

## Banking - Estonia

New guideline issued to clarify roles of collateral agents and underwriters

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Since most credit institutions (including banks) provide collateral agent services as well as acting as underwriters, the regulation stipulated in the Financial Supervision Authority's latest advisory guideline entitled Generally Recognized Professional Requirements upon Rendering Investment Services and Non-Core Services will introduce some new rules of play. The guideline mainly aims to specify the principles that are applicable to such services. The guideline, which will enter into force on September 1 2010, is built on three pillars:

- the obligations of the collateral agent;
- the role of the underwriter; and
- matters related to conflicts of interest.

As there are no specific regulations or relevant judicial practice on this issue, the obligations and liabilities of collateral agents are unclear. Therefore, the guideline will stipulate general principles, such as equal treatment of warrantees and the monitoring of the wellbeing of collateral. It is important to emphasize the supporting purpose of the guideline to regulate situations and provide principles for those cases where contracts lack relevant rules. This means that in case of dispute, the first point of reference will be the contract executed with the collateral agent. Therefore, it is important to stipulate the collateral agent's obligations and role in as much detail as possible and monitor the wellbeing and maintenance of the collateral.

The question of the underwriter's responsibilities has also come up for debate. Usually, the underwriter does not assume responsibility for investors; however, the guideline will include the principle that the tender documentation must be balanced (ie, it must reflect all opportunities, as well as risks). This means that the underwriter's role is not limited to the use of sales channels; it will also be expected to identify and explain risks. Should the underwriter detect any risks, it must draw the issuer's attention to the need to include the relevant aspect in the documentation. Furthermore, the underwriter is expected to be more competent in establishing and determining the risks than the issuer.

With reference to conflicts of interest, it is important to realize that:

- the underwriter is under due diligence and loyalty obligations to the issuer;
- the collateral agent is under due diligence and loyalty obligations to the party for which it is acting as a collateral agent (ie, the guaranteed party or warrantee); and
- the same applies to the receiver and forwarder of the order with regard to its clients (investors) and to the investment consultant with regard to its clients.

If one person renders more than one of these services, a conflict of interest between different functions is assumed. This means that in subsequent supervisory proceedings, the party rendering the service must be able to justify to the Financial Supervision Authority the efficiency of the methods applied. Proving the separation of functions requires the effective management of conflicts of interest, and therefore the institution rendering the services (eg, the bank) should feel no pressure, since generally it will be seen as 'one person'.

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