Memorandum

To Our Friends and Clients

The Regulation of Private Placements in France (Updated)

This memorandum discusses the current state of law concerning private placements in France, including the impact of the new EU Prospectus Directive ("the New Prospectus Directive"), the recently adopted law for "Confidence and Modernization of the Economy" (the "Law"), and recent reforms to the General Regulations of the French securities regulator, the Autorité des Marchés Financiers ("AMF").

1. Public Offering of Securities

Under French law, a public offering (appel public à l'épargne) is defined as (1) the listing of securities on a regulated market; or (2) the issuance or sale of securities to the public by way of advertising, solicitation, or the use of a financial intermediary.

In France, every issuer that makes a public offering of equity or debt securities must file a prospectus with the AMF. However, a public offering may be exempt from prospectus requirements in certain limited circumstances. Where a prospectus is required, the AMF

2 Law No. 2005-842 "pour la confiance et la modernisation de l'économie" dated July 26, 2005, amending, among other things, Articles L.411-2 et seq. of the French Monetary and Financial Code ("MFC").
3 Order of September 1, 2005 from the Ministry of Economy, Finance and Industry, approving changes to the General Regulations of the AMF (the "AMF GR").
4 Eurolist is the only regulated market in France to date.
5 Article L.411-1 of the MFC. Under Article 57 of Decree No. 67-236 of March 23, 1967, publication of information that is required by law or regulation does not constitute, in and of itself, a public offering.
6 Article L.412-1 of the MFC.
7 Article 4 of the New Prospectus Directive; Article L.412-1 of the MFC, para. 3. Articles 212-4 and 212-5 of the AMF GR. Offers of the following types of securities are generally
reviews the text in advance for compliance with statutory content rules and then issues a visa authorizing the public distribution of the prospectus. A visa from the AMF is required for all initial public listings, and for all listings on Eurolist. However, if the securities are to be listed on Alternext and are not publicly offered, the prospectus does not require formal AMF approval. In most circumstances, when the offer is made in France, the prospectus and other offering documents, including the summary thereof, must be in French.

The prospectus must contain all information necessary for an investor to make an informed decision concerning the issuer's value, business activities, financial situation, and operating results, and must include a statement of management's outlook for the future and a description of the rights attached to the securities. The prospectus must be made generally available to the public and transmitted to any person solicited in connection with the offering.

Failure to comply with offering requirements is a violation of an issuer's general "obligation to inform the public," and is subject to a fine of up to Euros 1.5 million or, if the issuer profits from the violation, of up to ten times the total profit.

In addition to those public offerings that are specifically exempted from prospectus requirements, French law provides three types of exemptions for share offers that are not deemed to be public offerings, and as such are not subject to prospectus requirements.

The first exemption is for private placements, usually to professional investors, and is discussed at length below. The second concerns offerings to investment service providers performing asset exempt from prospectus requirements: (a) shares issued in substitution for other shares without a capital increase; (b) securities offered through exchange offers in connection with a takeover, or in connection with a merger, if a document providing information equivalent to that in a prospectus is made available; (c) shares offered, allotted, or paid in kind as dividends, if information is made available concerning the shares and the offer; and (d) securities offered to directors or employees, if the issuer's securities are already listed and if information is made available concerning the securities and the offer. There are also exemptions from filing a prospectus in connection with an admission to trading, provided the class of securities is already admitted to trading on a regulated market. These exemptions include: (a) if the admission to trading is for less than 10 percent of the number of shares of the same class already admitted to trading on an EU regulated market; and (b) if the securities have been admitted to trading on another EU regulated market for more than 18 months, provided a summary document is produced.

8 A visa from the AMF is required for all initial public listings, and for all listings on Eurolist. However, if the securities are to be listed on Alternext and are not publicly offered, the prospectus does not require formal AMF approval.
9 Article 212-7 of the AMF GR.
10 Article 212-12 of the AMF GR. The prospectus may be in English with a French summary if the public offering concerns certain high denomination debt instruments, or if the public offering is made by an issuer which is not located in the European Economic Area, and the offer in France is made only to employees of French subsidiaries.
11 Article L.621-14-2 of the MFC.
12 Article L.621-15-III (c) of the MFC.
management for third parties. The third exemption, for “local” offerings, is intended to facilitate start-up financing.

Under the local offering exemption, an offering does not require a prospectus if it falls into one of the following categories:

- offers for a total consideration of less than € 100,000, or the equivalent in another currency, calculated over a 12 month period following the first transaction;

- offers for a total consideration between € 100,000 and € 2,500,000, or the equivalent in another currency, calculated over a 12 month period following the first transaction, when the securities issued represent less than 50% of the capital stock of the issuer;

- offers for a consideration exceeding € 50,000, or the equivalent in another currency, per investor, for each separate transaction;

- offers of securities having a per unit price of at least € 50,000, or the equivalent in another currency.

2. The Private Placement Exemption

Unlike the United States, France had no private placement exemptions from prospectus requirements prior to 1998. In 1998, France implemented the original EU Prospectus Directive, creating a private placement exemption for the issuance or sale of securities to "qualified investors" or a "restricted group of investors" acting in each case for their own account.

The categories of permitted investors under the old version of the Prospectus Directive were unclear, and posed practical problems for issuers. The New Prospectus Directive and the Law respond to these issues by expanding the definition of “qualified investors” and simplifying the definition of a “restricted group of investors.”

---

13 Article L.411-2-II-4°(a) of the MFC.
14 Article L.411-2 of the MFC. Article 211-1 of the AMF GR.
15 In the United States, private placements are regulated by Section 4(2) of the Securities Act of 1933, 15 USCA § 78d(2), and by SEC Regulation D (Rules 501 to 508), 17 C.F.R. §§ 230.501 – 230.508.
(i) Qualified Investors

"Qualified investors" are defined as individuals and legal entities that possess the necessary competence and means to appreciate the risks of securities transactions.\(^{17}\)

Pursuant to the New Prospectus Directive, the definition of qualified investors includes large companies; i.e., legal entities which, according to their last annual or consolidated accounts, meet two of the following criteria: (a) an average of more than 250 employees during the financial year; (b) a total balance sheet exceeding € 43 million; and (c) an annual net turnover exceeding € 50 million.\(^{18}\)

Qualified investors also include small- and medium-sized companies that expressly choose qualified investor status.\(^{19}\) Small- and medium-sized companies are defined as those which, according to their last annual or consolidated accounts, meet at least two of the following criteria: an average of less than 250 employees during the financial year, a total balance sheet not exceeding 43 million Euros and an annual net turnover not exceeding 50 million Euros.\(^{20}\)

Under the New Prospectus Directive, certain individuals may also be considered qualified investors, if they elect to be so treated, and if they meet at least two of the following criteria: (i) the investor has carried out transactions of a significant size on securities markets at an average frequency of at least 10 per quarter over the previous four quarters; (ii) the size of the investor's securities portfolio exceeds €500,000; and (iii) the investor works or has worked for at least one year in the financial sector in a professional position that requires knowledge of securities investment.\(^{21}\)

Although the New Prospectus Directive has been adopted by implementing legislation in France, France has yet to modify the governmental decree defining qualified investors to include the above criteria of the New Prospectus Directive.\(^{22}\) The decree will also specify the procedure for election to be treated as a qualified investor. Under the existing decree, such election is made by publishing corresponding management or board resolutions in the French

---

\(^{17}\) Article L.411-2 of the MFC.

\(^{18}\) Article 2.1.e.iii of the New Prospectus Directive.

\(^{19}\) Article 2.1.e.v of the New Prospectus Directive.

\(^{20}\) Article 2.1.f. of the New Prospectus Directive.

\(^{21}\) Articles 2.1.e.iv and 2.2 of the New Prospectus Directive.

\(^{22}\) Article L.411-2-II-4° of the MFC.
Mandatory Legal Announcements Bulletin (Bulletin des annonces légales obligatoires).23

(ii) Restricted Group of Investors

Previously, a "restricted group of investors" was defined as a group of entities or individuals related to managers of the issuer by "personal relations, of a professional or family nature."24

The New Prospectus Directive and the Law have replaced this qualitative definition with a flat numerical threshold. A prospectus is no longer required for an offer of securities addressed to fewer than 100 natural or legal persons per Member State, not counting qualified investors.

(iii) Acting for Its Own Account

The "acting for its own account" requirement is a restrictive condition that applies to both the exemption for qualified investors and for members of a "restricted group." The concept is not defined by law or regulation. It is not clear whether securities issued in a private placement must be held for a minimum period of time by the purchasers; whether the transferability of the securities must be restricted; whether a financial institution buying securities for a client's account is ineligible for the exemption; and whether "qualified investors" qualify for the exemption if they act on behalf of other "qualified investors" (or members of a "restricted group"). The AMF has suggested, though not formally required, that purchasers of securities issued in a private placement should purchase with the intent to hold the securities.25 However, an acceptable holding period has not been specified, either by regulation or other official statements.

(iv) Financial Intermediaries

A U.S. issuer intending to place its securities with French residents must act through a financial intermediary qualified to conduct business in France.26

24 Article L.411-2 of the MFC.
26 The term "placement" is defined broadly. Article 312-5 of the AMF GR states that "[a]n investment service provider conducts the business of placing where it seeks subscribers or purchasers on behalf of the issuer or of a seller of financial instruments." A placement is deemed an "investment service" under Article L.321-1-6 of the MFC; Article 311-1-1-1°(e) of the AMF GR. Investment services may be performed only by authorized investment
In order to conduct a placement of securities in France, a financial intermediary must be an authorized French "investment service provider" (*prestataire de services d’investissement*), or an equivalent entity in an EU Member State that benefits from the EU Single Passport system. French investment service providers must be approved by the *Comité des établissements de crédit et des entreprises d’Investissements* (*CECEI*).

The marketing activities of qualified financial intermediaries must be structured carefully to avoid losing the benefits of the private placement exemption. In general, brokers' research reports and circulars may be distributed to professional and institutional investors acting for their own account in a private placement. However, if such documents are distributed after there has been a public announcement or solicitation with respect to the offering (e.g., after the publication of a press release or the general distribution of a preliminary prospectus), these reports and circulars could be deemed "public offering documents" and hence render the placement subject to registration requirements.

Similarly, roadshows in France must be conducted in such a manner as to ensure that certain rules are respected: no more than 100 investors other than "qualified investors" can be invited, and all forms of public advertising should be avoided.

3. The Marketing of Financial Products in France

The benefit of the private placement exemption in France is limited by restrictions on the canvassing of securities ("démarchage") that overlap with and in some cases contradict French public offering rules. Although the Financial Security Law resolved some of the discrepancies, it left others intact and has created several new difficulties. The implementation of the New Prospectus Directive into French law has also created new discrepancies between the two regimes, as transactions that are exempted from public offering regulations by the New Prospectus Directive may still fall within the ambit of the *démarchage* regulations.

services providers. Article L.531-1 of the MFC. U.S. financial intermediaries might be able to argue that a private placement does not constitute a "placement" within the meaning of Article L.321-1 of the MFC, and that brokerage activities in connection with such a private placement are therefore not restricted to authorized investment services providers. This interpretation, however, is contrary to the AMF’s position, as expressed to us verbally.

27 Articles 321-3 and 321-4 of the AMF GR.

28 Article L.532-1 of the MFC.

29 The Financial Security Law No. 2003-706 of August 1, Law, codified as Articles L.341-1 to L.353-6 of the MFC.
Démarchage is defined in the French regulations quite broadly, as (a) any unrequested solicitation of a person, by any means, for the purpose of recommending or encouraging the subscription, purchase, exchange or sale of, or the participation in transactions involving securities or providing such recommendations or encouragement to the general public; or (b) visiting persons at their homes or places of work for the same purpose. Sending letters, circulars or other marketing materials and making telephone calls to customers for such purposes are included within the definition of démarchage, whether these activities are carried-out from within France or from abroad.

The distribution of investment research materials for marketing purposes and the solicitation of potential clients to participate in brokerage activities such as roadshows, would also be considered démarchage under the MFC.

Under the MFC, démarchage may be carried out by (1) French credit institutions authorized by the CECEI; (2) registered French investment service providers;\(^{30}\) (3) French insurance companies; or (4) equivalent entities in EU Member States that benefit from the EU single passport system, i.e., those authorized to conduct démarchage activities in their home states.

Démarchage may also be carried out in France by (a) venture capital companies ("sociétés de capital-risque") for distributions of their own shares, and (b) as discussed below, companies offering shares to their employees pursuant to certain profit-sharing plans.

The conduct of démarchage activities requires specific authorization by the AMF, which maintains a central registry of démarcheurs.\(^{31}\)

Entities conducting démarchage must maintain professional insurance;\(^{32}\) register with market regulators; obtain a personal démarchage card;\(^{33}\) and provide potential investors a form to use if

---

\(^{30}\) Article L.531-4 of the MFC.

\(^{31}\) Under Article L.341-6 of the MFC, the AMF, the CECEI and the Comité des Entreprises d'Assurance must create a common registry of companies and individuals conducting solicitation. Decree No. 2004-1018 dated September 28, 2004 provides for a publicly accessible list of accredited démarcheurs. The list is available at [www.demarcheurs-financiers.fr](http://www.demarcheurs-financiers.fr).

\(^{32}\) Article L.341-5 of the MFC.

\(^{33}\) Article L.341-8 of the MFC.
they decide to withdraw their offers. Violation of the démarchage rules may be sanctioned by imprisonment and a €7,500 fine.

The démarchage provisions do not apply to solicitation of "qualified investors." However, private placements targeting a "restricted group" of investors remain subject, on the face of the regulations, to démarchage rules, and thus require a prospectus. Such a prospectus need not be approved by the AMF, but would be distributed under the sole responsibility of the démarcheur. The same is true for offers having a total consideration of less than €100,000, or for offers of between €100,000 and €2,500,000 which do not represent more than 50% of the outstanding capital of the issuer. These offers are exempt from formal prospectus requirements, but may fall within the scope of the démarchage regulations.

Placements to employees under qualified profit sharing plans are also exempt from the démarchage rules. The exempt plans include plans d'épargne d'entreprise ("PEE"), under which companies and employees make contributions to reserved share accounts that hold stock of the employing company or shares of a mutual fund.

The MFC prohibits the solicitation of investors in France for the purchase of securities that are not admitted to trading on a French regulated market or on a recognized foreign market. The recognition of foreign securities markets is regulated by Decree No. 90-948 of

---

34 Article L.341-16 of the MFC allows a 14 day period from the date of receipt of a contract signed by the two parties to retract, and Article 9 of Decree No. 2004-1019 provides a retraction form.
35 Article L.353-1 of the MFC and Circular CRIM 2004-14 G3/14-09-2004: BOMJ No. 95. However, failure to present a valid démarchage card is subject only to administrative sanctions.
36 Article L.341-2(1) of the MFC.
37 Article L.341-3(2) of the MFC exempts from the démarchage regulations businesses canvassing their employees under Title IV of Book IV of the Labor Code (the “LC”). Although the MFC exempts the distribution of securities in a qualified Title IV plan, it does not address the issue of reserved employee share programs that are not governed by Title IV, such as the issuance of shares to a limited group of senior executives comprising more than 100 individuals. The AMF has indicated that the grant of stock options is not governed by public offering regulations because stock options are not financial instruments (AMF commentary dated May 16, 2005 published in connection with the AMF’s public consultation regarding the implementation of the New Prospectus Directive, p.14 of the comparative chart). For the same reasons employee stock options plan should not be subject to démarchage regulations. Similarly, in our view, the grant of free shares to employees and directors under Articles L. 225-197-1 et seq. of the Code of Commerce should not be subject to démarchage regulations.
38 Article L.443-1 to L.443-9 of the LC. A PEE is voluntarily established by a company and must be offered to all employees of the company. However the plan’s benefits may be restricted to employees with a certain level of seniority, not exceeding 3 months. Art. L.444-4 of the LC.
39 Articles L.341-10 and L.423-1 of the MFC.
October 25, 1990. This decree empowers the Ministry of Finance, acting on the AMF's recommendation, to certify foreign securities markets as having sufficient levels of regulatory oversight and investor protection. For the US, the current list of approved markets, issued on July 23, 2004,\textsuperscript{40} includes primarily commodities and derivatives exchanges, such as the Chicago Board of Trade, the Amex, and the New York Futures Exchange. The New York Stock Exchange and the NASDAQ are conspicuously absent from the French list of approved foreign markets.

Companies listed only on non-approved foreign exchanges can privately offer their securities in France only under the "qualified investor" exemption,\textsuperscript{41} or pursuant to a profit sharing program of the type discussed above.\textsuperscript{42} French investors can also purchase securities traded on non-approved foreign exchanges on their own volition.

4. Issuance and Sale of Foreign Securities in France

The issuance and sale of foreign securities in France is also regulated by Decree No. 2003-196 of March 7, 2003 (the "Foreign Investment Decree").\textsuperscript{43} Pursuant to the Foreign Investment Decree, the private placement of foreign shares and bonds in France requires no prior authorization from the French authorities. However, such a placement may still be restricted under the MFC as discussed above.\textsuperscript{44}

The rules applicable to the offering of interests in mutual funds (known in France as \textit{Organismes de placement collectifs en valeurs mobilières}, or “OPCVM”\textsuperscript{45}) are yet more restrictive. Mutual funds not

\textsuperscript{40} Order of the Ministry of Finance of July 12, 2004 (ECOT0420042A) recognizing the US Futures Exchange LLC (EurexUS).

\textsuperscript{41} The law does not define the term "public" within the meaning of Article L.423-1 of the MFC, prohibiting solicitation of the public in France for financial transactions performed on a non-recognized market. In our view, this term should not include qualified investors.

\textsuperscript{42} The AMF has verbally indicated to us that the prohibition of Article L.423-1 of the MFC applies only to financial intermediaries and not to issuers.

\textsuperscript{43} French law considers a legal person to be a resident of the country in which it has its principal place of business.

\textsuperscript{44} Until the coming into force of the Foreign Investment Decree, all trading of foreign securities in France required the prior authorization of the Ministry of Finance except for securities listed on a regulated market and issued by residents of a member state of the Organization for Economic Cooperation and Development. Today, only an administrative declaration of foreign direct and indirect investment in France is required, except in the case of investments concerning public order or public security, national defense, arms and explosives, or public health, which require prior authorization.

\textsuperscript{45} The definition of the term "OPCVM" is not found in French legislation, but rather in EU Council Directive 85/611 of December 20, 1985. Article 1(2) of that Directive defines a mutual fund as an entity, "the sole object of which is the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading and the units of which are, at the request of holders, repurchased or redeemed directly or indirectly out of those undertakings' assets." Under French law, a
incorporated in France must be approved by the AMF prior to any sales in France. Failure to comply with these requirements may subject the managers of the mutual fund to criminal sanctions, including imprisonment of up to two years. U.S. investment funds proposing to sell securities in France must therefore verify whether they could be deemed to be mutual funds for purposes of French law.

On November 2004, the AMF authorized two new forms of OPCVM: "OPCVM de fonds alternatifs" and "OPCVM contractuels" (respectively, "Alternative Funds" and "Contractual Funds"). These two types of funds are intended solely for qualified investors and may invest in shares of foreign mutual funds.

Alternative Funds may invest up to 100% of their assets in shares of other investment funds, including foreign investment funds, so long as the fund’s investments comply with requirements set out in the AMF GR. However, Alternative Funds must be authorized by the AMF prior to their formation. Only qualified investors, as defined by the law of the investor’s jurisdiction, may invest in Alternative Funds.

Contractual Funds are permitted to establish their own investment rules by means of internal regulations or bylaws, free of AMF restrictions on the type of assets they may hold. Those assets may include shares in foreign investment funds. Contractual Funds may be sold to a limited set of permitted investors, including qualified investors within the meaning of Article L.411-2 of the MFC. Unlike mutual fund is not restricted to raising funds from the public, and may invest assets on behalf of "qualified investors."

46 Article 411-57 of the AMF GR et seq.
47 Article L.231-3 of the MFC.
48 These two types of OPCVM have been codified by the Financial Security Law under Articles L.214-35 to L.214-35-6 of the MFC and implemented in Article 413-12 to 413-40 of the AMF GR.
49 Article. R. 214-36-I-1° of the MFC. Article 411-34 of the AMF GR.
50 Article L.214-35-1 paragraph 1 of the MFC; Article 413-12 of the AMF GR quoting the common provisions to all OPCVM including Article 411-5 of the AMF GR regarding prior approval of AMF. Certain physical persons may also invest in Alternative Funds: (a) investors mentioned in Article L.214-35-1 paragraph 1 of the MFC; (b) the State, or in the case of a federal State, a member of the federation; (c) the European Central Bank, national central banks, World Bank, International Monetary Fund, European Investment Bank; (d) companies that, based on the latest fiscal year, meet two of the three following criteria: (i) aggregate assets exceeding 20 million Euros; (ii) aggregate turnover exceeding 40 million Euros, or (iii) net equity exceeding 2 million Euros; (e) investors whose initial subscription exceeds 10,000 Euros when the OPCVM does not guarantee the subscribed capital; (f) any investors when the OPCVM does guarantee the subscribed capital and is itself the beneficiary of a guarantee or enables its holders to benefit from a guarantee. Article L.214-35-1 paragraph 2 of the MFC, referring to Article 413-13 of the AMF GR.
51 Article L.214-35-2, paragraph 3 of the MFC.
52 Pursuant to Article 413-35 of the AMF GR, the shares of Contractual Funds may be sold only to certain investors, including (a) qualified investors within the meaning of Article
Alternative Funds, formation of a Contractual Fund requires only an \textit{a posteriori} declaration to AMF.\textsuperscript{53}

The use of Alternative and Contractual Funds will make private placements of interests in foreign mutual funds possible in France, though only to qualified investors.

**Conclusion**

The broadened definition of qualified investors under the New Prospectus Directive and the new quantitative definition of a restricted group of investors will resolve many difficulties that hampered the benefit of the private placement exemption in France. Several inconsistencies within the regulations remain, however, and will require careful pre-transaction analysis.

**Paris**

Eric Cafritz  
33.140.62.2200

Patrick Jais  
33.140.62.2200

James Gillespie  
33.140.62.2200

Laurent Assaya  
33.140.62.2200

\textsuperscript{53} Article L.214-35-4 paragraph 1 of the MFC.