

## AMF position – recommendation 2010-22 Guidelines regarding the prevention of money laundering and terrorist financing

**Background regulations: Articles L.561-2, L.561-7, L.561-9-I, L.561-10-2 II, L.561-32, L.561-33 and R.561-38 III of the Monetary and Financial Code and articles 315-50, 315-52, 315-55, 315-58, 321-31, 321-48, 321-57, 325-12, 550-9, 550-10, 560-12 et 560-13 of the AMF General Regulation**

The French anti-money laundering and counter terrorist financing (AML/CTF) system was recast with the transposition into French law of European Directive 2005/60/EC, known as the “Third Money Laundering Directive” and its Implementing Directive<sup>1</sup>.

The new regulations, which stem from Order 2009-104 of 30 January 2009 and its implementing measures<sup>2</sup>, are aimed at enhancing the effectiveness of AML/CTF measures. They are based on a dual obligation of vigilance, relying on a risk-based approach and reporting requirements with regard to the financial intelligence unit, Tracfin.

The purpose of these guidelines is to specify the conditions for implementing the legal and regulatory provisions pertaining to the fight against money laundering and terrorist financing, which must be complied with by establishments (hereinafter the professionals) subject to the supervision of the *Autorité des Marchés Financiers*, namely:

- **Asset management companies and management companies** as regards the investment services they provide or the marketing of units or shares in collective investment schemes for which they may or may not act as a manager<sup>2</sup>,
- **Financial investment advisers**,
- Central Security Depositories and securities settlement systems managers.

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<sup>1</sup> Directive 2005/60/EC of 26 October 2006 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing – Directive 2006/70/EC of 1 August 2006 laying down the implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of “politically exposed person” and the technical criteria for simplified customer due diligence procedures and for exemption on the grounds of a financial activity conducted on an occasional or very limited basis.

<sup>2</sup> The regulations currently in force stem from:

- Order 2009-104 of 30 January 2009 on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing,
- Decree 2009-874 of 16 July 2009 for the enforcement of Article L. 561-15-II of the Monetary and Financial Code (“Tax Fraud” Decree)
- Decree 2009-1087 of 2 September 2009 on obligations of vigilance and reporting requirements for the prevention of the use of the financial system for the purposes of money laundering and terrorist financing (“Vigilance and Suspicious Transaction Reporting” Decree).
- Order of 2 September 2009 issued for the purposes of Article R. 561-12 of the Monetary and Financial Code defining the information relating to customer due diligence and the business relationship for the purposes of evaluating the risks of money laundering and terrorist financing.
- Order of 12 November 2009 approving the amendments to Books III and V of the AMF General Regulation.

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1. **The notion of “marketing” shares or units in collective investment schemes (CIS), which is the criteria used to determine whether portfolio management companies or asset management companies are subject to the AML/CTF obligations. The practical consequences are reviewed below.**

Article L. 561-2 of the Monetary and Financial Code imposes AML/CTF obligations on management companies with regard to:

- the investment services listed in Article L. 321-1 of the Monetary and Financial Code;
- the marketing of shares or units in CIS, whether or not they manage the schemes.

The notion of marketing is explained in Article 315-50 of the AMF General Regulation, which stipulates that it relates to marketing conducted by the management company “by itself or through an agent”.

An agent is a person who has the power to act in the name of and on behalf of a principal with which the agent has an agency agreement.

This means that, in addition to situations where it markets CIS shares or units itself and is direct contact with customers, the asset management company is also subject to AML/CTF regulations each time it uses an agent to market CIS shares or units in its name and on its behalf, even though the agent may not be subject to the regulations applying to direct marketing of banking and investment services. This applies to agents located in France or in other countries.

To comply with its AML/CTF obligations, the management company may instruct the agent to fulfil, in its name and on its behalf, according to its instructions and under its supervision, some or all of the applicable statutory and regulatory obligations, particularly with regard to customer due diligence. However, the asset management company must take all necessary steps, particularly with regard to organisational structures, procedures and supervision, to comply with its obligations.

There are two possible situations:

- 1) The agent is not part of the AML/CTF system or does not meet the conditions set out in Article L. 561-7 of the Monetary and Financial Code.

**Position**

The asset management company has the agency agreement stipulate:

- the measures and due diligence that the agent must implement with regard to the prevention of money laundering and terrorist financing and the procedures that the agent must follow, depending on the risk of money laundering and terrorist financing;
- the procedures by which the asset management company receives the information and documents gathered by the agent in its name and on its behalf, or held by it in its capacity as an agent;
- the procedures by which the asset management company supervises the agent and ensures compliance with its obligations.

It is also crucial for the asset management company to make sure that the agent has the necessary information and training to be familiar with and understand the measures that it needs to take in the name of and on behalf of the management company.

2) The agent is one of persons mentioned in points 1° to 6° or in points 12° and 13° of Article L. 561-2 of the Monetary and Financial Code, or engaged in a similar business under foreign law, and the agent is subject to the obligation to prevent money laundering and terrorist financing (e.g. financial investment advisers, investment services providers), under the same conditions set out in Article L. 561-7 of the same Code.

The asset management company establishes the necessary procedures to ensure that the agent submits customer identification information to it immediately and any information about the beneficial owner, where appropriate, along with customer due diligence information and information about the nature of the business relationship. The agent provides the asset management company with copies of the identification documents or any other relevant documents for the asset management company's supervision of the agent immediately upon request.

**Recommendation**

The asset management company may stipulate in a contract the procedures that the agent must use to submit this information and these documents to the asset management company and the asset management company's operating procedures for supervising the due diligence carried out by the agent.

**Position**

On the other hand, when CIS shares or units are marketed through distributors, such as financial investment advisers not engaging in direct marketing, who are not acting as the asset management company's agents, then the asset management company is not subject to the regulations regarding the marketing of CIS shares or units. In this case, and if the distributor is not part of the French anti-money laundering system, or the equivalent system of a European country or third country listed in the Order of 21 July 2006, the depository of the collective investment scheme will have to ensure that the agreement with the said distributor stipulates that the distributor will apply customer identification procedures that are equivalent to those applied in the Member States of the European Union and that it has access to information to identify the beneficial owner (Article R. 561-9 of the Monetary and Financial Code).

**2. Risk-based approach with regard to the prevention of money laundering and terrorist financing**

The risk-based approach determines the extent of the vigilance obligations incumbent upon the relevant professionals. This approach aims to enhance the effectiveness of the prevention of money laundering and terrorist financing by adapting the measures implemented to the level money laundering and terrorist financing risks incurred, and by optimising the resources that these professionals allocate to this fight.

Article L. 561-32 of the Monetary and Financial Code stipulates that the “persons mentioned in Article L. 561-2 establish risk assessment and management systems”, whereas the AMF General Regulation introduces this obligation in Article 315-51 and clarifies it in Article 315-54:

“The portfolio management company shall compile and periodically update a classification of the money laundering and terrorist financing risks involved in the services that it provides in order to establish the systems mentioned in Article 315-51. It shall assess its exposure to these risks in accordance with the terms and conditions under which the services are provided and the characteristics of its customers.

For this purpose, it shall consider the information published by the international body for cooperation and coordination in the prevention of money laundering and by the Minister for the Economy.”

#### **Position**

**Members of personnel involved in the prevention of money laundering and terrorist financing should understand the principles of this approach and how they apply in practical terms to the undertaking that they work for so that they can carry out, with all of the necessary expertise and knowledge, the tasks incumbent upon them that require them to use their judgment. The training and information programme should include this aspect, which is essential for an effective system.**

### **3. Classifying and managing risks with regard to the prevention of money laundering and terrorist financing**

The risk-based approach requires identifying risks, assessing them to classify them by level and then managing them.

Professionals subject to the regulations must therefore **identify** the potential risks and weaknesses with regard to money laundering and terrorist financing that are incurred in their business and, following an in-depth analysis of the risks identified, **classify** them, in concrete form, according to their own assessment of the likelihood of the risks occurring.

Except in cases where the risk levels are set by law (Articles L. 561-4, L. 561-9 II, L. 561-10 and L. 561-10-2 II of the Monetary and Financial Code)<sup>3</sup>, the risk levels are measured and classified according to subjective criteria by the professionals themselves, under their own responsibility and according to their own risk perceptions.

<sup>3</sup> The Monetary and Financial Code lists a number of situations identified as **high-risk** situations:

- Risks related to the customer:
  1. customer is not physically present (Article L. 561-10)
  2. politically exposed person (Articles L. 561-10 and R. 561-18)
- Risks related to the product: Product or transaction favouring anonymity (L. 561-10)
- Risks related to the transaction
  1. Transactions with persons located in a country where legislation and practices are obstacles to the prevention of money laundering and terrorist financing (L. 561-10)
  2. Transactions that are particularly complex, for unusually large amounts, or without any apparent economic justification or lawful purpose (L. 561-10-2 II)
- The Code also lists customers qualified as **low-risk** customers (L. 561-9 II and L. 561-4):
  - customers listed in Article R. 561-15, to wit,
    3. a customer or beneficial owner, as the case may be, who is an authorised person located or having its registered office in France, in another Member State of the European Union or in a third country with equivalent requirements for the prevention of money laundering and terrorist financing<sup>3</sup>.
    4. a customer or beneficial owner that is a listed company whose shares are admitted to trading on at least one regulated market in France or in a State party to the EEA Agreement or in a third country with equivalent financial disclosure requirements to those under European legislation.
    5. a customer or beneficial owner that is a government or a public body, under the terms of the Treaty on European Union, the Treaties instituting the Communities, derivative Community law, the public law of a Member State of the European Union or an international treaty ratified by France, provided it satisfies the following criteria:
      - its identity is accessible to the public, transparent and certain;
      - its activities and financial reporting practices are transparent;
      - it is accountable to a Community institution or to the authorities of a Member State or it is subject to appropriate supervision procedures.
  - When customers engage in an auxiliary financial activity that poses little risk of money laundering or terrorist financing and is directly linked to their main business activity (Article L. 561-4).

The following is a partial list of potentially relevant indicators:

- characteristics of the authorised entity itself:
  - types of services provided (e.g. order reception and transmission, asset management, etc.) or types of transactions offered;
  - business activities (hedge funds, unlisted securities, management of collective real-estate investment schemes and other real estate management services, etc.);
  - types of products offered (UCITS, CIS, venture capital funds, off-shore investment funds, etc.);
  - marketing procedures for products and services (e.g. marketing by the authorised entity or through direct marketing, etc.);
  - procedures for providing services (e.g. remote services, online services, telephone services, etc.);
  - geographical location(s) of the entity (one or more locations, national or international location);
- characteristics of customers and business relationships:
  - types of customers (natural persons or legal entities with more or less complex structures, which may or may not favour anonymity (foundations, trusts, etc.), persons acting on their own account or on behalf of third parties, politically exposed persons, customers who are not physically present;
  - steady customers or occasional customers<sup>4</sup>;
  - customers' occupations or businesses, financial situation and net worth, financial history, etc.
  - amount, type and volume of transactions planned or carried out, origin and destination of the funds;
  - customers' investment patterns;
  - economic justification for the business relationship planned;
  - duration of the current business relationship;
  - use of intermediaries between the customer and the authorised entity;
  - nationality, source of wealth.

The risk analysis and the resulting classification are based on:

- internal information;
  - knowledge of the customer and the business relationship (Articles L. 561-5 and L. 561-6 of the Monetary and Financial Code);
  - the professional's experience with the prevention of money laundering and terrorist financing;
- external information:
  - money laundering and terrorist financing typologies in the relevant sector (e.g. Tracfin annual report, Financial Action Task Force (FATF) document on money laundering and terrorist financing in the securities sector<sup>5</sup>, etc.);
  - information released by national bodies (e.g. Tracfin, supervisory authorities, Ministry for the Economy) and international bodies (e.g. FATF, Egmont Group);
  - contacts with national authorities;
  - experience sharing with other professionals.

The classification must not be static. To ensure that it is relevant over time, it needs to be monitored and, when necessary, updated or revised.

For example, the risk profiles of customers and business relationships based on the professional's knowledge of them at the start of the relationship are likely to be refined over time in line with the customers' behaviour over the course of the relationship. Comparing the customers' planned transactions or executed transactions with their profile helps identify new risk areas, adapt vigilance measures and

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<sup>4</sup> In the case of asset management companies, the notion of "occasional customers" would only apply in very rare cases involving financial investment advice or marketing.

<sup>5</sup> "Money Laundering and Terrorist Financing in the Securities Sector" available on the web at: <http://www.fatf-gafi.org/dataoecd/32/31/43948586.pdf>

detect anomalies that are likely to result in a suspicious transaction report to the financial intelligence unit, Tracfin (see “*Guidelines on the obligation to report suspicious transactions to TRACFIN*”).

Several examples of money laundering and terrorist financing typologies that could require filing a suspicious transaction report with Tracfin can be found in **Annex**. It is a partial list and other cases may be presented to illustrate the variety of risks incurred by management companies and financial investment advisers.

#### **4. Managing money laundering and terrorist financing risks**

Managing money laundering and terrorist financing risks requires implementation of adequate resources, internal procedures and audits for the various risk levels identified.

Risk management includes internal procedures for evaluating, classifying, monitoring and managing risks.

##### **Position**

**These procedures should make it possible to track changes in the identified risks, to re-evaluate them on a regular basis and to identify any material changes affecting them or any new risks.**

As a result:

- Implementing these procedures should make it possible to limit potential money laundering and terrorist financing risks identified as part of the risk classification process. The policy for accepting new customers, for example, could require approval of a supervisor or even a member of senior management in high-risk cases. Such approval is mandatory for the persons mentioned in Article R. 561-18 of the Monetary and Financial Code. The internal procedures may also call for the usefulness of the information obtained from customer due diligence to be assessed.

- As part of his tasks, the compliance and internal control officer must in particular ensure compliance with the obligations with regard to the prevention of money laundering and terrorist financing, make sure that due diligence is performed and supervise and assess the adequacy and effectiveness of the system in place.

- The systems for classifying and managing risks must enable the authorised entity to comply with its obligations. They must be tailored to the specific features of the entity, such as its structure, size, organisation, resources, work force and risk factors. No particular methodology or system is imposed. Authorised entities must determine their own risk levels and manage their risks effectively using appropriate procedures and in keeping with their individual characteristics.

The AMF will verify that the system for identifying, measuring and managing money laundering and terrorist financing risks, along with the controls implemented, are appropriate for the business activity of each authorised professional and that they comply with the principles of good practice and prudence.

#### **5. Appointing a member of management to be responsible for implementing the AML/CTF system stipulated in Article L. 561-32 of the Monetary and Financial Code**

Article 315-52 of the AMF General Regulation stipulates that the person appointed to be responsible for implementing the AML/CTF system stipulated in Article L. 561-32 of the Monetary and Financial Code must be a member of management.

##### **Definition of a member of management**

A member of management means:

- In the case of asset management companies, a “senior manager” who is a natural person, as defined in Article 312-6 of the AMF General Regulation, to wit:
  - o either a company officer with the power to represent the company in its dealings with third parties;
  - o or the chairman of the board of directors or a person specifically empowered by the company's governing bodies or bylaws to direct the company and determine its policies.
- If a financial investment adviser does not do business as a legal entity, he or she shall be responsible for implementing the system stipulated in Article L. 561-32 of the Monetary and Financial Code.

**Position**

**In the case of financial investment advisers incorporated as legal entities, a member of management means a “senior manager” who is a natural person, as defined in Article 312-6 of the AMF General Regulation, to wit:**

- o **either a company officer with the power to represent the company in its dealings with third parties;**
- o **or the chairman of the board of directors or a person specifically empowered by the company's governing bodies or bylaws to direct the company and determine its policies.**

**6. Procedures for delegating implementation of the AML/CTF system**

The provisions of the AMF General Regulation allow the appointed member of management to delegate some or all implementation:

- to a third party, which may be another employee of the entity, another entity in the group or an entity outside the group, in the case of portfolio management companies, other asset management companies and financial investment advisers, (Article 315-52, with reference to Articles 321-31, 321-48, 321-57 and 325-12 of the AMF General Regulation);
- to one of the employees of the entity, in the case of central securities depositories and securities settlement system managers (Articles 550-10 and 560-13 of the AMF General Regulation).

Such delegation is subject to the following conditions:

1° The empowered person must have the necessary authority, resources and skills and access to all relevant information;

2° The empowered person must not be involved in the execution of the services and activities under supervision.

The manager shall remain responsible for the delegated activities.

**Position**

**The empowered person may be the compliance and internal control officer, provided that such delegation is appropriate and complies with Articles 313-62 and the following articles of the AMF General Regulation for portfolio management companies and Article 550-6 of the same Regulation, in the case of central securities depositories.**

If implementation of the AML/CTF system is outsourced, the empowered person may be chosen from among the other employees of an entity in the same group as the asset management company or the financial investment advisers or be another person who meets the conditions set out in the AMF General Regulation.

**Position**

**Delegation must not in any way undermine the effectiveness of the system.**

**7. Combining the functions of the person responsible for implementing the AML/CTF system stipulated in Article L. 561-32 of the Monetary and Financial Code, the Tracfin reporter and/or Tracfin correspondent. Combining any of these functions with the function of the compliance and internal control officer**

The person responsible for implementing the AML/CTF system stipulated in Article L. 561-32 of the Monetary and Financial Code must be a member of management, but may delegate some or all of his tasks to another person subject to the conditions set out in Article 315-52 of the AMF General Regulation.

Under the terms of Articles R. 561-23, R. 561-24 and R. 561-28 of the Monetary and Financial Code, the Tracfin reporter and correspondent must be members of management, or officials<sup>6</sup> of the company or, under certain conditions, other entities in the same group as the asset management company or the financial investment adviser<sup>7</sup>.

The AMF must be informed of the identity of the Tracfin correspondents and reporters (Articles R.561-23 and R.561-24 of the Monetary and Financial Code).

**Position**

**Combining the functions of the person responsible for implementing the AML/CTF system stipulated in Article L. 561-32 of the Monetary and Financial Code, with the functions of the Tracfin reporter and/or correspondent must be appropriate in terms of work load and not undermine in any way the effectiveness of the AML/CTF system.**

**Combining any one or all of these functions with those of the compliance and internal control officers in asset management companies or with those of the internal control officers in central securities depositories or securities settlement systems is possible, as long as the combination of functions does not affect the effectiveness of the AML/CTF system and complies with the General Regulation provisions relating to the independence, objectiveness, autonomy of decision and adequate resources of the compliance and internal control functions. This is not an issue for financial investment advisers, which are not concerned by the functions of the internal control officer.**

**8. Information to be obtained and retained about the particularly complex transactions, transactions involving unusually large amounts or transactions that do not seem to have a lawful purpose mentioned in Article L. 561-10-2 of the Monetary and Financial Code**

Article 315-55 of the AMF General Regulation stipulates that the internal procedures established by authorised entities cover the information to be obtained and retained as part of the enhanced scrutiny of particularly complex transactions, transactions involving unusually large amounts or transactions that do not seem to have a lawful purpose.

**Recommendation**

**The following is a partial list of the information seems to be relevant:**

- **the amount, origin and destination of the funds, and the persons with an interest in the transaction in terms of remuneration;**
- **the identity of the payer and the beneficial owners of the funds in the transaction;**
- **the purpose of the transaction, its characteristics and the execution procedures;**
- **the consistency of the information gathered.**

<sup>6</sup> An official is a person who carries out acts or performs functions under the orders of another person. This is the situation of an employee with regard to their employer.

<sup>7</sup> Article R. 561-28 provides for the joint appointment of an empowered person within the group under certain conditions.

This document includes an annex which is available via the “Annexes and links” tab.

**Annex: Typologies of money laundering or terrorist financing clues that could give rise to a suspicious transaction report**