

News Update

INVESTMENT MANAGEMENT GROUP

I. AFM INTERPRETATIONS ON OPEN AND CLOSED END COLLECTIVE INVESTMENT SCHEMES, TRANSFERABILITY OF UNITS AND SIDE POCKETS

1. On 26 April 2011, the Authority for the Financial Markets (“AFM”) published a newsletter relating to its views on *inter alia* (i) when collective investment schemes (*beleggingsinstellingen*) are considered to be closed end or open end, (ii) when units are considered to be transferable, and (iii) how to deal with “side pockets”. This newsletter includes a summary of those views and sets out the possible effects for collective investment schemes and their managers.
2. Pursuant to the AFM communications, managers of collective investment schemes should carefully assess:
 - (i) whether they are a closed end or an open end collective investment scheme; and
 - (ii) whether the units issued by them are transferable or not.

Open vs Closed End

3. The AFM has noted that several collective investment schemes are registered as open end, while they limit their redemption obligation or make it practically impossible to invoke the redemption obligation. The AFM has stressed that in its view such collective investment schemes do not comply with their statutory redemption obligations and should be considered closed end instead of open end collective investment schemes.
4. The managers of open end collective investment schemes should carefully consider if the collective investment scheme meets the criteria for being an open end collective investment scheme. In the event that the criteria are not met, the manager has until 30 September 2011 to

ensure that the collective investment scheme’s conditions are compliant or to register as a closed end collective investment scheme.

5. If a collective investment scheme qualifies as a closed end collective investment scheme, the prospectus requirement in article 5:2 of the Act on Financial Supervision (“AFS”) will apply to the offering of the units. One of the most important implications thereof is that the prospectus will have to comply with the requirements set out in and promulgated pursuant to the EU Prospectus Directive. In addition, the prospectus will further require the approval of the AFM or another competent EU supervisor. If the collective investment scheme would have qualified as open end, the prospectus requirements set out in art. 4:49 AFS would have applied. These requirements are generally considered less stringent than the requirements pursuant to the EU Prospectus Directive.

Transferable Units

6. For closed end collective investment schemes the question whether their units are transferable or not determines whether the prospectus regime as set out in art. 4:49 AFS or 5:2 AFS applies. Pursuant to the Regulation on transferability issued on 15 February 2011 (*Beleidsregel verhandelbaarheid*) (“**Regulation**”), the AFM takes an economic view of the term “transferable”. Any unit which allows the economic value to be transferred, whether directly or indirectly, to a third party is considered to be a transferable unit. The AFM also considers arrangements that (i) allow the units to be redeemed by the collective investment scheme and subsequently sold to a third party or (ii) allow the units to be redeemed and cancelled by the collective investment schemes followed by the sale of a similar unit to third party shortly thereafter, to be transferable.

News Update

7. As a result of the Regulation, most units in closed end collective investment schemes, will be considered “transferable” and the offering of such units will be subject to art 5:2 AFS (i.e. the offer of such units will require a prospectus that complies with the EU Prospectus Directive and is approved by the AFM or another competent EU supervisor, unless an exemption applies). The Regulation has immediate effect as of 15 February 2011. However, exemptions apply for running offers of financial instruments that qualify as transferable securities as a result of the Regulation until the earlier of the end of the offer term or 15 February 2012.
8. The offering of units in open end collective schemes or non-transferable units in closed end collective investment schemes are subject to a prospectus requirement and a requirement to provide certain essential information on the basis of the AFS. After the implementation of the UCITS IV Directive, the essential information to be provided will be the key investor information documents (“**KIID**”) to be provided pursuant to the UCITS IV Directive. It should be noted that pursuant to the draft legislative implementation proposals, it is expected that the KIID requirement will apply to both UCITS and non-UCITS in the Netherlands. Collective investment schemes should have KIIDs prepared as soon as possible after the implementation of the UCITS IV Directive in Dutch law but in any event no later than 1 July 2012.

Side Pockets

9. The AFM does not allow collective investment schemes to have “side pockets” (segregated illiquid or hard to value assets in separate compartments within their investment portfolio). However, under certain conditions, the separation of assets through a legal demerger to a new collective investment scheme or subfund is permissible. The AFM indicates that the collective investment scheme should consult with the AFM prior to taking any

decisions to enter into such a demerger of its assets.

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

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