

# Flash News

## The upcoming changes to the SIF Law

14 September 2011

Almost immediately after its entry into force in early 2007, the SIF Law<sup>1</sup> has shown that it has met the industry's pressing need of enabling the rapid launch of tailored products in a regulated mantle, accessible to a clearly defined range of investors. The tremendous increase over the past four years of the number of SIFs and of their assets under management further confirms this perspective. But the financial world has changed since 2007, and so Luxembourg needs to adapt: the AIFMD is just around the corner (July 2013!) and will heavily affect the SIF world. UCITS IV has been transposed in a timely manner in the Fund Law of 2010<sup>2</sup>, which has provided the opportunity to make additional adaptations to the legal framework of funds. Last but not least, the Luxembourg regulator has had four years of practical experience dealing with SIFs and needs to have the necessary tools to perform its supervisory role over this successful product, while preserving its quality and reputation.

The Luxembourg Government has presented on 12 August 2011 the draft law n° 6318 (the "Draft") amending the current SIF law to tackle the above developments and ensure the continued success of the SIF. It is expected to be adopted before the end of the year.

The following are the main modifications, which may obviously still be subject to change as the parliamentary process goes along:

### 1. New rules on delegation

While the current SIF law is mute on the question of delegation of tasks by a SIF or its management company, if any, the Fund Law already contains

<sup>1</sup> Law of 13 February 2007 on Specialized Investment Funds

<sup>2</sup> Law of 17 December 2010 on Undertakings for Collective Investment

detailed provisions to that effect, applicable to UCITS and non-UCITS funds. With the upcoming transposition in Luxembourg of AIFMD and of its rules on delegation, SIFs can no longer be kept free from this sensible requirement to select qualified delegates and to supervise them in an appropriate manner.

In line with the wording of the Fund Law, the Draft hence foresees that SIFs, subject to conditions which are more or less those of the Fund Law, are authorised to delegate some of their functions. As regards portfolio management, the prohibition to delegate this function to the custodian bank is now extended also to SIFs. Admissible portfolio managers for a SIF must be entities authorised or registered for the purpose of asset management and duly supervised. They could still be natural persons, other than, for example, in the Fund Law or in AIFMD, but only with the prior approval of the CSSF, who will want to be assured of their experience and worthiness. Third-country portfolio managers can be authorised if there exists a cooperation between CSSF and the authority of that country.

For all main functions so delegated, the managing body of the SIF must be able to show that it has selected the delegate with care and that it duly supervises it. The CSSF must be duly informed of all such delegations, which also need to be listed in the SIFs offering document.

The rules on delegation need to be complied with **by 30 June 2013** – Luxembourg SIFs will hence be AIFMD compliant when it enters into force at EU level.

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## 2. New conduct of business rules for SIFs

The organisational requirements of AIFMD will be a challenge for Luxembourg SIFs, which currently need not comply with such requirements. It makes therefore sense that the Draft already requires SIFs to implement a **risk management policy and appropriate systems** in order to detect, measure, manage and monitor the risks associated with the portfolio positions and their contribution to overall risk profile of the portfolio. In the future, Luxembourg SIFs will also have to take all necessary organisational measures to reduce any risks of **conflict of interests**. A future CSSF Regulation may provide specific implementation measures with respect to these requirements, which need to be complied with by SIFs **by 30 June 2012**.

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### 3. New flexibilities inspired by the Fund Law

The Fund Law has introduced certain flexibilities from which SIFs should also benefit in the future:

#### **a) Cross sub-fund investment**

Subject to certain conditions, which are less stringent than in the Fund Law, sub-funds of a SIF created as an umbrella fund may invest in one or several sub-funds of the same SIF. The prohibition of double dipping of fees, which acts somewhat as a deterrent in the Fund Law, is abandoned in the Draft, as is the restriction to investment in target sub-funds themselves investing more than 10% in sub-funds of the SIF.

#### **b) Corporate life**

As already foreseen in articles 26 (for UCITS) and 95 (for non-UCITS) of the Fund Law, SIFs taking a corporate form will also be freed from certain requirements of the 1915 Companies Law. As a reminder, this concerns the translation of constitutional documents into French or German (which is no longer required), the sending of annual reports etc... to shareholders prior to the general assembly (also no longer required subject to conditions) and the time and method to determine quorum and majority rules at the assembly.

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### 4. New licensing process

A somewhat controversial new rule is proposed by the Draft, according to which CSSF will have to give its **prior** approval to the launch of a SIF. As is the case currently for funds subject to the Fund Law, CSSF will review and authorise the SIFs constitutional documentation, offering document and approve the various intervening party in the SIF (custodian bank, central administration, portfolio managers...). Other than currently, CSSF will also look at the identity of those persons actually in charge of the management of the SIF, not only those of the statutory management (board of directors, etc.). Any subsequent change to the above-mentioned information or to the documentation must be notified to the CSSF for approval. Additional supervisory and sanctioning powers, taken from the Fund Law, are also granted to CSSF over SIFs.

## 5. Further clarifications brought by the Draft

**“Active” management:** the Draft clarifies that the activities of a SIF must comprise the **active portfolio management** so as to per se exclude the passive management made e.g. in private wealth management companies (Société de Gestion de Patrimoine Familial) from the scope of the SIF Law. Real estate or private equity SIFs, which generally remain “passive” after their investments are done, are explicitly excluded from this restriction.

**Investors’ quality:** the Draft requires SIFs to establish the necessary measures to ensure that only “well-informed” investors can invest in the SIF, to the exclusion of all others, notably retail.

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