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INVESTMENT MANAGEMENT GROUP

I. AMENDMENTS DUTCH ACT ON FINANCIAL SUPERVISION

The Amendment Act Financial Markets 2010 ("**Amendment Act**"), amending (amongst others) the Dutch Act on Financial Supervision (*Wet op het Financieel Toezicht*) ("**AFS**") will for the most part enter into force on 1 July 2011. However, the provisions relating to the "warning statement" and the increase of the €50,000 exemption threshold will enter into force on 1 January 2012. In addition, it should be noted that the article stating which provisions of the AFS will apply to collective investment schemes subject to voluntary supervision apparently enters into force on 1 January 2012. Furthermore, although not discussed in this newsletter, certain provisions relating to which authorities supervise compliance with client identification and anti-money laundering rules will have retroactive effect to 1 August 2008.

The Amendment Act includes (among other things) the following amendments to the AFS, which are of particular relevance to the investment management industry and investors:

- (i) the optional supervision regime for collective investment schemes (*beleggingsinstellingen*) that only offer units to qualified investors (Part II below);
- (ii) the "warning statement" (Part III below);
- (iii) the extension of the power to grant "individual dispensations" to ongoing supervision (Part IV below); and
- (iv) an increase of the €50,000 exemption threshold (Part V below).

II. OPTIONAL SUPERVISION REGIME

Under the AFS, collective investment schemes that offer units:

- (i) solely to fewer than 100 persons that are not qualified investors, or
- (ii) solely to qualified investors,

are only partially subject to certain AFS provisions, such as for example, the offering of securities, notification requirements regarding capital, share and vote holdings in listed companies, regulations regarding market abuse, public offers, etc. Such collective investment schemes are generally speaking exempted from licensing requirements and only partially subject to ongoing supervision by the Dutch Authority for the Financial Markets ("**AFM**").

However, some foreign institutional investors, such as pension funds and insurers, are only permitted to invest in the participation of regulated and supervised collective investment schemes. In order to provide collective investment schemes with the option to become more attractive to such foreign investors, the Amendment Act will allow collective investment schemes offering units exclusively to qualified investors with the option of voluntarily opting for AFM supervision.

Who will be able to apply?

The optional supervision regime will only be available to collective investment schemes that exclusively offer units to qualified investors.

Except for certain starter funds, managers of collective investment schemes or internally managed investment companies offering units in the Netherlands exclusively to qualified

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investors, will be able to voluntarily opt for supervision and to request the AFM to issue a statement to that effect (i.e. a “**statement of optional supervision**”). The information required and procedure will be subject to further legislation.

The AFM will issue the statement of optional supervision to non licensed managers, if all of the following apply:

- (i) the requirements regarding the expertise and the integrity of the persons determining or co-determining the collective investment scheme’s day-to-day policy have been met;
- (ii) the collective investment scheme has adequate policies in place to ensure the integrity of its conduct of business;
- (iii) the collective investment scheme’s structure will not prejudice the AFM’s supervision due to lack of transparency or foreign legal restrictions; and
- (iv) the collective investment scheme meets the minimum capital requirements and the liquidity requirements.

A licensed manager, who has notified the AFM of its intention to offer units in the Netherlands exclusively to qualified investors, is deemed by operation of law to have received a statement of optional supervision for such offerings.

The AFM will register the relevant collective investment schemes or managers to whom it has issued a statement of optional supervision in its public register.

Differences between the optional and regular supervision

The optional supervision regime is less comprehensive and burdensome than the

“regular” supervision regime. The reason is that optional supervision is only available to collective investment schemes that offer units exclusively to qualified investors and qualified investors are considered to require less protection than investors who are not qualified investors.

Under the optional supervision regime, collective investment schemes are required to comply with the regulations on the following subjects:

- (i) the expertise and integrity of their policymakers;
- (ii) the policy and integrity of their business conduct;
- (iii) duties of care towards participants;
- (iv) notification requirements;
- (v) annual financial reporting requirements; and
- (vi) minimum capital and liquidity thresholds requirements.

The collective investment scheme is, furthermore, required to ensure that its assets are acquired for the benefit of the participants by an independent depository (*bewaarder*) pursuant to a written agreement.

Under the optional supervision regime, collective investment schemes are not required to comply with the regulations on:

- (i) the provision of information to the public and the quality of information on financial products;
- (ii) requirements on the number of policymakers, location and the board position of the manager of a collective investment scheme;

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- (iii) additional requirements on the arrangements between the collective investment scheme and the custodian;
- (iv) provision of semi-annual financial information and certain publication requirements in relation to the financial information; and
- (v) annual valuation of the collective investment scheme's assets by an independent expert.

Termination of optional supervision

A collective investment scheme may also request the AFM to revoke a statement of optional supervision. The collective investment scheme must inform its participants at least six months prior to any such request. The AFM must be notified simultaneously with the publication of the intention. The AFM will not take such a request into consideration until six months after the intention to request the revocation of the statement of optional supervision has been made public.

Entry into force of the optional supervision regime

It will be possible to request a statement of optional supervision as of 1 July 2011. However, it should be noted that pursuant to the Royal Decree determining when the provisions of the Amendment Act will enter into force, it seems that the provision setting out which provisions of the AFS will apply to collective investment schemes subject to voluntary supervision will enter into force on 1 January 2012. This seems contradictory. It is unclear how this will be dealt with in practice by the AFM.

III. WARNING STATEMENT

The current AFS and the regulations based thereon contain exemptions from the prohibition on offering:

- (i) investment objects;
- (ii) units in collective investment schemes,

to the public in the Netherlands.

Certain exemptions require an offeror to include a warning statement in its offer documentation and/or advertisements, stating that its offer is not subject to a license requirement or AFM supervision. The Amendment Act introduces provisions providing that such notifications must be made in the manner to be determined by the AFM. The notification of a lack of a license and supervision has been dubbed the "Wild West"-warning sign.

Importantly, similar provisions apply to exemptions from the prospectus obligation for offers of securities to the public (other than to qualified investors only) or for trading on regulated markets. Offerors offering securities that do not fall within the scope of the prospectus obligation must include a warning statement in their offers, advertisements and pre-offer documentation that:

- (i) no AFM approved prospectus will be made available to the public; and
- (ii) the offer is not subject to AFM supervision.

These provisions will enter into force on 1 January 2012. On 27 June 2011, the AFM published a draft decision including the regulations in respect of the "warning statements" to be used. The regulations are expected to be published in the State Gazette (*Staatscourant*) after the summer and expected to enter into force on 1 January 2012.

IV. INDIVIDUAL DISPENSATION

The AFS prohibits the offering of units in collective investment schemes in the

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Netherlands without a licence. The AFM has the authority to grant an individual dispensation from this license requirement (the “individual dispensation”). The Amendment Act, clarifies that such an individual dispensation can include a dispensation from the provisions relating to ongoing AFM supervision.

However, prior to granting an individual dispensation, the AFM will have to determine whether the interests protected by its supervision are being sufficiently protected in another manner.

The option of obtaining an individual dispensation will not apply to the offering of units in a UCITS.

V. INCREASE OF THE €50,000 THRESHOLD

The Amendment Act includes provisions, specifying that offers of investment objects, units in collective investment schemes or securities with a value of at least €100,000 each are exempt from the license and/or prospectus requirements. The intention is to increase the current thresholds from €50,000 to €100,000. This amendment anticipates the implementation of the amended EU Prospectus Directive 2010/73 of 24 November 2010. These provisions will enter into force on 1 January 2012.

If you have any queries regarding this newsletter, please do not hesitate to contact one of our investment management specialists.

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