa) and/or its marketing authorisation**

Target customers: All customers, either professional or non-professional, as set forth in Mifid

Pursuant to articles 411-9, 411-14, 422-10, 422-15, 422-84 and 422-126 of the AMF General Regulation, CIS can be marketed only after they are granted regulatory approval, a visa or a marketing authorisation. The asset management company shall ensure that any reference to a CIS in a press article, an advertisement or press release on the internet or on any other medium is published only after the AMF has granted approval or given its marketing authorisation for the said CIS.

Publishing an article in the print media or in any other medium that would prejudice the approval process for a CIS (or its visa or marketing authorisation) is a breach of the regulation.

### **2. Using the name of the regulator in a promotional material**

Target customers: All customers, either professional or non-professional, as set forth in Mifid

Pursuant to Article 314-17 of the AMF general regulation, *“the information shall not use the name of any competent authority in such a way that would indicate or suggest endorsement or approval by that authority of the products or services of the investment firm, except when mandatory statement is required.”*

AMF approval, visa or authorisation for the creation of a CIS cannot be used as a sales argument for the product.

Accordingly, for instance, the advertising slogan “Product complying with the AMF management requirements” cannot be accepted.

### **3. General principles as regards the making of a promotional material**

Target customers: all clients, either professional or non-professional, as set forth in Mifid

Investment service providers shall ensure that all the information, including promotional information, aimed at non-professional customers, or that could eventually reach such customers, meet the requirements for “clear, accurate and non-misleading information”, regardless of the chosen means of communication, which includes social media<sup>2</sup>. Consequently, it is the duty of the management company and of the product supplier respectively to ensure that all the information disseminated complies with the provisions set forth in paragraph I of Article L. 533-12 of the Monetary and Financial Code.

The requirements for clear, accurate and non-misleading information need to be assessed for any information addressed to the customers. These requirements are also applicable to any information document aimed at presenting a product to intermediaries, which are themselves intended to inform end customers, such as, for instance, all the salesperson training materials. They also apply to information that is published by a third party on social media and relayed by the asset management company or the distributor. In this case, the information relayed by the asset management company or the distributor shall invoke the liability of the asset management company or, where applicable, the distributor to the same degree as if said parties were the initiator.

However, this does not require that the asset management company display all the information needed for making an information decision in all its documents. Indeed, the level of accuracy of the information depends on the nature of the document.

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<sup>2</sup> The term social media is understood to include all technologies which enable social interaction and the creation of collaborative content online, such as blogs and social networks (Twitter, LinkedIn, Facebook, etc.), discussion forums and more recent versions of the latter (mobile applications, for example). This list is not exhaustive.

Accordingly, it cannot possibly be assumed that an individual communication does meet these requirements when the promotional material addressed to customers or likely to be addressed to customers are clear, accurate and non-misleading when brought altogether.

Conversely, when a financial product is being presented in several documents (or several messages for publications on social media), 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 features of the product, as soon as regulatory provisions, and notably the principle of balance, are being complied with.

For instance, a marketing material promoting an equity fund which briefly draws the attention of investors to the risks relating to the management strategy that will be implemented is not misleading insofar as the presentation is balanced, though not exhaustive.

When the prospectus relating to a foreign UCITS or AIF is not translated into French, it should be specified in very visible characters in the documents promoting the aforementioned product that the prospectus is not available in French.

In accordance with Article 411-129 and III of Article 421-26 of the AMF General Regulation, the person marketing units or shares in UCITS or AIFs or units or shares in compartments of UCITS or AIFs whose articles of association, regulation or any other investor information document is written in a usual financial language other than French must, in the conditions described in Article L. 214.23-1 or L. 214-25 of the Monetary and Financial Code, direct such marketing to professional investors as defined in Article D. 533-11 of the Monetary and Financial Code. The person must also ensure that the investor understands the language used.

#### The Agreement between the developer and the distributor

Pursuant to Article L.533-13-1 of the Monetary and Financial Code<sup>3</sup>, the distributor shall lay down in writing, together with the management company, an agreement under which the management company undertakes to review that the advertising documents prepared by the distributor before their dissemination comply with the provisions of the articles.

This agreement shall provide that the management company transmits to the distributor *“the information required to assess all the financial features of the financial instruments”* it was commissioned to distribute.

The quality of the information transmitted to the distributor by the management company is indeed an indispensable requirement to reduce the risks linked to misleading marketing by the distributor and, consequently, the risks that the management company and the distributor be held liable for it.

However, it was found that, sometimes, management companies refer to their distributor to adapt the promotional material they send to the distributor to the different marketing situations (for instance, by forwarding information aimed at professional customers while marketing is aimed at non-professional customers or by forwarding, for information purposes, past performance statistics based on periods of less than twelve months and by leaving it to the distributor to release only the past performance statistics that comply with the regulatory requirements, etc...) .

Such practices do necessarily put the management company at risk of facing a direct legal challenge in case of misleading marketing by the distributor. Accordingly, the management company shall ensure that the information it sends to its distributors in order to allow them to create their own marketing materials

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<sup>3</sup> Whose application conditions are provided for in Article R. 533-15 and R. 533-16 of the Monetary and Financial Code.

which will be disseminated to investors comply with the same requirements as if they were directly aimed at final investors.

### 3.1 Balance of the information

Target customers: all professional and non-professional customers as defined in Mifid.

#### 3.1.1. Accuracy of the information

Target customers: non-professional customers, as defined in Mifid

The ability to assess the accuracy of information depends on a balanced presentation of the different features of the financial instrument. These risks shall be pointed out in a similar way as the benefits. The space dedicated to less favourable features in the documents and the typography used help assess the accuracy of information.

In order to comply with Article 314-11 of the AMF General Regulation with regard to the accuracy of information, the following practices shall be complied with:

- the risks linked to the financial product shall not be presented in a footnote while the benefits are featured in the document's body;
- advertising slogans shall not be simplified by referring to one positive characteristic of the product only, i.e. the advertising slogan "Reap the benefits of the equity markets" for a structured fund while the performance offered is an average of the market performances over a period of years ;
- an advertising insert in a financial newspaper shall not bring forward high and quantified yields that may be returned by a structured fund while referring to a capital risk at maturity in the background only;
- a UCITS or an AIF offering exposure to commodities through a futures index shall not suggest in its communication that it directly replicates the performances of the underlying market (indeed, a commodity futures index does not necessarily reflect the price movements of the underlying commodities) ;
- for a real estate fund (SCPI), subscription on credit shall not be proposed without mentioning the risk borne by the partner if the proceeds derived from the sale of the units and the dividends are not enough to repay the whole credit ;
- An advertising slogan shall not juxtapose, in a simplistic manner, the concepts of "performance" and "security". (Indeed, since preserving the capital can only be achieved to the detriment of the performance, which costs money, juxtaposing the notions of "performance" and "security", or any similar notion, without additional explanatory notes shall not be permitted);
- A document promoting an ETF ("tracker") shall not refer to the reduced fees linked to this type of products as an advantage without specifying that the financial intermediary nonetheless charges transaction fees;
- A document that promotes an index fund which aims at replicating the performance of an index using leveraged investment strategies (which offers a leverage effect, i.e. a market exposure exceeding 100% of the asset's value) or short investment strategies (which allows investors to take a reverse position in the market) shall specify clearly that this objective can only be achieved at the close of the trading session. Indeed, this objective is no longer achievable on a longer observation period.
- The investment period of an index fund which aim to replicate the performance of a short equity strategy index is different from that of an index fund which aim to replicate the performance of a long equity strategy index and shall not be set at five years.
- In the presentation of a leveraged employee investment undertaking, the discount shall not be presented as a benefit insofar as it is traded in exchange for the guarantee and formula offered to the investors (just like a part of the performance and dividends).

#### 3.1.2 Clarity of the information

In order to be clear, the information shall be sufficient to help investors understand the main features of the financial instrument they are investing in. Investors need to be able to assess the benefits and risks. The vocabulary used in the presentation of the financial instrument needs to be understood by the target customers.

Pursuant to Article 314-11 of the AMF General Regulation on misleading information, the following practices shall be complied with:

- The features of the product shall not be presented with too much technical vocabulary or jargon to the target customers, detrimental to the clarity of the information;
- The presentation of the financial instrument shall not use ambiguous vocabulary, whose common sense does not match the economic reality of the instrument;
- Marketing materials shall not present an annual performance indicator (20% for instance) along with a formula that creates confusion between past performances and the promise of future profits.
- As regards the capital risk of the marketed CIS, promotional documents shall not only state something like “This CIS is not a capital-protected or guaranteed CIS” instead of stating clearly that “this product poses a risk of capital loss.”

### 3.1.3 Misleading information

Misleading information presupposes willingness to mislead investors by misrepresenting or offering an incomplete presentation of the financial instrument, with the ultimate purpose of promoting the sale of the said financial instrument. Practices aimed at presenting the benefits of the financial product only can also be qualified as misleading practices.

The AMF recalls that misleading commercial practices are forbidden in France.

This may include the publication of misleading advice or false recommendations, whether anonymous or not (on discussion forums, for example), positive or negative advice or recommendations concerning financial products or asset management companies, and even purchasing “likes” on Facebook or “followers” on Twitter.

Pursuant to Article 314-11 of the AMF General Regulation, the following practices shall be complied with:

- The information documents promoting a CIS shall indicate an investment objective, a benchmark indicator and/or a recommended investment period identical to that (or those) indicated in the regulatory documents;
- The name of a CIS whose exposure to the equity markets or any other asset aimed at boosting the performance of the fund is superior to 30% of the asset shall not contain the terms “safe”, “serenity”, “regularity”, which would have investors believe that the fund is not risky;
- Marketing materials promoting a formula CIS shall not base their communication on the distribution of a high annual yield while capital is not guaranteed *in fine*;
- Marketing materials of a formula CIS shall not state a potential final performance of the financial instrument without mentioning the equivalent annual yield;
- Marketing materials promoting a formula fund shall not present a disadvantage as an advantage. For instance, if a structured fund offers an annual final performance of 10% while the CAC 40 index achieves a performance of more than 15% over a similar period, it cannot present the 10% performance objective as an advantage in the marketing material;
- The marketing material compares the performance of a CIS to a benchmark indicator that is measured with dividends not reinvested while the CIS’s performance is measured including the dividends and is supplemented with a clear and explicit reference to the difference in the basis for the calculation of the performance;
- The promotional materials or the management reporting of a CIS compare some elements of the fund’s performance to a benchmark indicator that is identical to the one mentioned in the regulations governing the functioning of the fund. If several benchmark indicators are referred to in the promotional materials, in addition to the one presented in the regulatory documents, they cannot be selected afterwards and the comparison between the fund and these market indicators shall be sustainable;

- Marketing materials promoting a CIS which uses a constant proportion portfolio insurance (a type of management that belongs to the portfolio insurance techniques) shall not suggest that it is possible to achieve “the performance of the equity markets without bearing the associated risk.” It should not be overlooked that exposure to the equity markets may only be partial, or even inexistent if the CIS is invested in monetary assets only.
- The description of a feeder UCITS or AIF investment strategy in a promotional material shall not present only the strategy of the master fund without clearly stipulating that the proposed fund is a feeder fund and, accordingly, that it is invested in the master fund and that its performance can be lower than that of the master fund because of its own management fees;
- Marketing materials promoting an ETF shall not suggest that the latter replicates perfectly the performance of the underlying benchmark index. As long as the market price of the ETF cannot be identical to its net asset value at any time, it should be specified that the ETF aims to replicate the performance of an index and that its market price can be different from its net asset value and from the net asset value of the index. The ETF’s marketing document must comply with AMF position DOC-2013-06 relating to listed funds and other issues related to UCITS;
- The name of the financial instrument shall not include a digit that might lead investors to believe that it is a performance target and/or that the financial instrument is guaranteed. For instance, in the case of private equity funds launched every year and with the same name as those of the previous generation, the word « digit » shall be included in the name of the fund so as to avoid confusion on the period during which the assets are frozen or about the promise of future profit. Roman numerals are authorised on condition that they are not associated with the notion of return. For example, “Formula fund 3” would be bad practice, while “Formula fund V” or Formula fund no. 5” would be acceptable;
- A UCITS or AIF shall not indicate in a promotional material that it aims to achieve absolute performance while the fund implements strategies based on a significant and sustainable directional bias in a single asset class, which means that its performance depends significantly on the price movements in the markets, either upward or downward;
- A UCITS or AIF shall not indicate a quantified performance objective in a promotional material without referring to the recommended investment period or featuring an insert warning investors that the objective is based on the accomplishment of market assumptions set by the asset management company and that it can by no means be considered a guarantee of future performance;
- A formula UCITS or AIF investing in indices or baskets of shares with a dividend waiver shall indicate that it does not take into account the dividends waived in the calculation of its final performance. When the proposed formula is based on indexes or baskets with selection criteria for the underlying assets comprising them which are linked to the level of dividends distributed, a communication that would highlight this selection policy and the dividend waiver may be considered as misleading. In that respect, any communication that would emphasize on the high dividend distribution rate and that would have investors believe that these dividends directly contribute to the final performance of the fund shall be avoided;
- The Synthetic Risk and Reward Indicator indicated in the marketing material shall be identical to the one indicated in the key investor information document.
- Where an indicator is measured including the dividends or coupons reinvested, the performance of the UCITS or AIF shall systematically be compared to it in order to avoid providing investors with misleading information.

Should the indicator exclude dividends, the information provided on the bias arising from the comparison between the performance achieved by the indicator and that of the fund must be as clear as possible.

The AMF recommends to asset management companies that manage funds whose investment objective is based on a benchmark index to produce reports for investors, allowing them to assess how closely the fund tracks its benchmark indicators. These reports must at least include the following indicators:

- The comparative performances (compared in a chart and a table),
- The portfolio's volatility compared with the volatility of the index, and
- The annualised standard deviation of the fund's performances relative to its benchmark index (or tracking error).

### 3.2 Communication on performances

Target customers: non-professional customers, as set forth in Mifid

#### 3.2.1 Indicating past performances is not the core issue of the information disseminated

This regulation basically rules out any communication that would focus on the product performance only. When the performance of the financial instrument stands as given information in the same way and on the same level as other features of the instrument, one can consider that it is not the core issue of the information communicated. In such a situation, particular attention should be paid to the typography and colours used for communicating on performances in order to avoid that this piece of information be brought to the forefront.

Indication of the performance can be considered as the core issue of the information when:

- The size of the font for presenting the data relating to the performance is disproportionate compared to the font for presenting the other features of the financial instrument;
- The main content of the advertising document is a curve which compares the performance of the UCITS or AIF with that of the market index;

A advertising insert which comprises many graphs in the background which would have investors believe that the fund systematically achieves a positive performance: stylised performance graphs that do not display the abscissa and ordinate axes and which do not be representative of the fund's real performance, arrows systematically pointing up, and figures always positive (+30, +100) can be considered as focusing mainly on performance.

#### 3.2.2 Indicating the reference period and the source of data

This information shall be provided in a legible manner in the document.

If the information on the reference period chosen for measuring the performance and the source of the data used are mentioned in a footnote or if the use of a small font size makes it difficult to read the document, the said document can be considered as non-compliant.

Conversely, if the font size does make it possible to read the information, mentioning the piece of information in a footnote is not such as to call into question compliance with Article 314-13 of the AMF general regulation.

#### 3.2.3 Reference to past performances

This reference, which is provided for in the regulation, aims to draw investor attention to the fact that past performances are not a reliable indicator of future performance. Accordingly, it is important that it features prominently to fully play its role. Consequently, it is essential to look at the typography used for writing the information and its place in the document to determine whether or not the provisions of Article 314-13 4° are being complied with.

Using a small font size or a footnote that would make it difficult to read the warning is not compliant with the regulation.

Writing the warning in colour makes it more legible.

## 4. Communication on financial indexes and strategy indexes

Target customers: All customers, either professional or non-professional, as set forth in Mifid.

### 4.1 Indexes aimed at generating a specific behaviour or an outperformance



As soon as an index has typical features such as the existence of an intrinsic systematic strategy aimed at inducing a specific behaviour compared to its benchmark market or at outperforming it, the requirements for “clear, accurate and non-misleading” information requires to ensure that all these elements are communicated to the investors:

- By labelling such indexes “strategy index”;
- By giving details about the main elements of the index rules aimed at generating this bias or this outperformance.

The intrinsic strategy of a strategic index relies on systematic allocation. The method for determining the components of the index does not rely on a discretionary bias.

When a UCITS or AIF replicates (or is backed to) the performance of an index which includes elements of discretion for choosing the assets that are part of it, the term « index » cannot be used. Terms like “tactical allocation” or “proprietary strategy” shall be used instead.

For French formula funds, structured UCITS<sup>4</sup> and equivalent foreign AIFs, if the discretion is exercised by an entity that is not regulated for the provision of portfolio management services for third parties, or UCITS or AIF management, the following warning must appear and be clearly visible (in other words it must appear in an inset and in bold) at the start of the commercial information:

"The change in the product's value depends, in whole or in part, on the discretionary decisions of [name of entity], which is not an entity approved for the management of UCITS or AIFs, or for the provision of portfolio management services for third parties".

#### 4.2 Special methods for calculating the financial index or the strategy index

When marketing materials promote a financial index, it should be ensured that this information does not eclipse some key elements of the index. Particularly, some indexes do not reflect the total simulated performance of a specific investment in their components. This can be the case where:

- The performance of the index is measured without taking into account the reinvestment of the dividends paid out by the underlying assets;
- The performance measured is a performance that is said to be generating excess return;
- The acquisition and sale of some components required by index rebalancing are recorded at different prices (thereby simulating a buy/sell price range)
- The performance is calculated including a funding margin (for instance : paying out the interests based on a zero-risk interest rate by deducting a fixed cost expressed in basis points );
- The performance is measured including the execution cost of some transactions;
- The performance is measured including the total index operating costs, a “synthetic” dividend, or other deductions or equivalent costs (for instance : the performance of the index is deflated by a fixed percentage or by a pro rata temporis percentage at each reporting date)

Failing to mention such costs in the information documents increases the risk that information may not be “accurate, clear and non-misleading.”

The following elements are included in the information disseminated:

- mentioning that the index does not reflect the total performance of its underlying assets;
- Giving details on the applicable rules that might result in the index value being reduced compared to the aforementioned total performance (these rules shall naturally be predetermined, failing which, the risks that the index value might be manipulated are greatly increased);

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<sup>4</sup> Structured UCITS are referred to in Article 36 of Commission Regulation (EU) No. 583/2010 of 1 July 2010 implementing directive 2009/65/EC.

- elements which allow the customer to assess the impact of these performance deductions on the total performance (for instance, referring to a website which compares the index to the index featuring the total performance, or the impact of these “costs” over a pertinent past period, may help meet this requirement).

#### 4.3 Using the term “index” appropriately: available information on the index or on the strategy index

The information provided to investors is not clear, accurate and is misleading if the term “index” is used whereas it does not offer the guarantee usually expected for the making and dissemination of an index. This requires notably that adapted information, either on the general rules for developing and managing the index or on the index composition, be easily accessible or disseminated to investors or potential prospects.

#### 4.4 Information on potential conflicts of interest

Measuring the value of the assets comprising an index and disseminating them require two successive stages:

- The first stage consists of setting a list of the components and of their relative weight;
- The second stage consists of measuring the value of the index based on the predetermined rules for calculating the index.

These two stages are likely to give rise to conflicts of interests. In particular, the most sensitive situation identified as regards a CIS is where a UCITS or AIF is exposed to an index that is measured, released and disseminated by several entities owned by a single financial firm via futures financial instruments and when the counterparty to the futures financial instrument is managed by the same firm.

The risk is further increased where the asset management company is an entity of the concerned financial firm. In this case, it is essential that investors be clearly informed about potential conflicts of interests.

### 5. Order execution policy for formula UCITS or AIFs

Target customers: All customers, either professional or non-professional, as set forth in Mifid.

Pursuant to Article L. 533-18 of the Monetary and Financial Code, the asset management company which manages a formula UCITS or AIF and executes orders resulting from its investment decisions, implements and conducts an order-execution policy.

This order execution policy specifies in particular the modalities agreed upon by the asset management company in choosing the counterparty, or counterparties, to the structured fund party to the derivatives contract, or derivatives contracts, which will provide the formula promised to investors.

The asset management company is allowed to solicit bids from several competing counterparties, according to a formal, traceable and controllable procedure, and to choose the counterparty which will offer the UCITS or AIF the best result based on predetermined factors. Usually, it is the most natural procedure to prove that the choice of the asset management company is the best possible.

However, this does not rule out the possibility for the asset management company to commission, as part of its order execution policy, a single counterparty to the derivatives contract entered into by its formula UCITS or AIF without systematic calls for competition, as long as it considers that this counterparty offers the best result possible for its transactions. This counterparty can be an entity belonging to the asset management company’s group.

In all cases, the asset management company is responsible for the modalities for choosing its counterparties, as provided for in its execution policy.

Such a responsibility shall lead the asset management company to take into account, as of the structuring of the financial instrument, the modalities for marketing the said instrument and the type of investors targeted, including when the latter invests in unit-linked life insurance contracts.

Where the formula UCITS or AIF is mainly marketed by the asset management company itself, or by entities which do not have a sufficient degree of autonomy from the asset management company, to non-professional investors, i.e. investors to whom the best result possible is based on a total cost, failure to launch calls for competition between several counterparties does not allow ensuring that the product has an optimised cost structure for investors.

That is why, when no prior call for competition between several counterparties has been launched, asset management companies which manage structured funds aimed at non-professional investors are required to give priority to entities that enjoy real autonomy from the asset management company and from the chosen counterparty as regards the choice of the financial instruments it deals. This allows these autonomous entities to refer the customers to other financial instruments, should they consider that the cost structure of the formula UCITS or AIF does not serve their best interests.

## 6. Marketing rules governing index UCITS or AIFs

Target customers: All customers, either professional or non-professional, as defined in Mifid.

Any UCITS or AIF which is described as an “index” fund in a promotional material shall display its ex post tracking error, or the tracking error target for newly created funds which have not operated for a sufficient time to display their tracking error, i.e. the standard deviation between the performance collective investment of the fund and that of the index over a reference period. The latter shall not exceed one of the two following limits:

- 1° 1 % or, if it is higher, 5 % of the index volatility;
- 2° 2 % or, if it is higher, 15 % of the index volatility.

The limitation provided for in 2° does not apply to UCITS or AIFs that meet at least one of the following conditions:

- a) The financial instruments comprising the index are eligible for trading on markets that have different closing times;
- b) The financial instruments comprising the index are eligible for trading on markets on which the net asset value of the UCITS or AIF is released outside trading days;
- c) The index comprises a significant percentage of financial instruments whose trading value is reported in multiple currencies;
- d) The time at which the UCITS or AIF value is being determined is different from the time at which the index value is being determined;
- e) The index is reported in a currency that differs from the reporting currency of the UCITS or AIF net asset value;
- f) The index is synthetically replicated through derivative products.

The ex post tracking error is measured as follows:

$$ES = \sqrt{52} \sqrt{\frac{1}{N-1} \sum_{s=1}^N (R_s - \bar{R})^2}$$

with:

- $R_s$ : The performance tracking error in week  $s$  between the UCITS or AIF and its benchmark index, calculated from the fluctuations in the CIS net asset value and the index value,

$$\text{That is } R_s = \ln\left(\frac{NAV\_fund_s}{NAV\_fund_{s-1}}\right) - \ln\left(\frac{index_s}{index_{s-1}}\right)$$

$$\bullet \bar{R} = \frac{1}{N} \sum_{S=1}^N R_S, \text{ the average tracking error over a twelve-month period } (N = 52 \text{ weeks}).$$

The ex post tracking error complies with the calculation method provided for in the recommendations for the standardisation of the calculation methods of the tracking error published by the French Asset Management Association.

When, in application of articles D. 214-22-1 II and D. 214-32-31 II. of the Monetary and Financial Code, units or shares of the UCITS or AIF are admitted to trading on a regulated market, the marketing documents specify that the following operating rules, determined by [Euronext Paris SA], apply: reservation thresholds are set by applying a variation percentage of [X%] on both sides of the indicative Net Asset Value or iNAV of the fund, published by [Euronext Paris SA] and updated with an estimate during the session according to any index variations [X]:

The “Market makers” ensure that the market price of the fund units does not deviate by more than [X%] on either side of the indicative net asset value of the UCITS in order to remain within the reservation thresholds set by [Euronext Paris SA].

## **7. Distributing funds using a constant proportion portfolio insurance strategy (a type of management that belongs to the portfolio insurance techniques)**

Target customers: non-professional clients, as set forth in Mifid

- 7.1 Funds using constant proportion portfolio insurance strategy or any other assimilated strategies with maturity protections or guarantees or permanent protections or guarantees

### Performance scenarios

Promotional documents shall feature several scenarios that graphically illustrate the algorithm chosen in respect of the constant proportion portfolio insurance strategy, or any other similar strategy, (a type of management that belongs to the portfolio insurance techniques).

Just like for formula UCITS or AIFs, this scenario, or these scenarios, aims at, or aim at, illustrating the following:

- How the strategy works in the context of slightly unfavourable market conditions,
- The mechanisms specific to the strategy;
- The situations in which these mechanisms have a slightly unfavourable impact on the final performance.

The examples used in the conception of the scenario(s) are based on reasonable and prudent assumptions about future price developments and market conditions.

Some elements appear to be essential for investors to understand properly the mechanisms of a Constant Proportion Portfolio Insurance strategy and may need to be specified.

Accordingly, the variables that best describe such types of management and which could feature on the illustrations are (other variables may be added to the description):

- The dynamic asset prices,
- The fund's exposure to the dynamic assets expressed in percentage,
- The temporal evolution of the guaranteed net asset value,
- The temporal evolution of the UCITS or AIF net asset value.

Unfavourable situation:

Recommendation:

It is recommended that the unfavourable scenario be presented first. This scenario aims to illustrate the most harmful events for investors and highlights the risk linked to the portfolio being entirely invested in monetary assets.

Accordingly, in the case of a fund using a classic Constant Proportion Portfolio Insurance strategy, the scenario could feature:

- A decline in the financial markets that is sharp enough to prompt the UCITS or AIF to reduce its exposure to the dynamic assets;
- In a second stage, a rebound of the aforementioned dynamic assets in which the fund cannot take part;
- The possibility for the UCITS or AIF to be entirely invested in monetary assets if its exposure to dynamic assets reaches a certain threshold and if the strategy allows such a move;

The objective is to have investors understand that they cannot reap the full benefits of a market rebound and the example shows to which extent the performance of the UCITS or AIF depends on the path chosen.

For instance, after a significant decline in the dynamic asset price, the UCITS or AIF will be forced to cut its exposure to these assets progressively until it is entirely invested in monetary assets. At this point, investors will not be able to benefit from a market rebound and the CIS net asset value will converge towards the guaranteed net asset value.

Conversely, if the fund structure prevents it from being entirely invested in monetary assets, the unfavourable scenario will have to be adapted in consequence. This means not letting it be understood that the investment strategy can avoid all risk of monetisation, in view of the very low residual exposure to risky assets in the event of a sharp correction in their value.

Favourable situation:

The following scenario looks to describe a situation in which investors can reap most of the benefits of the strategy implemented:

- The scenario features a bullish financial market which allow investors to benefit from outperforming dynamic assets,
- The performance of these dynamic assets shall be realistic and in line with the current market conditions.

Recommendation:

A favourable scenario may feature a constant increase in the risky asset price, in proportions consistent with its performance history, which would explain the good performance of the UCITS or AIF. The fund's net asset value may then be much higher than the guaranteed net asset value.

However, given the complexity of the strategies implemented, the message shall be limited to essential information when it comes to describing the basic mechanisms. It shall not mislead investors.

For instance, combining high volatility and a bullish market would suggest wrongly that volatility chiefly contributes to the performance of such UCITS or AIF.

In that respect, when a strategy provides ongoing capital protection (for instance a protection which, at all times, amounts to 90% of the reference net asset value, adjusted through a ratchet effect), the fund is able to demonstrate that this guarantee contributes to reducing exposure to risky assets and that, accordingly, the performance will be lower than when contracting a simple maturity guarantee.

Intermediate scenario:

The 'intermediate' nature cannot possibly be defined by a favourable scenario slightly worsened, in which the financial markets are slightly bullish. Indeed, Constant Proportion Portfolio Insurance strategies feature disadvantages which are inherent in their sophisticated structure and which must be explained to investors. Such a scenario would then be too optimistic and could eclipse such disadvantages.

Recommendation:

It is recommended to introduce the intermediate scenario as a scenario offering a “disappointing performance” that will involve relevant market distortions in order to fully explain the limits of the Constant Proportion Portfolio Insurance strategies, such as the following:

- A decline in the value of the dynamic assets that leads to changing exposure to these assets, in order to show the imperfections of the adjustment mechanism,
- Highly volatile dynamic assets fuelling unstable exposure,
- A constant, quasi-money return on the dynamic assets,
- etc.

For instance, a fund using a Constant Proportion Portfolio Insurance strategy that offers capital guarantee upon maturity may involve a sudden market decline in the first days of its term that could ultimately result in its exposure to risky assets being adjusted. Time remaining until maturity may allow restoring exposure to these assets, which will ultimately provide investors with low returns.

However, the intermediate scenario strongly depends on the features of the management strategy implemented and particular attention should be paid to the way it is built.

When the investment strategy implemented in a given time period is systematically extended, the scenarios shall reveal the existence and impact of this automatic extension.

Moreover, the scenarios on the performance of the structured UCITS or AIF should be accompanied by a text explaining the advantages and disadvantages of the strategy in the promotional material. This explanation aims to help investors understand the advantages and disadvantages of the proposed strategy.

➤ Multiple and simultaneous guarantees

Providing multiple and simultaneous guarantees or increasing the fund's hedging level during its term provides additional protection to the capital or performance. However, this may give rise to an additional management requirement which may limit exposure to risky assets.

➤ Lack of formal external guarantee

When the UCITS or AIF is structured in such a way as to preserve the principal at maturity but is not guaranteed by a depositary, a credit institution or an investment firm (pursuant to the provisions of Articles R. 214-19 and R. 214-32-28 of the Monetary and Financial Code), the lack of guarantee is a disadvantage whose consequences shall be explained.

See position DOC-2013-12 on the requirement to offer a guarantee (on formula or capital, depending on the case) for structured UCITS and AIFs, “guaranteed” UCITS and AIFs and structured debt securities issued by special purpose vehicles and marketed to the general public.

➤ The risk that the CIS may be entirely invested in monetary assets

The risk that the fund may be invested in monetary assets only, which consists of cutting the fund's exposure to the performance of the risky assets totally and definitively, implies that investors waive their rights to benefit from a rebound in these risky assets.

➤ Partial participation in the performance of the risky assets

The structure adopted entails the risk of participating only partially, and not totally, in the performance of the risky assets.

➤ Guarantee extension

Where the investment strategy is implemented in a given time period, and systematically extended, the impact of the systematic extension process on the risk profile of the UCITS or AIF shall be listed.

Accordingly, a UCITS or AIF which implements a Constant Proportion Portfolio Insurance strategy aimed at preserving the capital with a one-year objective and that is automatically extended sees its risk level increasing each time the strategy is extended.

➤ Systematic structured funds

Where some specific market conditions have a particularly negative or positive impact on the behaviour of the structured fund, these situations shall be identified and stipulated.

➤ Leverage effect and composition of the risky asset class

Constant Proportion Portfolio Insurance strategies are structured in such a way as to reap the benefits of a leverage effect which offers the possibility to adjust exposure to risky assets and to yield a return.

Adjusting this leverage effect is a direct consequence of the composition of the risky asset class, both for actively managed and passively managed Constant Proportion Portfolio Insurance, where assessing the value of the applicable multiplying factor is required.

The features of the assets chosen to comprise the risky class need to be highlighted in order to fully explain the imperfections of the adjustment mechanism.

Consider some low-liquidity risky assets: in order to adjust the leverage level of the strategy during the term of the fund, an allocation adjustment between the two classes that will lead to liquidating the risky assets is required. The liquidation period can last a long time and, consequently, delay the effective adjustment, thereby making it impossible to meet the management objective.

➤ The impact of volatility on the strategy

The impact of volatility on adjusting allocation between the risky and non-risky asset classes shall be clearly highlighted insofar as the performance achieved by the risky asset class relies heavily on the volatile price movements in the assets comprising it. These volatile price movements can indeed amplify the behaviour of the strategy and, notably, speed up the process through which the fund may be invested in monetary assets.

For instance, an asset class including non-diversified and highly correlated risky assets that would suffer the consequences of sharp price movements on a stressful trading day would have to change substantially its composition. Such changes could result in the fund being invested in monetary assets more quickly.

## **7.2 Funds using a constant proportion portfolio insurance strategy with capital protection or guarantee staggered over time**

UCITS or AIF using a constant proportion portfolio Insurance strategy aim at offering a capital protection and a performance linked to some markets at a given maturity.

Implementing capital protection or guarantee in such funds staggered over time is possible. For instance, it may consist of offering total capital protection to investors after six years and partial participation to a bullish stock market, intermediate protections of the initial investment in the third, fourth and fifth years at levels of 85%, 90% and 95% respectively.

Accordingly, the way such products are managed depends on the different protection or guarantee commitments to be met. Should intermediate guarantees become more demanding than the guarantee offered upon maturity – notably because of the influence of the price movements in interest rates on the

cost of the guarantees – management could prove less effective for investors who are willing to retain their units until maturity.

Marketing these types of products requires that particular attention be paid to information aimed at investors. In that respect, the marketing materials shall be coherent with the opportunities that are truly offered through the diversity of the protections proposed on the one hand, and, on the other hand, with the risk and reward profile of the fund.

In that respect, formulations restricting themselves to highlighting the optimised nature of the management without mentioning the constraints and impact linked to the guarantees shall be avoided. The asset management company may naturally mention, where appropriate, that it uses techniques aimed at minimising the impact of the intermediate guarantees.

Advice to final customers as regard this specific feature of the product and on its risk and reward profile throughout its term shall be enhanced.

## **8. The marketing features of SOFICA**

Target customers: All customers, either professional or non-professional, as set forth in Mifid

### 8.1 Information on backed investments

Some SOFICAs use a mechanism known as “backing”.

Through this mechanism, SOFICAs fund an investment (for instance 100) which can yield returns all throughout the investment period (for instance 10).

At a time known in advance, this investment is usually bought out from the SOFICA at a determined price corresponding to the purchase price 100, minus the returns paid out. The SOFICA does not make any profit on the investment, even when its value has appreciated (for instance 300).

On an economic point of view, the investor will lose the amount of the fees charged on the assets by the SOFICA but will not make any profit.

The promotional material released by the SOFICA shall present this mechanism, the proportion of the assets on which it is backed and specify that the investor will not make any profit on this asset class. They shall also mention whether the backed amount is guaranteed by a bank or not.

### 8.2 Using the term “guaranteed”

SOFICAs may be incorporated as “guaranteed SOFICAs”. The capital guarantee mechanism is ensured by redeeming the shareholder’s shares at a predetermined price after a longer investment period (8 years against 5 years usually) by a financial institution or by a non-financial institution (in that case, a specific warning on the entity’s status is required, which may undermine its capacity to meet its commitment). The term “guaranteed” shall be used for this type of packages only.

Besides, the guaranteed amount net of all expenses, commissions or taxes shall be precisely described.

### 8.3 Communication on success movies and awards

The marketing materials released by film investment funds (SOFICA) cannot refer to success movies, awarded movies or soon-to-be-awarded movies, the names of famous actors and/or actresses that were linked to SOFICAs incorporated in the past. Since these lists are not exhaustive and could lead potential investors to subscribe for units in the SOFICA on the basis of past performances, this type of references in the promotional documents released by the SOFICA waiting to be marketed should be removed.



## **9. The marketing features of real estate funds**

Target customers: All customers, either professional or non professional, as set forth in Mifid

### **9.1 The link between the minimum investment period of taxable real estate fund units and their term**

Investors of taxable real estate fund units have, in counterparty of the tax advantage they've been granted, the obligation to retain their units over a predetermined time period, which may vary, depending on the tax regime. It should be noted that for this type of real estate funds, reselling the unit does not allow transferring the tax advantage and, when reselling takes place before the end of the minimum investment period, investors lose all the tax advantages they were granted when they first subscribed for units in the fund. Consequently, the market for exchanging taxable real estate fund units is almost inexistent.

The marketing materials shall clearly specify that investors shall not consider their investment as liquid before the real estate fund reaches the end of its term (usually between 13 and 15 years for such instruments), to which shall be added the selling time of the buildings. In addition, promoting the secondary market shall be avoided.

### **9.2 Allowing investors to buy real estate fund units on credit**

Instalment loans or interest-only loans for real estate fund units are often proposed to investors, with the revenues paid out by the real estate fund being used to cover the repayments. Should an interest-only loan be proposed, repaying the loan in a single repayment may be covered by the prior sale of the real estate fund's property portfolio.

As regards the use of loans, the marketing materials shall notably draw the investors' attention to the following:

- Given the randomness of the revenues generated by the real estate fund, investors shall not rely on these revenues alone to meet their repayment obligations.
- The term of an interest-only loan aimed at financing taxable real estate fund units is not compatible with the predictable liquidation time periods of the real estate fund, which can last several years. It is recommended that investors stay informed about the maximum time period during which the real estate fund can be liquidated.
- Moreover, should a payment default on the loan granted occur, the real estate fund units may be sold, which may cause a capital loss and/or, in the case of a taxable real estate fund subsidiary, result in the tax advantage being lost.
- Lastly, should the real estate fund units be sold at a discounted price, investors will be required to compensate the possible difference between the capital outstanding (with a view to repay the outstanding part of the loan) and the amount generated by the sale of their units.

### **9.3 Marketing materials for “Malraux” and “Déficit foncier” real estate funds**

Marketing materials for real estate funds offering investors tax reductions or a reduction in their tax base, in relation to the amount of works undertaken (for “Malraux” and “Déficit foncier” real estate funds in particular), must explain clearly and intelligibly the expected effect on taxable capital gains resulting from the sale of real property assets each time that the tax gain is evoked in the first days of its term.

## 10. Marketing specifics for authorised private equity funds

All the marketing materials promoting retail private equity funds, innovation funds and local investment funds which qualify for the tax measures shall feature a warning. This warning shall be displayed in bold and in a box and be worded as follows:

*“Investors’ attention is drawn to the fact that the money you deposited will be blocked for a duration of [X] years, [except in the case of an event qualifying for early release as provided for in the regulation]. The concerned venture capital fund, innovation fund or local investment fund is chiefly invested in non-listed companies that present specific risks.*

*You shall be aware of the risk factors linked to this venture capital fund, innovation fund or local investment fund, described in item “risk profile” of the regulation.*

*Lastly, approval by the AMF does not mean that you will automatically benefit from the different tax schemes presented by the asset management company. This will depend on compliance with certain investment rules, on the time period of your investment and on your personal circumstances.”*

This warning shall be followed by a summary table aimed at helping investors assess the ability of the management company to meet the investment requirements needed to be granted the tax advantage. This table shall be displayed for any approved venture capital fund, innovation fund or local investment fund. In addition to its name and creation date, the table features the percentage of the asset eligible for the quota that was reached at the time the document was last created and the date at which the quota needs to be reached.

As the performance of a private equity fund can be determined only at maturity, marketing materials for such funds in the course of their existence cannot describe successful past investments. These investments are not exhaustive and could encourage the investor to subscribe on that basis. This sort of information can appear in marketing materials for private equity funds only if they also mention investments that have not performed as well.