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Outlook 2016

FINANCIAL MARKETS LEGISLATION
WHAT WILL BE CHANGING IN 2016?

➢ ***Looking back***

Developments in the financial supervision legislation did not stand still in 2015. A year in which, inter alia, the scope of the banker's oath and the suitability and integrity requirements were expanded and in which a bonus cap of 20% was introduced for the entire financial sector. Furthermore, it was also a year in which the consequences of the European banking supervision became visible and in which it was established that FinTech undertakings and crowdfunding platforms must and will have a clear place in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft).

➢ ***Looking forward***

The year 2016 will be anything but dull, at least from the perspective of financial supervision law. A lot of new legislation is pending. In addition, the supervisory authorities have announced on-site and topic-based investigations. In this Outlook we will provide an overview of the most important developments relating to the financial supervision legislation which will be relevant for the market in 2016. We will report on both new regulations, and the scrutiny of the supervisory authorities; the Dutch Central Bank (DNB), the Netherlands Authority for the Financial Markets (AFM) and of course the European Central Bank (ECB).

➢ ***What are you interested in?***

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➢ **How can you contact us?**

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FINANCIAL MARKETS LEGISLATION
GENERAL DEVELOPMENTS IN 2016

TOPICS

➢ European action plan for building a capital markets union

On 30 September 2015 the European Commission presented the action plan on building a capital markets union (COM (2015) 148 final). In the framework of the priority of the Juncker Commission of stimulating employment, growth and investments in the EU, with this action plan the European Commission is trying to reinforce the growth potential of Europe by strengthening and diversifying financing sources for European companies and long-term investment projects. The action plan covers a wide area and the diversity of proposed actions is great. Six themes can be distinguished in the action plan:

- the financing of innovation, start-ups and the small- and medium-sized enterprise sector (SMEs)
- improving access to capital market financing
- promoting long-term investments in sustainable and infrastructure projects
- encouraging retail and institutional investments
- increasing the financing capacity of banks
- facilitation of cross-border investments

In its response to the European Commission's action plan, the Dutch cabinet has indicated that in principle it views this positively. Actions which will be concretely shaped in 2016 and which directly affect market parties will be discussed in the individual sections of the Finnius Outlook.

➢ DNB Supervision Priorities 2016

DNB published its supervision priorities for the coming year in November 2015. The report describes the supervision priorities for the financial industry in the Netherlands for 2016, from DNB's perspective. This document contains announcements for specific institutions like banks and insurance companies, but also announcements of a more general nature. A number of these general announcements relate to:

- ***Data quality and reporting***: in 2016 DNB will focus on improving reporting by the institutions;
- ***Risk management***: DNB will keep a closer eye on the link between risks identified by institutions and the measures taken in connection with these risks;
- ***Integrity supervision***: DNB will intensify its integrity supervision in 2016. It will do so, on the one part, by keeping a close eye on signals and trends and by its own (topic-based) studying of potential problems. On the other, it will study integrity risk analyses and management measures. A whistleblower portal will be set up for employees of institutions which are under supervision.
- ***Transparency of DNB***: DNB will increase its own transparency in 2016. For example, in 2016 the Status of Supervision will be published for the first time, with information on the development of the sector and how the DNB supervision contributed to this.

- ***Technological innovation***: In 2016 DNB will start an investigation into the impact of technological innovation in the financial sector and the supervision thereof.
- ***On-sites***: DNB will establish a greater role for in-depth on-site supervision studies and will focus on more data-driven supervision.
- ***EMIR***: One of the DNB supervision topics for 2016 is the compliance of institutions under supervision with the EMIR obligations.

➢ **Broader powers for the AFM and DNB?**

The AFM has submitted an overview of legislative wishes to the Minister of Finance. The AFM is requesting, inter alia, broader powers to give a public warning on two points:

- The AFM wants to be able to give a public warning at an earlier stage. At present the AFM can only give a public warning if a violation has been assessed. In the interests of consumer protection, the AFM wants to be able to issue a public warning if there is *a reasonable suspicion* of a violation.
- The AFM wants to be able to issue a public warning with regard to *all* violations. At present the AFM only has this power with regard to violations of provisions containing a prohibition, and a number of specific violations, but, for example, not with regard to violation of the code of conduct of part 4 of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft).

The AFM furthermore wishes to have the power to be able to mention financial companies by name in reports: '*faming, naming and shaming*'. The AFM has noted that in studies and exploratory reviews it regularly notes violations of the standards laid down in the Wft. At present the AFM cannot mention these parties by name in reports. The AFM believes that the reports can gain in impact if this were possible: (i) companies which are in compliance cannot be held accountable for negligent actions of industry peers and (ii) companies which are not fully compliant will have an extra incentive to improve the organisation.

DNB in turn expressed the wish for a statutory basis for a power for DNB to go public if an institution itself publishes confidential supervision information which is inaccurate or incomplete. DNB would like an exception to its duty of confidentiality to be created which offers DNB the option of correcting this kind of inaccurate or incomplete information.

The Minister of Finance has indicated he wishes to study to what extent statutory changes are necessary and/or desirable and that he will discuss the matter with the AFM and DNB. This may be reflected in a proposal for the Financial Markets Amendment Act 2017, which will be consulted in accordance with the usual legislative cycle in the course of 2016. Parties who are concerned about this possible expansion of powers, will thus do well to highlight this in the coming year.

➢ **Developments in the area of EMIR**

The *European Markets Infrastructure Regulation* (EMIR, Regulation 648/2012) sets requirements for all parties which make use of OTC derivatives. EMIR sets provisions for the trade in and clearing of OTC derivatives. The provisions apply to all institutions engaged in these activities. EMIR entered into force on 16 August 2012, but the lower regulations, on the basis of which supervision can be effected, will enter into force in stages. Two important EMIR obligations will enter into force in 2016.

- ***Compulsory central clearing***
  As of 21 June 2016 it will be mandatory for clearing members to centrally clear certain categories of interest rate swaps (this means the obligation to clear these derivatives via a *Central Counter Party* (CCP)). As of 21 December 2016 this obligation also applies with regard to financial counterparties as referred to in EMIR (these are inter alia banks and investment firms and certain alternative investment funds).

- ***The bilateral margin exchange with non-centrally cleared transactions***
  EMIR mandates the timely and accurate exchange of collateral for non-centrally cleared derivatives transactions. This obligation enters into force on 1 September 2016. This obligation is specified in further detail in draft Regulatory Technical Standards (RTS) published by the ESAs. The rules in the RTS require the exchange of initial collateral and variable collateral. In particular, the giving of initial security entails a new extra burden for market parties, although the RTS does provide a few exceptions to this obligation. These rules apply to financial and non-financial counterparties as referred to in EMIR and only apply to derivatives contracts which are not centrally cleared via a CCP. The RTS will enter into effect in stages.

Parties who are engaged in OTC derivatives will have to ensure that they are contractually and systematically prepared to perform the central clearing obligation and the obligation of a bilateral exchange of collateral.

➢ **Reporting and transparency obligations for securities financing transactions**

On 12 January 2016, the European Regulation on reporting and transparency of securities financing transactions will enter into force on a phased basis. The regulation relates to securities lending and commodities lending, (reversed) repurchase agreements, buy-sell back or sell-buy back and margin lending transactions. The most important provisions in the regulation relate to:

- the monitoring and reporting of the arising of system risks in the financial system in connection with securities financing transactions (entry into force depends on the entry into force of the ESMA technical regulation standards, currently unknown);

- the provision of information on such transactions to investors whose assets are used in the transactions (the provision of information in periodical reports takes effect commencing on 13 January 2017, the provision of information in pre-contractual documents takes effect commencing on 13 July 2017);

- re-use activities, the re-use by financial institutions of collateral provided to them by their clients (takes effect commencing on 13 July 2016).

For parties with outstanding securities financing transactions made before the date of entry into force, it is important to check whether the remaining term is more than 180 days. In such case the above reporting obligation applies. In addition, it is important in the event of re-use of received collateral to be alert to the fact that a record is made in the underlying documentation regarding the conditions on which re-use is possible and that explicit consent has been granted therefore by the providing counterparty.

➢ **Modification of DNB screening process**

DNB recently assessed its own screening practice (i.e. trustworthiness or suitability screening) by having an external research agency conduct a study. The study provided many concrete points, so that DNB decided to further strengthen the screening process with regard to a number of points. DNB will do this by:

- Making the screening process more organised and through greater involvement of the DNB senior management.
- Providing more insight into the screening process, the decision making and the options for objection and appeal.
- Offering more transparency and providing more information. This will take place by means of, inter alia, sharing anonymised cases which make it clear how a screening takes place in practice. New information material will be made available for the institutions and the candidates, so that they can properly prepare for the screening process. DNB will also organise information meetings for candidates and parties who are involved in preparing the screening.

Persons who must be screened in 2016 will thus do well to involve this new guidance in his or her preparation, to the extent it is already available at the time of screening or preparation for the screening.

- **DNB Misconduct Reporting Portal**

DNB opened the Misconduct Reporting Portal in the middle of December 2015. The DNB Misconduct Reporting Portal is intended for professionals in the financial sector who have valid suspicions of or have come into contact with forms of serious violation of legislation and regulations. Think of fraud, corruption, conflict of interests, money laundering and terrorism financing. DNB expects that a person reporting misconduct will first report the matter internally to the institution where he or she works. If this is not possible, the person wishing to report misconduct can make the report by telephone, email, letter or online reporting form. The form is currently being developed. DNB will then evaluate the report and possibly start an investigation. Due to its statutory duty of confidentiality DNB cannot give substantive feedback to the person who reported the misconduct regarding the approach to and the status of the report. As of the middle of January more information will be published on dnb.nl regarding the DNB Misconduct Reporting Portal, such as the necessary details for a report and the differences between the whistleblower portal and the registration of the report.

- **European Commission call for evidence on the impact of financial regulations**

On 30 September 2015 the European Commission published a call for evidence, in which it asked for input and feedback with regard to the cumulative impact and interaction of the current European legislation and regulations in the area of financial services. In this manner the European Commission wishes to gain better insight into possible inconsistencies, incoherencies and gaps in the current framework and it wants to determine whether there is unnecessary regulatory pressure and factors which may have a negative influence on investments and long-term growth. Concrete examples of overlapping, inconsistencies, unnecessary tax and unwanted effects of legislation can be submitted up to 6 January 2016.

- **Applicability of the Wft**

Along with the Dutch act implementing the Bank Recovery and Resolution Directive, the Netherlands Council of State set out in its advice that due to its structure, the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft) is a technically complicated and poorly accessible statute. This is in part the result of the number of European directives and regulations which have direct effect (to which the Wft may or may not refer). The Advisory Division of the Netherlands Council of State believes that a thorough revision of the structure of the Wft must improve the accessibility. For the time being the accessibility of the Wft could be improved with a handbook, according to the Netherlands Council of State. At present the Ministry of Finance is thinking about a revision of the Wft. We expect to see more concrete proposals on the matter in 2016.

We advise market parties who have an interest in a more organised supervisory legislation framework, to determine what stumbling blocks they see in the current Wft, and to highlight it at this stage.

- **Guidelines AFM on real estate valuations**

In December 2015, the AFM started a public consultation on its Guidelines for real estate valuations. The motive for this document is the average unreliability of real estate valuations within the financial sector for the public and regulators. The AFM makes recommendations to financial undertakings with respect to the valuation process and the valuator, and provides guidance to the conditions of the sound business operations relating to valuations. The guidelines are not necessarily the only way to comply with the requirements on sound business operations with respect to valuations. The consultation period ends on 29 January 2016.

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FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR SETTLEMENT INSTITUTIONS IN 2016

TOPICS

➢ Settlement institutions based in a non-designated state

The Financial Markets Amendment Act 2016 entails a number of, mostly technical, changes with regard to the supervision of settlement institutions (*afwikkelondernemingen*). These changes will see to it that the market entry provisions better align with the provisions relating to ongoing supervision. The most important changes entail that the regulations for settlement institutions based in the Netherlands and the regulations for settlement institutions based in a non-designated state are brought in line.

This means, in particular, that new requirements will apply to settlement institutions based in a non-designated state which wish to provide services in the Netherlands, particularly if this takes place through a branch office. For example, the suitability and reliability test for directors will also apply to the branch office when entering the market. DNB has already anticipated these requirements. The Financial Markets Amendment Act 2016 enters into force as of 1 April 2016.

➢ Interchange Fee Regulation

On 8 June 2015 the Interchange Fee Regulation (2015/751/EU) entered into force. This regulation establishes rules for interchange fees for cards based on payment transactions (for example, credit card and debit card payments). The Interchange Fee Regulation introduces, inter alia, a maximum interchange fee. As of 9 December 2015 the Minister of Finance determined a weighted average maximum interchange fee for domestic debit card transactions of € 0.02 per transaction. It is possible to nationally fix a lower maximum interchange fee for domestic debit card transactions than the standard rule. The established maximum applies for 5 years, after that the standard fee will, in principle, apply, i.e.: 0.2% of the transaction value per transaction. The standard rule is followed with regard to the maximum interchange fee for credit card transactions, i.e.: 0.3% of the transaction value per transaction.

Part of the rules from the Interchange Fee Regulation only apply as of 9 June 2016 (Articles 7-10 Interchange Fee Regulation). These relate to, for example, the separation between the debit card schemes on the one hand and the processing entities on the other. Also, a debit card scheme is prohibited from preventing an issuer from adding two or more different payment brands or payment applications on a card-based payment instrument. Debit card schemes and payment service providers are no longer permitted to oblige parties accepting a specific card to accept all (often more expensive) cards of the same scheme. These rules may in part apply to the settlement institution itself, or to its participants (the payment service providers).

➢ Remuneration rules apply in full as of 1 January 2016

On 7 February 2015 the Financial Undertakings Remuneration Policy Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) entered into force with retroactive effect to 1 January 2015 (although an employment court recently held otherwise). The Wbfo is included in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*). Among other things, the Wbfo contains provisions relating to a sound remuneration policy for settlement institutions, remuneration policy publication obligations, claw-back and

adjusting variable remunerations and provisions on the amount and conditions for severance payments. The most striking provision of the Wbfo is the limiting of the maximum variable remuneration to 20% of the fixed remuneration (the 20% bonus cap). This bonus cap (but also the prohibition on guaranteed variable remuneration and the provision on the maximum severance package) has a very broad scope and few exceptions. The Wbfo contains a transition period of one year for financial commitments relating to variable remunerations which already existed on 1 January 2015. This transition period will therefore end on 1 January 2016.

This means that as of 1 January 2016 settlement institutions can in principle no longer award variable remuneration of more than 20%. DNB is expected in 2016 to conduct research into the remuneration policy, with particular attention to the bonus cap.

- **Financial sector oath/affirmation: End of transition period on 31 March 2016**

As of 1 April 2015 the group of persons who must swear the oath/make the affirmation will be expanded to all persons who work under the responsibility of a settlement institution in the Netherlands and:

(i) whose work can significantly influence the risk profile of the settlement institution; or
(ii) who have direct client contact.

Employees must in principle swear this oath/make this affirmation within 3 months after taking up employment. However, the rules contain a transition scheme for existing personnel: persons who fall under the scope of the obligation and already worked at the settlement institution on 1 April 2015, must swear the oath or make the affirmation on 1 April 2016 latest.

It is therefore important that settlement institutions see to it that the relevant persons have sworn the oath/made the affirmation on 1 April 2016 latest.

- **Whistleblowers scheme**

The modified "House for Whistleblowers" bill will be treated in the Dutch Senate on 9 February 2016. If the bill is passed, employers who have at least 50 people working for them as a rule will be obliged to establish a whistleblowers scheme. A "House for Whistleblowers" will be founded; an independent administrative body which will have independent powers to advise and investigate companies.

The House for Whistleblowers Act is expected to enter into force in the course of 2016. Settlement institutions with more than 50 employees must provide a whistleblowers scheme as of that time.

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FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR ALTERNATIVE FINANCING IN 2016

TOPICS

➢ National legislation regarding credit unions

The Dutch Act on the supervision of credit unions (*Wet toezicht kredietunies*, Wtk) creates a separate supervision framework for credit unions in the Dutch Financial Supervision Act. Credit unions are cooperatives in which entrepreneurs unite per industry or per region and lend each other money. The Wtk provides a licensing regime for and continuous supervision of credit unions by the Dutch Central Bank (*De Nederlandsche Bank*, DNB). A distinction is made in this respect between credit unions with a limited scope and other credit unions. The starting point is that a credit union is obliged to have a licence. The law regulates, however, that credit unions with a limited scope (less than € 10 million) are exempted from the licensing requirement for credit unions. Credit unions up to € 100 million and 25.000 members require a licence from DNB in order to conduct the business of a credit union. Cooperatives which have more money to distribute, require a banking licence. For the SME sector, credit unions mean an alternative source of funding.

The Wtk and the related subordinate legislation (a decree and a regulation) entered into force on 1 January 2016.

➢ Adjustments to national regulation of crowdfunding

In the past few years the legislator and the supervisory authorities have been working on better gearing the supervision system to the rapid development of crowdfunding. The measures relate to both crowdfunding whereby the investment is construed as a participation in equity (*equity based*) and to crowdfunding in the form of loans (*loan based*). The following six measures are concerned:

- ***Increase in investment limits:*** When the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) grants a licence or a dispensation to a crowdfunding platform it will be made subject to certain conditions. Since 10 December 2015 the AFM has applied higher investment limits as part of those conditions. For equity based crowdfunding the investment limit has been increased from EUR 20,000 to EUR 40,000 per platform. This means that a consumer cannot invest more than a total of EUR 40,000 in bonds or stock via 1 platform. For loan based crowdfunding the investment limit has been increased from EUR 40,000 to EUR 80,000.
- ***Mandatory investor test*:** An additional condition for crowdfunding platforms since 10 December 2015 is that platforms have to take an investor test whereby the outcome indicates whether the investment is or is not appropriate for the consumer concerned.
- ***Reflection possibility for consumers:*** The AFM believes it is important that the consumer consciously makes a choice to invest and therefore according to the AFM there must be a possibility to reflect. This

can occur in two ways (at the discretion of the platform), i.e. (i) by giving the consumer 24 hours to confirm his or her investment or (ii) by offering the consumer the option during a period of 24 hours to easily cancel the investment free of charge. The choice can be laid down in the general terms and conditions. The AFM appears to already be applying this obligation in its supervision of platforms.

- ***Exception to the inducement ban for investment firms*:** This will be realised as of 1 April 2016 by means of the Financial Markets Amendment Decree 2016. This exception is only relevant for equity-based crowdfunding platforms which qualify as an investment firm.
- ***Dispensation regime for intermediaries attracting redeemable funds*:** Many crowdfunding platforms execute their activities in the Netherlands under an individual dispensation from the AFM to act as an intermediary in the attracting of redeemable funds. By means of the Financial Markets Amendment Decree 2016 the dispensation regime will be formally reinforced as of 1 April 2016. In particular, additional conditions are set in relation to the business operations which are geared to preventing disfunctioning of and fraud by the platform. Furthermore, directors and supervisory directors of a platform with a dispensation as of 1 April 2016 must not only go through a integrity test, but also a suitability test.
- ***Exemption to prohibition on attracting redeemable funds*:** With loan based crowdfunding the borrower attracts redeemable funds from the public. In principle this activity is prohibited on the basis of Section 3:5 of the Dutch Financial Supervision Act. That is why in the course of 2016 the Exemption Regulation under the Dutch Financial Supervision Act will include an exemption to this prohibition specifically for this situation.
- ***Requirements for asset segregation:*** The AFM has stated that in the course of 2016 it is coming up with additional regulations relating to the segregatiomn of assets by crowdfunding platforms. In practice the assets of a crowdfunding platform will often be separated from the assets of the investors and borrowers of that platform by the creating of a foundation through which the payment flows go. Regulations the AFM is thinking of are, e.g., guidelines which the foundation's board of directors must comply with, guidelines for the structure of the business operations and the activities which the foundation may execute.

The AFM has announced that the new regulations will not only apply for new entrants, but must also be observed by existing platforms as of 1 April 2016 latest. The AFM will contact the relevant existing platforms in January 2016. They will have to take measures to satisfy a number of the above-mentioned requirements as of 1 April 2016, including the new suitability requirements for directors and supervisory directors.

➢ **Banking licence-light**

The response of the Minister of Finance of 4 November 2015 to the Actal advice 'Regulatory pressure at granting of credit' (*Regeldruk bij kredietverstrekking*) shows that the minister intends to work out a plan regarding the possibility of a banking licence-light for small, specialised and innovative financial institutions. This means that an entrant to the market could in the first instance apply for a limited banking licence, for which initially lower requirements apply with regard to capital, liquidity and required (ICT) investments than for a regular banking licence. Such a regime already exists in the UK. The minister expects to inform the Dutch House of Representatives in the first half of 2016.

➢ **European action plan on building a capital markets union**

On 30 September 2015 the European Commission presented the action plan on building a capital markets union (COM (2015) 148 final). In the framework of the priority of the Juncker Commission of stimulating employment, growth and investments in the EU, with this action plan the European Commission is trying to reinforce the growth potential of Europe by strengthening and diversifying sources of funding for European companies and long-term investment projects. The action plan covers a wide area and the diversity of proposed actions is great. Six topics can be distinguished in the action plan:

Outlook 2016

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Actions which will be concretely shaped in 2016 and which directly affect market parties will be discussed in the individual sections of the Finnius Outlook.

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FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR BANKS IN 2016

TOPICS

➢ SSM: ECB supervision priorities

After the entry into force of the Single Supervisory Mechanism (SSM) on 4 November 2014, the European Central Bank (ECB) became the direct banking supervisory authority of all significant banks in the euro member states. In addition, the ECB is the indirect banking supervisory authority of all less significant banks in those member states. The national competent authorities, including DNB, must conform to ECB policy. The ECB's most important priorities for 2016 are set out below. These priorities are not only relevant for significant banks, but can also be relevant for less significant banks. DNB can take over specific topics from the ECB.

- ***Business models and profitability***: In 2016 the ECB will hold detailed reviews regarding the profitability at individual banks and regarding comparable business models. The ECB concentrates on, inter alia, how banks deal with low interest rates and new regulations.
- ***Credit risk***: The ECB will also focus on non-performing loans (NPLs). At present the number of NPLs in Europe is very high. In the Netherlands the number is relatively low, however. A separate work group will develop a consistent approach for NPLs. Work will also be carried out on excessive risk concentrations and exposures to countries and to commercial and residential real estate.
- ***Internal models***: The ECB will carry out specific studies of the quality of internal models of banks to see whether they satisfy the supervisory standards. It is also a goal to promote consistency of the internal models between banks.
- ***Capital adequacy***: In 2016 the ECB will also focus on the internal stress tests in the ICAAP of banks. This is in part with an eye on the SREP stress test and an EBA stress test in 2016. The ECB also takes into account the implementation of the MREL (Minimum Requirement for own funds and Eligible Liabilities) and TLAC (Total Loss Absorbing Capacity) requirements.
- ***Governance and risk appetite***: In 2016 focus will remain on the governance and risk appetite of individual banks. Particular attention will have to be paid to the organisation and composition of the

board of directors and the supervisory board of a bank, and the suitability of directors. The ECB has furthermore set up a task force relating to behaviour and culture which will carry out specific research in 2016.

- ***Cyber risk and data integrity***: Given the dependence of banks on IT systems, the ECB has launched a cyber-security review of significant banks and performed a benchmarking exercise. Based on the outcome the ECB has identified the banks at which it wishes to carry out on-site inspections, which were launched in the second half of 2015. Currently, the ECB is setting up a process to closely monitor significant IT incidents at all significant banks. The ECB will also track trends and developments relating to cyber risk.

➢ **SSM: harmonisation of supervision rules and practices**

The ECB – as primary bank supervisory authority – is striving for far-reaching supervisory harmonisation within the SSM. This applies both to supervisory rules and to supervisory practices. National supervisory authorities applying the supervisory rules differently among themselves does not align with a harmonised European bank supervision. Following are a number of ECB initiatives which will have a material impact on the supervision of banks in 2016.

- ***Harmonization of options and national discretions:***
  The ECB has consulted a number of proposals to harmonise national application of the rules of the CRD IV and the CRR ('options and national discretions'). At national level the competent authorities now have approximately 120 options under the CRD IV and the CRR to fill in the supervisory rules themselves nationally. There are also many national differences in fleshing out the provisions of EU banking supervision.

  DNB still uses different options and national discretions in its supervision. A few examples of this are the individual consolidation method (Article 9 CRR), IFRS reporting (Article 24 (2) CRR), acknowledgement of CET1 instruments by cooperatives (Article 27 (1) CRR) and consent for the reduction of equity (Article 78 (1)(b) CRR). As soon as the ECB's proposals have been introduced, all supervisory agencies in the euro area will apply the options and discretions in the same way.

  The consultation concluded on 16 December 2015. The final documentation in the form of an ECB Regulation and a Guide for the application of options and national discretions are expected in April 2016. For Dutch banks this will have a big impact insofar as the ECB's policy will deviate from current DNB policy. We advise keeping a close eye on any differences with the current DNB practice.

- ***Far-reaching harmonisation of supervision practices and AnaCredit***
  The supervisory practices of the ECB will be composed of the best practices of the various national supervisory authorities. For example, the ECB has taken over data-driven supervision and on-site supervision from the Southern-European member states. Practices which are now becoming noticeable at DNB as the supervisor of less significant banks. Reporting formats are also being standardised.

  It is our expectation that this harmonisation of supervision practices will only continue to increase in 2016. It is relevant here to keep track. An important point for attention will be the introduction of credit data-analysis system AnaCredit (analytical credit datasets). On the basis thereof banks will have to furnish an enormous quantity of detailed information regarding individual credit facilities on a monthly basis. According to the current proposal this encompasses approximately 100 data fields per credit facility.

  It is expected that the gathering of data will start in 2018. At present consultation is ongoing regarding an ECB Regulation. This consultation will last to 29 January 2016. We advise banks to – jointly or otherwise – review to what extent they can comply with the provision of such a detailed set of information, and at what costs.

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- **CRR revision**

At present the European Commission is evaluating and revising the working of the CRR. The results of this revision will be published in 2016, and will probably lead to an adjustment of the CRR in 2017. Lord Hill, the EU commissioner for Financial Stability, Financial Services and Capital Markets Union, has already indicated that in this revision focuses on (i) improving credit lending to the SME sector, (ii) improving the involvement of banks in long-term investments and infrastructure projects, and (iii) making the rules of the CRR more proportional.

We advise banks which wish to influence this revision of the CRR to keep a very close eye on whether consultations on the revision take place.

- **Recovery and resolution of banks (BRRD and SRM)**

The BRRD (Bank Recovery and Resolution Directive, Directive 2014/59/EU) and the SRM Regulation (Single Resolution Mechanism Regulation, Regulation 806/2014) provide for regulations relating to the recovery and resolution of banks (and specific investment firms). Provisions include, inter alia, resolution powers and instruments, like the bail-in tool. If the resolution authority deploys the bail-in, certain types of debt of a bank can be written off or converted into share capital. In addition, banks must draw up recovery plans in line with the BRRD / SRM Regulation. The resolution authority will draw up a resolution plan for every bank involved. The bank can be asked to assist draw up the plan.

The Dutch legislation implementing the BRRD entered into force on 26 November 2015 (part 3A of the Dutch Financial Supervision Act). Specific components relating to the bail-in included in the BRRD, entered into force on 1 January 2016. The same applies with regard to the bail-in option for significant banks on the basis of the SRM Regulation. We advise banks to check whether they have a recovery plan available that satisfies the requirements of the BRRD (or, in the case of significant banks, the SRM Regulation). In addition, we advise banks to determine, for example, whether they have sufficient capital which is eligible for a bail-in, the MREL (Minimum Requirement for own funds and Eligible Liabilities) to be established by the resolution authority. In its ALM policy the bank must take account of the capital costs of such capital.

- **DNB Supervision Priorities 2016**

DNB published its supervision priorities for the coming year in November 2015. This document contains a number of relevant announcements for banks. Banks must take account of the fact that they will be confronted with a large number of specific DNB assessments and investigations in 2016. For example, DNB announced that in 2016 it will give priority to the following points:

- ***On-site supervision***: Carrying out investigations more often and for a longer period of time on site at the banks (*on-site* supervision).
- ***Search for yield***: Due to the low interest rates banks are making poor yields and they are looking for alternative and more risky ways to increase the profit. DNB sees a risk that banks are pushing the boundaries too much, and will be on top of this in 2016.
- ***Concentration risk***: Study concentration risk (exposure to one counterparty, one sector or one country) particularly on the part of smaller banks.
- ***Data quality***: Carry out specific *on-site* investigations or '*deep dives*' at several banks, geared to quality of data and the reporting process.
- ***Minimum capital standards***: Study the correlation between and calibration of international minimum capital standards like MREL (Minimum Requirement for own funds and Eligible Liabilities) and TLAC (Total Loss Absorbing Capacity). DNB may execute an impact analysis on the basis of existing figures.
- ***Remuneration policy***: The review of the information on remuneration furnished by the banks. DNB will take note of compliance with, inter alia, the bonus cap and the retention policy.

- ***Credit risk management***: Research to what extent credit risk management has been properly embedded in smaller banks. The studies will look at, inter alia, the SME loans portfolio. An on-site study will form part of the research.
- ***Interest rate structure***: Research to what extent Dutch banks are vulnerable to changes in the interest rate structure. DNB will pay specific attention to savings.
- ***Conduct and culture***: DNB will present requests for information to selected banks relating to conduct, culture and change processes. This may encompass board assessments.
- ***Banking licence-light***: Studying the options for issuing partial-licences. The background of this is that in the opinion of DNB and the Ministry of Finance, the banking sector will benefit from the arrival of new entrants and more competition dynamics (see below for further details).

➢ **EBA guidelines relating to remuneration rules**

The Regulation on Sound Remuneration Policies 2014 (Rbb) is of great importance for further rules on the remuneration policy of banks. The Rbb applies to all banks. The Rbb forms the implementation of remuneration rules of the Capital Requirements Directive (CRD IV). The European Banking Authority (EBA) drew up Guidelines relating to sound remuneration policy with regard to these rules in 2010. DNB will apply these Guidelines in the interpretation of the Rbb.

On 21 December 2015 the EBA published the definite new Guidelines with regard to sound remuneration policy for banks and investment firms. One of the most important topics for the market which is discussed is the principle of proportionality. This principle is currently encompassed in CRD IV and stipulates that an institution must apply the remuneration rules taking account of size, internal organisation and nature, scope and complexity of the activities. Up to now the market interpreted this in such way that under certain circumstances institutions, in view of their specific profile, could not apply certain rules. After an uncertainty of a few months as a result of an EBA opinion on proportionality unfavourable for the market, EBA is proposing to continue the original view of proportionality as laid down in the current guidelines and to adjust/clarify the CRD. The new Guidelines contain interpretations on different topics, such as governance, the payment of variable remuneration in financial instruments and the application scope of the remuneration rules within groups with earlier financial undertakings.

DNB has indicated it will apply the Guidelines to be drawn up by EBA in the Netherlands in the framework of the supervision of compliance with the Rbb. The new Guidelines must be applied as of 1 January 2017 and must be implemented in the remuneration policy of banks.

➢ **Reporting and transparency obligations for securities financing transactions**

On 12 January 2016, the European Regulation on reporting and transparency of securities financing transactions will enter into force on a phased basis. The regulation relates to securities lending and commodities lending, (reversed) repurchase agreements, buy-sell back or sell-buy back and margin lending transactions. The most important provisions in the regulation relate to:

- the monitoring and reporting of the arising of system risks in the financial system in connection with securities financing transactions (entry into force depends on the entry into force of the ESMA technical regulation standards, currently unknown);

- the provision of information on such transactions to investors whose assets are used in the transactions (the provision of information in periodical reports takes effect commencing on 13 January 2017, the provision of information in pre-contractual documents takes effect commencing on 13 July 2017);

- re-use activities, the re-use by financial institutions of collateral provided to them by their clients (takes effect commencing on 13 July 2016).

For parties with outstanding securities financing transactions made before the date of entry into force, it is important to check whether the remaining term is more than 180 days. In such case the above reporting obligation applies. In addition, it is important in the event of re-use of received collateral to be alert to the fact that a record is made in the underlying documentation regarding the conditions on which re-use is possible and that explicit consent has been granted therefore by the providing counterparty.

- **Remuneration rules apply in full as of 1 January 2016**

On 7 February 2015 the Financial Undertakings Remuneration Policy Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) entered into force with retroactive effect to 1 January 2015 (although an employment court recently held otherwise). The Wbfo is included in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*). The Wbfo contains, inter alia, provisions relating to a controlled remuneration policy for banks, publication obligations relating to this remuneration policy, claw-back and adjusting variable remunerations and provisions regarding the amount and conditions for payment of severance packages. The most striking provision of the Wbfo is the limiting of the maximum variable remuneration to 20% of the fixed remuneration (the 20% bonus cap). This bonus cap (but also the prohibition on guaranteed variable remuneration and the provision on the maximum severance package) has a very broad scope and few exceptions. The Wbfo contains a transition period of one year for financial commitments relating to variable remunerations which already existed on 1 January 2015. This transition period will therefore end on 1 January 2016.

This means that as of 1 January 2016 banks in principle can no longer award variable remuneration of more than 20%. DNB is expected in 2016 to perform a study into the remuneration policy at banks, with particular attention to the bonus cap.

- **Financial sector oath/affirmation: End of transition period on 31 March 2016**

As of 01 April 2015 the group of persons who swear the oath/make the affirmation (the 'banker's oath') was expanded to virtually all employees of a bank. The obligation relates to all persons in the Netherlands who work under the responsibility of the bank and:

(i) have an employment contract with the bank; or
(ii) carry out activities which form part of or ensue from the exercising of the banking business, or form part of the essential operating processes in support thereof.

Employees must in principle swear this oath/make this affirmation within 3 months after taking up employment. However, the rules contain a transition scheme for existing personnel: persons who fall under the scope of the obligation and already worked at the settlement institution on 1 April 2015, must swear the oath or make the affirmation on 1 April 2016 latest. It is therefore important that banks see to it that the relevant persons have sworn the oath/made the affirmation on 1 April 2016 latest.

- **Lapsing of statutory basis for the Banking Code**

As of 1 January 2016 the Banking Code no longer has any statutory basis. The most important reason for this is that it has turned out that the banks have already started to implement the principles of the Banking Code industry-wide and the most important principles have already been encompassed in legislation. This already provides for supervision of sector-wide compliance with these principles. The result of this is that as of 2016 it is sufficient to confirm and account for compliance with the Banking Code on the website. It is no longer necessary to include a comply-or-explain paragraph regarding this point in the annual report.

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Outlook 2016

- **Countercyclical capital buffer as of 01 January 2016**

  As of 1 January 2016 the countercyclical capital buffer (CCyB) has entered into force. The introduction of the CCyB is intended to protect banks against fluctuations in the economic cycle. The underlying view is that excessive credit growth in the past was often a precursor to crises. The CCyB will usually be at zero, but is activated when the credit growth in a country is excessive. The instrument is a variable buffer above the minimum capital requirements which can rise to 2.5 percent of the risk-weighted assets, or higher if the circumstances give rise to such. If the risks decrease the CCyB will be relaxed. If risks manifest themselves – like in a crisis – a decision can be made to release the buffer fully, so that banks can absorb losses through the buffer.

  As of 2016 DNB will announce the CCyB every quarter. On 18 December 2015 DNB announced that at this time it does not see any reason to activate the CCyB for the Netherlands. The CCyB percentage is therefore nil percent as of 1 January 2016.

- **Preparation for the PRIIP Regulation**

  The PRIIP Regulation (1286/2014/EU) contains regulations for developing and offering on the retail market of Packaged Retail and Insurance-based Investment Products (PRIIP). PRIIPs can be divided into two categories: (i) packaged retail investment products and (ii) insurance-based investment products. Packaged retail investment products are products whereby the amount to be paid to the retail investor depends on fluctuations in a specific reference value or on the performance of one or more assets which have not been directly purchased by the retail investor. Examples of PRIIPs are participation rights in an investment institution or UCIT, life insurance contracts with an investment component, structured products and structured deposits. The developer of a PRIIP must draw up a key information document (KID) for the retail investors, which the seller (usually an intermediary) will have to furnish to the customer.

  The PRIIP Regulation has in the meantime been adopted and will enter into force on 31 December 2016. This means that before the end of this year banks must have prepared a KID for the PRIIPs developed by them and must have furnished them to sales channels.

- **Re-evaluation of interest rate derivatives by banks**

  Also in 2016 banks will have a lot of work involving the mandatory re-evaluations of the interest derivatives which have been sold to SME. Since 2013 this topic has been fully in the spotlights and banks are occupied with a re-evaluation of SME interest derivatives at the AFM's instruction. At the beginning of December 2015 the AFM stated via a press release that it had noted that re-evaluations of interest derivatives files at the six banks involved contained inaccuracies and incomplete information. A substantial part of the re-evaluations will have to take place again because the banks have not applied the statutory framework sufficiently.

  The AFM will make individual agreements with each of the six banks regarding the new method of re-evaluation – and regarding the re-evaluation of the contracts terminated before 1 April 2014 ('old cases'), the reference framework to be applied and the period within which the process of the new re-evaluations must have been completed.

- **First decisions of the FBEE Disciplinary Commission**

  In addition, as of 1 April 2015 Dutch banks are obliged to have a disciplinary procedure to which bank employees are subject and the application and execution of which has been charged to an independent and expert external institution. The latter institution is the Foundation for Banking Ethics Enforcement (FBEE) (*Stichting Tuchtrecht Banken*). In 2016 we expect the first decisions of the FBEE Disciplinary Commission following complaints lodged with FBEE against bank staff.

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Outlook 2016

- **Protection of derivatives holders against bankruptcy of intermediaries**

  As a result of the Financial Markets Amendment Act 2016, on 1 April 2016 new rules will enter into force with regard to the protection of derivatives holders against the bankruptcy of an intermediary (including banks). The derivatives positions which an intermediary takes on behalf of a client will be separated from the assets of the intermediary. A very important obligation is that the intermediary keeps a proper administration of the derivatives assets.

  In addition, banks which take a derivatives position on behalf of a client are obliged to indicate in advance in what capacity the bank is doing so: as intermediary or as final counterparty. The role which the bank takes is of influence on the property law position of the client (possible protection under the Dutch Securities Giro Transactions Act (*Wet giraal effectenverkeer*)). The duty of disclosure is included for this reason. The AFM can establish additional rules regarding the information method, so that this takes place in a uniform manner.

  Banks which take on derivatives positions on behalf of clients are advised to review to what extent the new obligations have an impact on their business.

- **Publication of set of uniform key data of banks**

  The DNB legislation letter 2015 and the Minister of Finance's response to the letter shows that both DNB and the minister wish to periodically publish a uniform set of key data from the supervision reports of individual banks, including in any event the leverage ratio. At present there is no statutory basis for this. The reason behind this wish is to provide consumers and other stakeholders with insight into the nature and financial position of banks.

  Should such a power to publish be established, it may be reflected in a proposal for the Financial Markets Amendment Act 2017, which will be consulted in accordance with the usual legislative cycle in the course of 2016. Parties who are concerned about this power of publication are advised to keep an eye on this in the coming year.

- **Financial stability and resolvability test**

  DNB and the Ministry of Finance expressed many wishes in 2015 for future banking legislation. When and whether these wishes will be realised is not yet clear, but due to the relevance we will point out here that DNB and the Ministry of Finance – in order to prevent megabanks which are too big to fail - wish to introduce a financial stability and resolvability test for banks. They want to do this by means of a change in the European rules for qualifying holdings, as laid down in CRD IV. This directive sets out criteria on the basis of which a supervisory authority can grant or refuse a "declaration of no objection" (DNO) with a merger or takeover of a bank. For the time being, these review grounds are purely micro-prudential. A review of financial stability and resolvability does not (yet) form part of these criteria. DNB and the Ministry of Finance are arguing to include these points in the directive and will work together to gather support for an adjustment of the relevant directive, inter alia, by means of a joint position paper. The U.S. already use of a specific merger and takeover review to prevent the creation of megabanks.

- **Banking license-light**

  The response of the Minister of Finance of 4 November 2015 to the Actal advice 'Regulatory burdens for consumer credit provision' shows that the minister intends to flesh out a plan regarding the possibility of a banking license-light for small, specialised and innovative financial institutions.

  This means that an entrant on the market could in the first instance apply for a limited bank license, for which initially lower requirements apply with regard to capital, liquidity and required (ICT) investments

than for a regular bank authorisation. Such a regime already exists in England. The minister expects to inform the Dutch House of Representatives in the first half of 2016. We expect that such a lowering of the threshold for both the application process and the granting of the authorisation will lead to an increasing number of entrants on the market.

➢ **Deposit guarantee system**

With regard to the deposit guarantee system, two developments are ongoing which will be important in 2016.

- ***Ex ante financing***
  First, at the end of November 2015 the Dutch legislation implementing the European Deposit Guarantee Schemes Directive (2014/49/EC) entered into force. Following the implementation of this directive the Dutch deposit guarantee system will become more risk-based. This entails the following changes:
  - banks will have to deposit a contribution every quarter *in advance* (ex ante financing) in a fund on behalf of the deposit guarantee system;
  - from now on large-commercial deposit holders come within the scope of the guarantee (this does not apply to, inter alia, financial institutions and governments);
  - there is an additional temporary guarantee for deposits which are directly connected with the purchase or sale of a home;
  - the term within which it must be possible to honour claims of deposit holders will be shortened in stages to seven working days in 2024.

- ***European deposit guarantee system***
  In addition, at the end of November the European Commission presented proposals for a European deposit guarantee system. Minister Dijsselbloem was extremely critical about this and the cabinet's response to these proposals from the middle of December 2015 show that the cabinet is of the opinion that it is too early for the introduction of a European deposit guarantee system. We expect that in 2016 more will become known about the plans for a European deposit guarantee system.

➢ **DNB guidance regarding compliance with the Sanctions Act**

Compliance with the Sanctions Act by banks will have the full attention of the DNB in 2016 as well. In the past few years integrity has always been an important supervision topic for DNB. The first cross-sectoral survey of DNB dates from October 2014, followed by follow-up surveys in the first quarter of 2015 and November 2015. In DNB's view the 'systematic integrity risk analysis' (SIRA) in particular is the weak point for many institutions. That is why in the course of 2016 DNB will come with (cross-sectoral) guidance regarding compliance with the Sanctions Act.

➢ **Whistleblowers scheme**

The modified "House for Whistleblowers" bill will be treated in the Dutch Senate on 9 February 2016. If the bill is passed, employers who have at least 50 people working for them as a rule will be obliged to establish a whistleblowers scheme. A "House for Whistleblowers" will be founded; an independent administrative body which will have independent powers to advise and investigate companies.

The House for Whistleblowers Act is expected to enter into force in the course of 2016. Banks with more than 50 employees must provide a whistleblowers scheme as of that time.

FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR INVESTMENT FUND MANAGERS IN 2016

TOPICS

- **Implementation of UCITS V**

  UCITS V (2014/91/EU) is now the fifth directive relating to undertakings for collective investment in transferable securities (UCITS) and was published on 28 August 2014. The most striking change is that a UCITS investment fund manager must appoint an independent depositary who is responsible for the supervisory and inspection tasks (including the custody of financial instruments, the keeping of a register of assets and the monitoring of cash flows). With regard to the rules for depositaries, alignment is sought with the regulatory framework relating to depositaries of the Alternative Investment Fund Managers Directive (AIFMD, 2011/61/EU). A bank, an investment firm or another authorised depositary can be appointed as depositary. A Regulation which is expected to be published shortly will provide for rights and obligations of the UCITS depositary. Furthermore, a UCITS investment fund manager must have a remuneration policy which is consistent with healthy risk management and which must satisfy certain minimum requirements.

  UCITS V must have been implemented in the Netherlands on 18 March 2016 latest. The bill to implement UCITS V was presented to the Dutch House of Representatives on 15 October 2015. On 27 October 2015 the related draft proposal for an implementation decree regarding amendment of the UCITS directive was presented for consultation. The consultation term was to run to 23 November 2015. The AFM will set out the new remuneration rules in lower-level regulations. These are not available at this time.

  We advise UCITS investment fund managers to check whether they have appointed a depositary who satisfies the new rules and to adjust the depositary contract to the depositary's new package of tasks. If the depositary previously appointed by the investment fund manager is not a bank or investment firm, a transition regime applies for these depositaries with regard to the obligation to have a license: they must have an a license 18 March 2018 latest. In addition, the remuneration rules to be published by the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) must have been implemented in the remuneration policy.

- **Regulation concerning European long-term investment funds (ELTIF)**

  The ELTIF Regulation (2015/760/EU) creates a new form of collective investment whereby investors are given the opportunity to invest in specific long-term investment funds (ELTIFs), for example infrastructure funds. The regulation was established to offer investors the opportunity to invest in long-term projects.

Certain conditions must be satisfied in order to qualify as an ELTIF. Only investment fund managers within the meaning of Alternative Investment Fund Managers Directive (AIFMD) are eligible to request the supervisory agency to be allowed to offer ELTIFs. ELTIFs may be offered to professional and retail investors, subject to certain (disclosure) obligations. In addition, ELTIFs can be offered throughout the entire European Union on the basis of a European passport. The regulation has been in effect since 9 December 2015.

An investment fund manager who invests in long-term projects may be eligible for the ELTIF label. The advantage of this label is that ELTIFs may be offered throughout the entire European Union to professional and retail investors on the basis of a European passport. For retail investors local rules do not have to be satisfied, as is the case for an 'ordinary' AIFMD investment fund manager.

- **Offers to *high net worth individuals***

At present, investment fund managers with an AIFMD licence may only offer participation rights to retail investors in the Netherlands if they perform a number of *top-up* obligations, such as additional disclosure obligations. Retail investors now entail all investors who do not qualify as a professional investor (for example, a bank or a pension fund) within the meaning of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*). This will change as of 01 April 2016 as a result of the Financial Markets Amendment Act 2016. Said act stipulates that the *top-up* regime does not apply to offers to retail investors, if:

(i) the participation rights can only be acquired at a counter-value of at least EUR 100,000 per participant; or
(ii) which have a nominal value per right of at least EUR 100,000.

This exception can be of great value for AIFMD investment fund managers which intend to (or already do) offer participation rights to *high net worth individuals*, but experience compliance with the additional obligations as a burden.

- **Inducement ban for unit-linked investment insurance policies**

As of 1 April 2016 insurance companies are prohibited from receiving inducements any longer from an investment fund manager with regard to a unit-linked investment insurance policy for which premiums are invested in the relevant investment fund. Provision has been made for a transition scheme on the basis of which there is an honour-based enforcement of individual investment insurance policies made before a specific date. For pension insurance which was taken out before a specific date there is a transition term up to and including 31 December 2020.

As a result of the inducement ban, insurance companies will have to adjust their earnings model with regard to unit-linked investment insurance policies as of 1 April 2016. This will therefore have an impact on the current money flows between investment fund managers and insurance companies.

- **Q&As AFM and ESMA relating to AIFMD**

The AFM and the European Securities and Markets Authority (ESMA) have published *Questions & Answers* (Q&As) on their websites relating to the AIFMD which they continually update. We advise that you periodically consult the websites of the supervisory agencies for the latest news regarding interpretation and application of the AIFMD.

- **ESMA guidelines relating to AIFMD and UCITS**

On 23 July 2015 ESMA published a consultation document with draft Guidelines for a sound remuneration policy under the AIFMD and UCITS. The Guidelines will be drawn up on the basis of the new UCITS V

directive, but also provide for a change in the guidelines which ESMA previously drew up on the basis of the AIFMD. It is indicated in UCITS V that the UCITS guidelines must align as much as possible with the AIFMD guidelines. One of the topics which ESMA is reviewing, is whether investment fund managers of UCITS are permitted to apply the principle of proportionality to compliance with the remuneration rules. On the basis of the AIFMD the investment fund manager of AIFs is permitted not to apply certain rules (or to apply them to a lesser degree), if this is appropriate in view of the size, nature and scope of the activities. ESMA is also considering applying this principle with regard to UCITS.

ESMA intends – partly with an eye on the entry into force of UCITS V as of 18 March 2016 – to publish the final Guidelines in Q1 of 2016. Investment fund managers of UCITS will have to draw up a remuneration policy which complies with the guidelines. Investment fund managers of AIFs must take account of the fact that they will have to adjust their current remuneration policy on certain points.

- **Passport options for non-EU investment fund managers**

In 2016 ESMA will conduct further research into the options for creating a European passport for non-EU investment fund managers who are regulated under the AIFMD. At present, a non-EU investment fund manager cannot make use of a European passport on the basis of which it is possible to manage and/or market investment funds throughout the entire European Union on the basis of the authorisation obtained in one reference member state. The AIFMD provides that at some point in time this must be an option. The AIFMD gives ESMA the assignment to evaluate the following factors to come to a positive recommendation relating to the non-EU investment fund manager passport: investor protection, market disruption, competition and the supervision of system risk. ESMA will carry out this research per jurisdiction. At present, ESMA is studying the following countries: Hong Kong, Singapore, the U.S., Australia, Canada, Japan, the Cayman Islands, the Isle of Man and Bermuda. It is still unclear within which time frame ESMA will come to a conclusion on the basis of which the European Commission can make a decision on this "third-country" policy.

- **Preparation for the PRIIP Regulation**

The PRIIP Regulation (1286/2014/EU) contains regulations for developing and offering on the retail market of Packaged Retail and Insurance-based Investment Products (PRIIP). PRIIPs can be divided into two categories: (i) packaged retail investment products and (ii) unit-linked investment products. Packaged retail investment products are products whereby the amount to be paid to the retail investor depends on fluctuations in a specific reference value or on the performance of one or more assets which have not been directly purchased by the retail investor. Examples of PRIIPs are participation rights in an investment institution or UCITS, life insurance contracts with an investment component, structured products and structured deposits. The developer of a PRIIP must draw up a key information document (KID) for the retail investors, which the seller (usually an intermediary) will have to furnish to the customer.

The PRIIP Regulation has in the meantime been adopted and will enter into force on 31 December 2016. This means that before the end of this year, investment fund managers must have prepared a KID for the PRIIPs developed by them and must have furnished them to sales channels.

- **Financial sector oath/affirmation: End of transition period on 31 March 2016**

As of 1 April 2015 the group of persons who must swear the oath/make the affirmation has been expanded to all persons who work under the responsibility of the manager in the Netherlands and:

(i) whose work can significantly influence the risk profile of the manager; or
(ii) who have direct client contact.

Employees must in principle swear this oath/make this affirmation within 3 months after taking up employment. When this expansion entered into force, provision was made for a transition period of one year for all persons who were already working under the responsibility of the manager before 1 April 2015 and will continue doing so in 2016. It is therefore important that investment fund managers ensure that the relevant persons have sworn the oath/made the affirmation on 31 March 2016 latest.

- **Whistleblowers scheme**

The modified "House for Whistleblowers" bill has been passed by the Dutch House of Representatives and will have plenary treatment in the Dutch Senate on 9 February 2016. If the bill is passed, employers who have at least 50 people working for them as a rule will be obliged to establish a whistleblowers scheme. A "House for Whistleblowers" will be founded; an independent administrative body which will have independent powers to advise and investigate companies.

The House for Whistleblowers Act is expected to enter into force in the course of 2016. Investment fund managers with more than 50 employees must provide a whistleblowers scheme as of that time.

- **Reporting and transparency obligations for securities financing transactions**

On 12 January 2016, the European Regulation on reporting and transparency of securities financing transactions will enter into force on a phased basis. The regulation relates to securities lending and commodities lending, (reversed) repurchase agreements, buy-sell back or sell-buy back and margin lending transactions. The most important provisions in the regulation relate to:

- the monitoring and reporting of the arising of system risks in the financial system in connection with securities financing transactions (entry into force depends on the entry into force of the ESMA technical regulation standards, currently unknown);
- the provision of information on such transactions to investors whose assets are used in the transactions (the provision of information in periodical reports takes effect commencing on 13 January 2017, the provision of information in pre-contractual documents takes effect commencing on 13 July 2017);
- re-use activities, the re-use by financial institutions of collateral provided to them by their clients (takes effect commencing on 13 July 2016).

For parties with outstanding securities financing transactions made before the date of entry into force, it is important to check whether the remaining term is more than 180 days. In such case the above reporting obligation applies. In addition, it is important in the event of re-use of received collateral to be alert to the fact that a record is made in the underlying documentation regarding the conditions on which re-use is possible and that explicit consent has been granted therefore by the providing counterparty.

- **DNB Supervision Priorities 2016**

DNB has indicated what it will (particularly) focus on in 2016. The general supervision priorities are discussed in the 'General Developments' section of the Finnius Outlook. With regard to specifically investment fund managers, the Dutch Central Bank (*De Nederlandsche Bank*, DNB) points out that it will focus on adequate capital buffers and healthy business operations. DNB will pay particular attention to the viability of business models. In addition, DNB will pay extra attention to improving the data quality.

We advise that investment fund managers critically review the organisation with regard to these points and where necessary make modifications, so that the organisation is prepared for possible questions of DNB.

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Outlook 2016

- **DNB supervision wish: Notification duty for capital withdrawals**

  DNB has submitted an overview of legislative wishes for 2015 to the Minister of Finance. With regard to investment fund managers, DNB is seeking the introduction of a notification duty for reductions in equity or the solvency of the investment fund managers. The Minister of Finance has said that he is discussing this matter with the DNB.

  Should such a notification duty be established, it may be reflected in a proposal for the Financial Markets Amendment Act 2017, which will be part of a consultation procedure in accordance with the usual legislative cycle in the course of 2016. Parties who are concerned about this notification duty are advised to keep an eye on this in the coming year.

- **Consultation on impediments to cross-border distribution of investment funds**

  The European Commission has concluded that the securities holding of investment funds on the European stock markets has increased proportionally from less than 10% in 1990 to 21% in 2012. These funds have become increasingly more important in the last few years as holders of company bonds. They belong to the most active cross-border investors. Consequently the European Commission will start a consultation in Q2 2016 on the most important impediments to the cross-border distribution of investment funds. On the basis of the information material provided, the Commission will focus on lifting substantial impediments, if necessary via the legislative channel.

  Investment fund managers who wish to provide input on the above-mentioned consultation are advised to keep a close eye on the starting and end date of this consultation.

- **Points of attention for asset managers with in-house funds**

  In December 2015 the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) drew up the guidelines 'Points of Attention for Asset Managers with an own provider of investment funds', and published these guidelines on its website. This applies with regard to asset managers who invest on behalf of clients in investment funds which are managed by an investment fund manager within the same group (in-house funds). In the guidelines the AFM refers to possible conflicts of interests and unwanted incentives if they manage assets for private investors in in-house funds. The guidelines set out points for attention, statutory obligations and existing practical examples against which asset managers can review their policy and on the basis of which the AFM has established its supervision strategy.

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Outlook 2016

FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR INVESTMENT FIRMS IN 2016

TOPICS

➢ Preparation for MiFID II

The most important development for investment firms is the pending entry into force of MiFID II. The MiFID II package consists of a directive (2014/65/EU), a regulation (600/2014/EU) and further elaboration in level 2 regulations and level 3 regulations. The directive and the regulation were adopted and were published on 12 June 2014. It was set out that MiFID II would enter into force on 3 January 2017. The (draft) level 2 regulations and level 3 regulations have not been officially published to date. Objections have arisen in the market in the meantime; implementation of MiFID II in the (IT) systems before January 2017 is claimed to be too ambitious. In addition, a rumour is going around the market, on the basis of a letter to the European Commission and ESMA from Germany, France and the United Kingdom (which was not published), that these countries deem certain changes relating to transparency and the commission rules in the MiFID II package to be desirable. It therefore very much looks as if the entry into force of MiFID II will be postponed by one year, i.e. to 3 January 2018.

Although it looks as if MiFID II will be postponed by one year, we recommend, in view of the substantial impact of the new rules, starting with (or continuing to work on) the preparations for the entry into force.

➢ Preparation for PRIIP Regulation

The PRIIP Regulation (1286/2014/EU) contains rules for the development and offering in the retail market of *Packaged Retail and Insurance-based Investment Products* (PRIIP). PRIIPs can be divided into two categories: (i) packaged retail investment products and (ii) insurance-based investment products. Packaged retail investment products are products whereby the amount to be paid to the retail investor depends on fluctuations in a specific reference value or on the performance of one or more assets which have not been directly purchased by the retail investor. Examples of PRIIPs are participation rights in an investment institution or UCIT, life insurance contracts with an investment component, structured products and structured deposits. The developer of a PRIIP will have to draw up a key information document (KID) for the retail investors, which must then be provided by the seller (usually an intermediary) to the customer.

The PRIIP Regulation has been adopted and will enter into force on 31 December 2016. This means that investment firms will have to draw up a KID for the PRIIPs developed by them before the end of this year and provide these to their sales channels.

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Outlook 2016

- **Recovery and resolution of banks and (large) investment firms (BRRD)**

  The BRRD provides regulations relating to recovery and resolution of banks and certain investment firms. This provides for, inter alia, resolution powers and instruments, like the bail-in tool. If the resolution authority uses the bail-in tool, debts of the investment firm can be written off or converted into share capital. In addition, investment firms must draw up recovery plans in line with the BRRD. The resolution authority will draw up a resolution plan for every investment firm involved, whereby the investment firm, if so desired, can be asked to help in the drawing up. In addition to banks, the BRRD also applies to *stand-alone* investment firms with a mandatory starting capital of at least EUR 730.000. In practice these are investment firms which (i) place or take over financial instruments when offering them with a placement guarantee, (ii) deal on own account and (iii) operate a multilateral trading facility (MTF). The BRRD also applies to branch offices of these investment firms which are based outside of the EU.

  The Dutch legislation implementing the BRRD entered into force on 26 November. Certain parts relating to the bail-in included in the directive entered into force on 1 January 2016. We advise the relevant investment firms to check whether they have a recovery plan available that satisfies the requirements of the BRRD. In addition, it is recommended, for example, to determine whether there is sufficient capital which is eligible for a bail-in, the MREL (*Minimum Requirement for own funds and Eligible Liabilities*). In its ALM policy, the investment firm must take account of the capital costs of such capital.

- **Protection of derivatives holders against the bankruptcy of intermediaries**

  As a result of the Financial Markets Amendment Act 2016, on 1 April 2016 new rules will enter into force with regard to the protection of derivatives holders against the bankruptcy of an intermediary (including investment firms). The derivatives positions which an intermediary takes on behalf of a client will be separated from the assets of the intermediary. A very important obligation is that the intermediary keeps a proper administration of the derivatives assets.

  In addition, investment firms which take a derivatives position on behalf of a client are obliged to indicate in advance in what capacity the investment firm is doing that: as intermediary or as final counterparty. The role which the investment firm takes is of influence on the property law position of the client (possible protection under the Dutch Securities Giro Transactions Act). The duty of disclosure is included for this reason. The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) can establish additional rules regarding the method of informing, so that this takes place in a uniform manner.

  Investment firms which take on derivatives positions on behalf of clients are advised to determine to what extent the new obligations have an impact on their business.

- **Points of attention for asset managers with in-house funds**

  In December 2015 the AFM published a guideline containing Points of Attention for Asset Managers with an own provider of investment funds. This applies to asset managers who invest on behalf of clients in investment firms or UCITs which are managed by an investment fund manager within the same group (in-house funds). In the guidelines the AFM refers to possible conflicts of interests and unwanted incentives if they manage assets for private investors in in-house funds. The guidelines set out points for attention, statutory obligations and existing practical examples against which asset managers can review their policy and on the basis of which the AFM has established its supervision strategy. The AFM previously consulted six conditions with market parties with which the possible conflicts of interests and incentives can be avoided.

  We recommend asset managers who invest in in-house funds on behalf of clients to observe the guidelines.

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- **Remuneration rules apply in full as of 1 January 2016**

  On 7 February 2015 the Financial Undertakings Remuneration Policy Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) entered into force with retroactive effect to 1 January 2015 (although an employment court recently held otherwise). The Wbfo is included in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*). The Wbfo contains, inter alia, provisions relating to a sound remuneration policy for investment firms, publication obligations relating to this remuneration policy, claw-back and adjusting variable remunerations and provisions regarding the amount and conditions for payment of severance packages. The most striking provision of the Wbfo is the limiting of the maximum variable remuneration to 20% of the fixed remuneration (the 20% bonus cap). This bonus cap (but also the prohibition on guaranteed variable remuneration and the provision on the maximum severance package) has a very broad scope and few exceptions. The Wbfo contains a transition period of one year for financial commitments relating to variable remunerations which already existed on 1 January 2015. This transition period will therefore end on 1 January 2016.

  This means that as of 1 January 2016 investment firms in principle can no longer award variable remuneration of more than 20%. The Dutch Central Bank (*De Nederlandsche Bank*, DNB) is expected in 2016 to perform a study into the remuneration policy at investment firms, with particular attention given to the bonus cap.

- **EBA guidelines relating to remuneration rules**

  The Regulation on Sound Remuneration Policies 2014 (Rbb) is of great importance for the elaboration of the remuneration policy of investment firms. The Rbb applies to all investment firms. The Rbb forms the implementation of remuneration rules of the Capital Requirements Directive (CRD IV). The European Banking Authority (EBA) drew up Guidelines relating to sound remuneration policy with regard to these rules in 2010. These Guidelines apply in the interpretation of the Rbb by DNB.

  On 21 December 2015 the EBA published the definite new Guidelines with regard to sound remuneration policy for banks and investment firms. One of the most important topics for the market which is discussed is the principle of proportionality. This principle is currently encompassed in CRD IV and stipulates that an institution must apply the remuneration rules taking account of size, internal organisation and nature, scope and complexity of the activities. Up to now the market interpreted this in such way that under certain circumstances institutions, in view of their specific profile, could not apply certain rules. After an uncertainty of a few months as a result of an EBA opinion on proportionality unfavourable for the market, EBA is proposing to continue the original view of proportionality as laid down in the current guidelines and to adjust/clarify the CRD. The new Guidelines contain interpretations on different topics, such as governance, the payment of variable remuneration in financial instruments and the application scope of the remuneration rules within groups with earlier financial undertakings.

  DNB has indicated it will apply the Guidelines to be drawn up by EBA in the Netherlands in the framework of the supervision of the compliance with the Rbb (and thus to all investment firms). The new Guidelines must be applied as of 1 January 2017 and must be implemented in the remuneration policy of investment firms.

- **Whistleblowers scheme**

  The modified "House for Whistleblowers" bill will be treated in the Dutch Senate on 9 February 2016. If the bill is passed, employers who have at least 50 people working for them as a rule will be obliged to establish a whistleblowers scheme. A "House for Whistleblowers" will be founded; an independent administrative body which will have independent powers to advise and investigate companies.

The House for Whistleblowers Act is expected to enter into force in the course of 2016. Settlement institutions with more than 50 employees must provide a whistleblowers scheme as of that time.

- **Reporting and transparency obligations for securities financing transactions**

On 12 January 2016, the European Regulation on reporting and transparency of securities financing transactions will enter into force on a phased basis. The regulation relates to securities lending and commodities lending, (reversed) repurchase agreements, buy-sell back or sell-buy back and margin lending transactions. The most important provisions in the regulation relate to:

- the monitoring and reporting of the arising of system risks in the financial system in connection with securities financing transactions (entry into force depends on the entry into force of the ESMA technical regulation standards, currently unknown);

- the provision of information on such transactions to investors whose assets are used in the transactions (the provision of information in periodical reports takes effect commencing on 13 January 2017, the provision of information in pre-contractual documents takes effect commencing on 13 July 2017);

- re-use activities, the re-use by financial institutions of collateral provided to them by their clients (takes effect commencing on 13 July 2016).

For parties with outstanding securities financing transactions made before the date of entry into force, it is important to check whether the remaining term is more than 180 days. In such case the above reporting obligation applies. In addition, it is important in the event of re-use of received collateral to be alert to the fact that a record is made in the underlying documentation regarding the conditions on which re-use is possible and that explicit consent has been granted therefore by the providing counterparty.

- **Financial sector oath/affirmation: End of transition period on 31 March 2016**

As of 1 April 2015 the group of persons who must take the oath / make the affirmation has been expanded to all persons who work under the responsibility of an investment firm in the Netherlands and:

(i) whose work can significantly influence the risk profile of the investment firm; or
(ii) who have direct client contact.

Employees must in principle take this oath/make this affirmation within 3 months after taking up employment. When this expansion entered into force provision was made for a transition period of one year for all persons who were already working under the responsibility of an investment firm before 1 April 2015 and will continue doing so in 2016. It is therefore important that investment firms see to it that the relevant persons have taken the oath/made the affirmation on 31 March 2016 latest.

- **DNB Supervision Priorities 2016**

DNB has indicated what it will (particularly) focus on in 2016. The general supervision priorities are discussed in the 'General Developments' section of the Finnius Outlook. With regard to investment firms, DNB points out that it will focus on guaranteeing the financial resilience and continuity of, in particular, smaller investment firms. DNB noticed in the market that smaller investment firms are increasingly having difficulty in keeping their heads above water due to competition from large investment firms (which enjoy advantages of scale and have resources to invest in technological innovations). In 2016 DNB is placing the emphasis on adequate capital buffers and healthy business operations. DNB will pay particular attention to the viability of business models. DNB will pay extra attention to improving the data quality. DNB will preventatively influence and steer investment firms, and where necessary, sanction them by means of an enforcement policy if a shortfall is noted.

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In the first quarter of 2016 DNB intends to present an information request to investment firms with respect to the sustainability of business models. In the second and third quarter there will be an analysis by DNB with possible specific investigations. In the fourth quarter DNB will present its feedback. We advise the organisation to critically review these components and where necessary steer them, so that the organisation is geared to the DNB investigation.

- **DNB Supervision Wish: Notification duty for capital withdrawals**

DNB has presented an overview of legislative wishes to the Minister of Finance. With regard to investment firms, DNB is asking for the introduction of a notification duty for reductions in the shareholders' equity or the solvency of the investment firms. The Minister of Finance has indicated he is discussing the matter with DNB.

Should such a notification duty exist, then it may be reflected in a proposal for the Financial Markets Amendment Act 2017 (which will be consulted in accordance with the usual legislative cycle in the course of 2016). Parties who are worried about this possible notification duty are advised to pay attention to this issue in the coming year.

- **Consultation on impediments to cross-border distribution of investment funds**

The European Commission has concluded that the securities holding of investment funds on the European stock markets has increased proportionally from less than 10% in 1990 to 21% in 2012. These funds have become increasingly more important in the last few years as holders of company bonds. They belong to the most active cross-border investors. Consequently the European Commission will start a consultation in Q2 2016 on the most important impediments to the cross-border distribution of investment funds. On the basis of the information material provided, the Commission will focus on lifting substantial impediments, if necessary via the legislative channel.

Investment firms which wish to provide input on the above-mentioned consultation are advised to keep a close eye on the starting and end date of this consultation.

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FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR PAYMENT SERVICE PROVIDERS IN 2016

TOPICS

➢ PSD2 adopted: tightening of rules for payment service providers

On 08 October 2015 the European Parliament agreed to the revision of the Payment Services Directive. The European Council gave its approval on 16 November 2015. PSD2 was published in the Official Journal on 23 December 2015 and PSD2 will enter into force as of 12 January 2016. Member States must implement PSD2 in their legislation within two years after publication.

Important changes relating to the current regulations are:

- an expansion of the scope so that payment transactions in any currency whatsoever and 'one-leg transactions' will be regulated;
- a restriction of the ability to make use of the exception for telecom services and commercial agents;
- the introduction of a registration duty for parties which make use of the exception for 'limited use' or for telecom services;
- new security regulations relating to internet payments;
- providers of payment initiation services and account information services (Third Party Providers) will be provided access to the market;
- payment institutions must have access to payment account services of banks in an objective, non-discriminatory and proportional basis.

We advise undertakings which provide payment services to review whether the new rules will affect their activities and if necessary to draw up an implementation plan in time.

➢ Interchange Fee Regulation

On 08 June 2015 the Interchange Fee Regulation (2015/751/EU) entered into force. Said regulation establishes rules for interchange fees for cards based payment transactions (for example, credit card and debit card payments). The Interchange Fee Regulation introduces, inter alia, a maximum interchange fee. As of 9 December 2015 the Minister of Finance determined a weighted average maximum interchange fee for domestic debit card transactions of € 0.02 per transaction. Member States have the option to determine a lower maximum interchange fee for domestic debit card transactions than the standard rule. The established maximum applies for 5 years, after that the standard fee will, in principle, apply, i.e.: 0.2% of the transaction value per transaction. For maximum interchange fee for credit card transactions, the standard rule is followed, i.e.: 0.3% of the transaction value per transaction.

Part of the rules from the Interchange Fee Regulation only apply as of 9 June 2016 (Articles 7-10 Interchange Fee Regulation). These relate to, among others, the separation between the debit card schemes on the one hand and the processing entities on the other hand. Furthermore, a debit card scheme is prohibited from preventing an issuer from adding two or more different payment brands or payment applications on a card-based payment instrument. In addition, debit card schemes and payment service

providers are no longer permitted to oblige parties accepting a specific card to accept all (often more expensive) cards of the same scheme.

- **DNB Regulations relating to Oversight of proper working of payment traffic**

The Dutch Central Bank (*De Nederlandsche Bank*, DNB) is entitled to set additional rules for licensed payment service providers (and banks and EMIs) with regard to the proper working of payment traffic. To this end, DNB has drawn up a regulation (the Regulation Oversight proper functioning of payment systems). The Regulation prescribes that financial institutions must satisfy the DNB regulations when setting up their business operations. The Regulation implements international standards with regard to the promoting of the proper functioning of the payment systems. The regulations relate to governance rules, the implementation of responsibilities within the organisation and to risk management. In its response to the new regulations, the European Central Bank (ECB) requested that national regulations always align with European and international rules and principles.

The Regulation was published in the Netherlands Government Gazette (*Staatscourant*) on 21 December 2015 and entered into force as of 22 December 2015. We advise payment institutions to evaluate whether their organisation complies with the rules set out in the Regulation.

- **Remuneration rules apply in full as of 1 January 2016**

On 7 February 2015 the Financial Undertakings Remuneration Policy Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) entered into force with retroactive effect to 1 January 2015 (although an employment court recently held otherwise). The Wbfo is included in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft). The Wbfo contains, inter alia, provisions relating to a sound remuneration policy and publication obligations relating to this remuneration policy (for payment institutions) and claw-back and adjusting variable remunerations and provisions regarding the amount and conditions for payment of severance packages (for payment service providers that fall within the scope of the Wft). The most striking provision of the Wbfo is the limiting of the maximum variable remuneration to 20% of the fixed remuneration (the 20% bonus cap). This bonus cap (but also the prohibition on guaranteed variable remuneration and the provision on the maximum severance package) has a very broad scope and few exceptions. The Wbfo contains a transition period of one year for financial commitments relating to variable remunerations which already existed on 1 January 2015. This transition period will therefore end on 1 January 2016.

This means that as of 1 January 2016, payment service providers that fall within the scope of the Wft in principle can no longer award variable remuneration of more than 20%.

- **Financial sector oath/affirmation: End of transition period on 31 March 2016**

As of 1 April 2015 the group of persons who must take the oath/make the affirmation has been expanded to all persons who work under the responsibility of payment institutions in the Netherlands and:

(i) whose work can significantly influence the risk profile of the payment institution; or
(ii) who have direct client contact.

Employees must in principle swear this oath/make this affirmation within 3 months after taking up employment. When this expansion entered into force, provision was made for a transition period of one year for all persons who were already working under the responsibility of a payment institution before 1 April 2015 and who will continue doing so in 2016. It is therefore important that payment institutions see to it that the relevant persons have taken the oath/made the affirmation on 31 March 2016 latest.

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- **Whistleblowers scheme**

  The modified "House for Whistleblowers" bill has been passed by the Dutch House of Representatives and will have plenary treatment in the Dutch Senate on 9 February 2016. If the bill is passed, employers who have at least 50 people working for them as a rule will be obliged to establish a whistleblowers scheme. A "House for Whistleblowers" will be founded; an independent administrative body which will have independent powers to advise and investigate companies.

  The House for Whistleblowers Act is expected to enter into force in the course of 2016. Payment service providers with more than 50 employees must provide a whistleblowers scheme as of that time.

- **FinTech and DNB priorities 2016**

  DNB is signalling stormy developments in the payment services market and expects that these developments will fundamentally change the payment services market. PSD2 (see above) will make it possible that at the consumer's request, payment transactions are effected by non-banking parties, making use of direct access to the consumer's payment account. Innovative FinTech companies are demanding an ever-greater role. For DNB it is essential that the payment systems remain safe, reliable and efficient. DNB wants payment institutions (and new market entrants) to identify the integrity and security risks of the new technologies and to adjust their business operations and services accordingly. Payment institutions will have to develop a future-proof business model. In the first quarter of 2016 DNB will select the payment institutions which will be reviewed on this point. Specific investigations will be carried out in the course of 2016.

  We advise the organisation to critically review these points and where necessary to steer them, so that the organisation has been adequately set up prior to the DNB investigation.

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FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR FINANCIAL SERVICES PROVIDERS IN 2016
(INTERMEDIARIES, ADVISERS AND PROVIDERS OF INVESTMENT OBJECTS)

This part of the Finnius Outlook deals with important developments in 2016 for financial services providers. This catch-all category includes, inter alia, providers of investment objects and intermediaries and advisers for financial products, such as insurance and consumer credit facilities. Consumer credit providers are also deemed financial services providers in the Dutch Financial Supervision Act. Developments for these consumer credit providers are included in a separate, own, part of the Finnius Outlook.

TOPICS

➢ Unit-linked insurance after-care

At present, the government is primarily emphasising the after-care for clients with a unit-linked insurance policy in relation to the unit-linked insurance problems. In order to reinforce this policy, in the summer of 2015 an obligation was laid down in the Further Regulation on Conduct of Business Supervision of Financial Undertakings (*Nadere Regeling Gedragstoezicht financiële ondernemingen*, NRGfo) for insurance companies to 'activate' clients with a unit-linked insurance policy. Activate refers to the efforts of the life insurance company to enable its clients to make a considered choice to continue, alter or stop their unit-linked insurance. This activating of clients will preferably take place by means of a rebalancing advice to the client. This will often take place via the adviser. The deadline for activating clients with a pension-related or a mortgage-related unit-linked insurance expires on 31 December 2016. The requisite result belonging with this deadline was specified by the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) at the end of October in its Unit-linked Insurance After-Care Report (*Rapportage Nazorg beleggingsverzekeringen*).

It is important that advisers continue to cooperate sufficiently in 2016 with the insurance company's activation duty. The AFM announced that this point of attention will remain under its supervision in the coming year.

➢ Implementation of the Mortgage Credit Directive in March 2016

The Mortgage Credit Directive (2014/17/EU) was adopted on 4 February 2014 and contains, inter alia, rules for mortgage providers in the area of advertising, information provision, foreclosure in the event of payment arrears, tied sales and early redemption. The Mortgage Credit Directive also contains a number of provisions which are specifically relevant for mortgage intermediaries. For example, mortgage intermediaries will have the option to apply for a "European passport" on the basis of a licence in the Netherlands, with which the intermediary services can also be offered in another European country.

Furthermore, intermediaries must furnish clients with a European Standardised Information Sheet (ESIS) as of 21 March 2016.

Mortgage intermediaries and advisers will have to request mortgage providers to provide them with modified mortgage documentation and the ESIS in due time, so that these intermediaries and advisers can furnish that new documentation to clients as of 21 March 2016.

- **Inducement ban for services relating to claims under a defined contribution pension scheme**

As of 1 April 2016, pursuant to the Financial Markets Amendment Decree 2016, an inducement ban will apply for advice and intermediary services in relation to claims under a defined contribution pension scheme. This is the same inducement ban that has applied since 1 January 2013 for other products which have a significant impact, like life insurance and mortgage credit. The inducement ban entails that clients must pay advisers and direct providers directly for advice and the arranging of claims under a defined contribution scheme. At this point in time clients usually pay the costs via the price of the product. Following the inducement ban, the remuneration of advisers and of direct providers may no longer be incorporated in the price of the product. Nor may advisers receive a fee (commission) from the provider for these claims under a defined contribution pension scheme.

As a result of the inducement ban advisers and intermediaries will have to adjust their earnings model with regard to claims under a defined contribution pension scheme as of 1 April 2016.

- **Wft diplomas: Only one year left**

Since 1 January 2014 there is a new professional competence system for consumer credit providers who also advise on credit facilities. The last transition period for achieving the new diploma obligations ends on 31 December 2016. Most advisers will then have had three years to obtain the necessary diplomas. Only in the case of extraordinary circumstances during this period (e.g. long-term illness or loss of job), can the AFM grant a temporary exemption on request. This exemption will only be granted in cases of significant hardship.

This means that consumer credit providers who also give advice will in principle only have this year to obtain the necessary diplomas as prescribed by the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft).

- **Remuneration rules apply in full as of 1 January 2016**

On 7 February 2015 the Financial Undertakings Remuneration Policy Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) entered into force with retroactive effect from 1 January 2015 (although an employment court recently held otherwise). The Wbfo is included in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*). The Wbfo contains, inter alia, provisions relating to a sound remuneration policy for financial services providers, publication obligations relating to this remuneration policy, claw-back and adjusting variable remunerations and provisions regarding the amount and conditions for payment of severance packages. The most striking provision of the Wbfo is the limiting of the maximum variable remuneration to 20% of the fixed remuneration (the 20% bonus cap). This bonus cap (but also the prohibition on guaranteed variable remuneration and the provision on the maximum severance package) has a very broad scope and few exceptions. The Wbfo contains a transition period of one year for financial commitments relating to variable remunerations which already existed on 1 January 2015. This transition period will therefore end on 1 January 2016.

This means that as of 1 January 2016 financial services providers in principle can no longer award variable remunerations of more than 20%.

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- **Financial sector oath/affirmation: End of transition period on 31 March 2016**

  As of 1 April 2015 the group of persons who must take the oath/make the affirmation has been expanded to all persons who work under the responsibility of a consumer credit provider in the Netherlands and:

  (i) whose work can significantly influence the risk profile of the consumer credit provider; or
  (ii) who have direct client contact.

  Employees must in principle take this oath/make this affirmation within 3 months after taking up employment. When this expansion entered into force provision was made for a transition period of one year for all persons who were already working under the responsibility of a consumer credit provider before 1 April 2015 and will continue doing so in 2016. It is therefore important that consumer credit providers see to it that the relevant persons have taken the oath/made the affirmation on 31 March 2016 latest.

- **Whistleblowers scheme**

  The modified "House for Whistleblowers" bill has been passed by the Dutch House of Representatives and will have plenary treatment in the Dutch Senate on 9 February 2016. If the bill is passed, employers who have at least 50 people working for them as a rule will be obliged to establish a whistleblowers scheme. A "House for Whistleblowers" will be founded; an independent administrative body which will have independent powers to advise and investigate companies.

  The House for Whistleblowers Act is expected to enter into force in the course of 2016. Financial services provider with more than 50 employees must provide a whistleblowers scheme as of that time.

- **Regulation of investment objects and investment bonds**

  The legislator announced in 2014 that it was going to work on the further regulation of (managers of) institutions which offer investment bonds. Investment bonds are bonds whereby the money raised is used for investment. According to the national legislative programme 2015 an 'Investment Objects and Investment Bonds Amendment Act' is being prepared. This Amendment Act will not only regulate investment bonds, but will also tighten up the existing rules for the provision of investment objects. This is not surprising in view of the recent signals from the AFM that there has been a noteworthy increase in the number of notifications that something might be wrong with high-yield investments in, particularly, real estate, holiday homes and land.

  In 2016 providers of investment objects can most likely expect a tightening of the supervision regime. In addition, we expect that parties which can now still issue investment bonds without supervision may be confronted with some form of regulation in 2016.

- **MiFID II and PRIIP Regulation for National Regimers**

  Advice and intermediary services regarding financial products with an investment component (such as securities-based mortgages, pension products, bank savings products) in principle requires a licence as investment firm pursuant to the *Markets in Financial Instruments Directive* (MiFID). This type of intermediaries, however, may provide their services under the National Regime without a separate MiFID licence on the basis of a licence as financial services provider, provided a number of conditions are satisfied. One of those conditions is that the service provision itself does satisfy the rules of conduct under MiFID. The existing MiFID rules of conduct will be tightened when MiFID II (consisting of Directive 2014/65/EU and Regulation 600/2014/EU) is implemented in the Netherlands. It very much looks as if this implementation will be postponed for a year, from 1 January 2017 to 1 January 2018. This postponement turned out to be necessary to give the market parties time to implement the sometimes far-reaching changes (e.g. in IT systems).

This means that National Regimers have a year longer to implement MiFID II. We advise to start by making an impact analysis to chart the necessary changes in the business at the end of 2016, so that after that sufficient time will remain to become MiFID II-*proof*.

In addition, the PRIIP Regulation (1286/2014/EU) is relevant for intermediaries and advisers who provide services relating to combined products with an investment component. The PRIIP Regulation contains regulations for developing and offering on the retail market of *Packaged Retail and Insurance-based Investment Products* (PRIIP). PRIIPs can be divided into two categories: (i) packaged *retail* investment products and (ii) insurance-based investment products. Examples of PRIIPs are participation rights in an investment institution or UCITS, life insurance contracts with an investment component, structured products and structured deposits. The developer of a PRIIP must draw up a key information document (KID) for the retail investors, which the seller (usually an intermediary) will have to furnish to the customer.

The PRIIP Regulation has in the meantime been adopted and will enter into force on 31 December 2016. We advise intermediaries and advisers to align with developers of PRIIPs when the KID will be available for provision to clients.

- **EIOPA consultation of Guidelines relating to "product oversight and governance"**

In October 2015 EIOPA started a consultation on the "preparatory Guidelines on product oversight and governance arrangements by insurance undertakings and insurance distributors." This consultation is related to the implementation of the *Insurance Distribution Directive* (this directive was previously also called *Insurance Mediation Directive II*, or IMD II) for which it is currently expected that they will be implemented in 2018. The consultation contains guidelines for national supervisory authorities, which relate to both insurance companies and insurance intermediaries. The consultation relates to internal processes to put insurance products on the market and to ensure that the products are suitable for the persons who purchase them. The consultation term closes on 29 January 2016.

- **Payments for software**

The AFM explained its position that a provider may not pay for inclusion of its products in advisory or comparison software in its newsletter concerning financial services providers of 22 December 2015. According to the AFM, these payments entail a risk of steering clients and are therefore undesirable. If the provider pays the software supplier for inclusion of its products in the software, the provider will pay indirectly for being included in the advice of independent advisers. The payments can consequently have an influence on the outcome of the advice. The AFM has drawn up a Q&A, which can be found on its website. The AFM's vision must be seen in the light of the commission ban which applies to products which have a significant impact like mortgage credit and life insurance.

Providers who are still making payments for the inclusion of their products in the software, must have stopped these payments before 1 January 2016.

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Outlook 2016

FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR CONSUMER CREDIT PROVIDERS IN 2016

TOPICS

- **Mortgage loans: Implementation of the Mortgage Credit Directive in March 2016**

  The Mortgage Credit Directive (2014/17/EU) was adopted on 4 February 2014 and contains, inter alia, rules for mortgage providers in the area of advertising, information provision, foreclosure in the event of payment arrears, tied sales and early redemption. The Mortgage Credit Directive deviates on a number of points from the similar rules which mortgage providers in the Netherlands must already satisfy. In addition, the Mortgage Credit Directive contains specific requirements relating to the contents of credit agreements. The directive must be effective in the Netherlands as of 21 March 2016. The bill to implement the Mortgage Credit Directive was presented to the Dutch House of Representatives on 23 September 2015. The new rules do not apply to credit agreements made before the entry into force of the implementation act.

  Mortgage loan providers will in any event have to adjust their general terms and conditions and draw up a European Standardised Information Sheet (ESIS) before 21 March 2016. In addition, these consumer credit providers must change certain procedures before that date, including the procedure for early redemption and foreclosure in the event of payment arrears.

- **Mortgage loans: Expansion of borrowing capacity for dual-income borrowers**

  The borrowing capacity of dual-income borrowers has been expanded as of 01 January 2016. In order to effect this, adjustments have been made with regard to the financing burden rate. The financing burden rate indicates what part of the gross income can be spent on mortgage costs, without this leading to irresponsible financial burdens for the consumer. With dual-income borrowers, the salary of the lower-earning partner will not be weighted as heavily when determining the maximum borrowing capacity. The reason for this is that account will be taken of the possibility that one of the partners may start to work less and that dual earners are less able to deal with financial setbacks by taking on extra work (as they are already doing so). Due to the reduction of the tax credit for the lower-earning partner, the net available income of dual earners will increase with regard to sole earners. For the 2016 standards the second income will therefore count more heavily when determining the financing burden rate, i.e. for 50%. In 2015 the figure was 33%.

  We advise mortgage loan providers to adjust the existing credit acceptance standards to the new rules.

- **Mortgage loans: New reference rate for borrowing capacity**

  For mortgages with a fixed-rate period of less than ten years, when determining whether the mortgage is appropriate for the consumer, it is mandatory to apply a reference rate. Using a reference rate is intended

to prevent consumers from ending up in financial difficulties after the end of the fixed-rate period. If the statutory interest is higher than the reference rate, use must be made of the actual interest rate. The reference rate is at least 5%. The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) publishes the reference rate on its website. The reference rate is 5% for the first quarter of 2016.

In the first quarter of 2016 mortgage loan providers must apply the reference rate of 5% and are advised to consult the AFM website for the following quarters.

- **Mortgage loans: Payments for software**

The AFM explained its position that a provider may not pay for inclusion of its products in advisory or comparison software in its newsletter for financial services providers of 22 December 2015. According to the AFM, these payments entail a risk of steering clients and are therefore undesirable. If the provider pays the software supplier for inclusion of its products in the software, the provider will pay indirectly for being included in the advice of independent advisers. The payments can consequently have an influence on the outcome of the advice. The AFM has drawn up a Q&A, which can be found on its website. The AFM's vision must be seen in the light of the commission prohibition which applies to products which have a significant impact, like mortgage loans.

Mortgage loan providers who are still making payments for the inclusion of their products in the software, must have stopped these payments before 1 January 2016.

- **New standards relating to consumer credit borrowing capacity**

The basic standard amounts for consumer credit are changing as of 01 February 2016. These standard amounts are determined annually by the Netherlands Association of Banks and the AFM. They indicate what amounts consumers, depending on their household composition, must have available at all times for their maintenance. If the net income is below the standard, there is no scope for obtaining consumer credit. The standards form an integral part of the Consumer Credit Code of Conduct.

Consumer credit providers must embed these new standards in their credit acceptance framework as of 01 February 2016.

- **Credit provision in the telecom sector**

On 13 June 2014 the Netherlands Supreme Court ruled that a telephone subscription with a ‘free’ phone qualifies as a (goods) credit facility. This means that when offering such subscriptions to consumers, telephone providers must possess a license as credit provider and must comply with the prevailing requirements of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft). Telecom providers then asked the Minister of Finance to establish an exception or exemption for the telecom sector. In the meantime there are discussions in the Dutch House of Representatives and with the telecom sector on the drawing up of a code of conduct which all telecom providers must adhere to. The Minister of Finance is considering in such case including an exemption in the relevant parts in the Wft.

We expect it to become clear in 2016 whether the telecom sector, when offering telephone subscriptions with a ‘free’ phone, must comply with the Wft or whether a code of conduct will offer a solution for the sector. The outcome of this is important for every player in the mobile phone sales chain.

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- **Wft diplomas: Only one year left**

  Since 1 January 2014 there is a new skills testing system for consumer credit providers who also advise on consumer credit facilities. The last transition period for achieving the new diploma obligations ends on 31 December 2016. Most advisers will then have had three years to obtain the necessary diplomas. Only in the case of extraordinary circumstances during this period (e.g. long-term illness or loss of job), can the AFM grant a temporary exemption on request. This exemption will only be granted in cases of significant hardship.

  This means that consumer credit providers who also give advice will in principle only have this year to obtain the necessary diplomas as prescribed by the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft).

- **Remuneration rules apply in full as of 1 January 2016**

  On 7 February 2015 the Financial Undertakings Remuneration Policy Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) entered into force with retroactive effect to 1 January 2015 (although an employment court recently held otherwise). The Wbfo is included in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*). The Wbfo contains, inter alia, provisions relating to a sound remuneration policy for consumer credit providers, publication obligations relating to this remuneration policy, claiming back and adjusting variable remunerations and provisions regarding the amount and conditions for payment of severance packages. The most striking provision of the Wbfo is the limiting of the maximum variable remuneration to 20% of the fixed remuneration (the 20% bonus cap). This bonus cap (but also the prohibition on guaranteed variable remuneration and the provision on the maximum severance package) has a very broad scope and few exceptions. The Wbfo contains a transition period of one year for financial commitments relating to variable remunerations which already existed on 1 January 2015. This transition period will therefore end on 1 January 2016.

  This means that as of 1 January 2016 consumer credit providers in principle can no longer award variable remuneration of more than 20%.

- **Financial sector oath/affirmation: End of transition period on 31 March 2016**

  As of 1 April 2015 the group of persons who must swear the oath/make the affirmation has been expanded to all persons who work under the responsibility of a consumer credit provider in the Netherlands and:

  (i) whose work can significantly influence the risk profile of the consumer credit provider; or
  (ii) who have direct client contact.

  Employees must in principle swear this oath/make this affirmation within 3 months after taking up employment. When this expansion entered into force, provision was made for a transition period of one year for all persons who were already working under the responsibility of a consumer credit provider before 1 April 2015 and will continue doing so in 2016. It is therefore important that consumer credit providers see to it that the relevant persons have sworn the oath/made the affirmation on 31 March 2016 latest.

- **Whistleblowers scheme**

  The modified "House for Whistleblowers" bill has been passed by the Dutch House of Representatives and will have plenary treatment in the Dutch Senate on 9 February 2016. If the bill is passed, employers who have at least 50 people working for them as a rule will be obliged to establish a whistleblowers scheme. A "House for Whistleblowers" will be founded; an independent administrative body which will have independent powers to advise and investigate companies.

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The House for Whistleblowers Act is expected to enter into force in the course of 2016. Consumer credit providers with more than 50 employees must provide a whistleblowers scheme as of that time.

➢ **Regulatory pressure relating to credit provision**

On 15 October 2015 the Dutch Advisory Board on Regulatory Burden (Actal) presented its advice entitled 'Regulatory pressure relating to credit provision' (*Regeldruk bij kredietverstrekking*) to the Minister of Finance, in which Actal makes recommendations to alleviate the regulatory pressure on the part of consumer credit providers in the Netherlands. A number of interesting observations and recommendations for consumer credit providers:

- "Small and new parties are under certain circumstances '*too small to comply*' – the supervisory agencies should take this into account in a licence application procedure." The Minister of Finance has indicated he will study the possibilities of a 'baning licence-light'.
- "A '*think small first principle*' should be applied in the financial legislation and regulations at European level, which entails that under certain conditions small parties may be exempted from certain regulations." The Minister of Finance has indicated it will continue working in a European context on proportionality of new regulations for small, innovative parties.
- "The obligations pursuant to the Prevention of Money Laundering and Financing of Terrorism Act (*Wet ter voorkoming van witwassen en financiering van terrorisme*, Wwft) and the Sanctions legislation relating to identification (detection and screening) should be standardised with regard to SME credit facilities, in order to keep costs down." The Minister of Finance has indicated that the Wwft and Sanctions legislation have a risk-based system – not the size of the institution, but the risk of money laundering is decisive with regard to the intensity of the investigation. This point is not being satisfied at this time.
- "Alternative forms of financing should be encouraged." The Minister of Finance has indicated that crowdfunding and credit unions must – in the short term – provide for this need. The minister will support additional kinds of alternative financing.

Legislative amendments may be implemented to satisfy Actal's wishes. This may be reflected in a proposal for the Financial Markets Amendment Act 2017, which will be consulted in accordance with the usual legislative cycle in the course of 2016. Parties who have an interest in these legislative amendments are advised to follow the developments relating to these points.

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FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR TRUST OFFICES IN 2016

TOPICS

- **DNB supervision wishes for the trust sector: promoting integrity**

In its legislation letter 2015 of 15 June 2015, DNB presented an overview of legislative wishes to the Minister of Finance. With regard to trust offices DNB presented different wishes in connection with the promotion of the integrity in the trust sector. The most important points of attention for DNB are:

- To incorporate more explicit provisions in the Trust Offices Supervision Act (Wtt) that the business activities of trust offices must be geared to mitigating the integrity risks which trust activities entail. DNB has maintained its wish to introduce a minimum of two executive policymakers.

- In the event a trust office is structurally not able to comply with the statutory standards and there are no other resources available to enforce compliance, DNB wishes to possess more options for revoking the license.

- DNB does not deem structures which promote the anonymity of final beneficiaries to be desirable in the light of realising the "gate-keeper" function.

- DNB deems the outsourcing of the compliance function to an external party an impediment for the internalisation of integrity within a trust office. DNB wishes to have further internalisation of integrity within a trust office effected from now on via an integrated compliance function.

In response to DNB's legislation letter, the Minister of Finance has indicated he understands the importance of good regulations for the trust sector and in consultation with DNB will draw up an inventory regarding where the existing trust regulations require adjustment.

The Financial Markets Amendment Act 2016, which will enter into force as of 1 April 2016, does not contain any changes to the rules established by and pursuant to the Wtt. Possibly changes will be reflected in a proposal for the Financial Markets Amendment Act 2017, which will be discussed in the course of 2016 in accordance with the usual legislative cycle. Parties who are concerned about this possible expansion of the requirements relating to integrity are advised to discuss this in the framework of that consultation.

- **DNB's Supervision Outlook 2016: internalised ethical culture**

In its Supervision Outlook for 2016 DNB mentions as a goal for the trust sector an “internalised ethical culture’. DNB intends in this respect in the framework of topic-oriented investigation to pay attention to, inter alia, the quality of the audit function. That investigation will be geared to evaluating and benchmarking the quality of the audit function in a selected number of trust offices. The investigation will take place in the first quarter of 2016 and feedback on the findings will be presented in the second quarter.

DNB has previously concluded that the integrity risks in the trust sector are too high in its opinion and that these risks are not being adequately managed. In cooperation with the Ministry of Finance, partly on DNB's request in its legislation letter 2015, DNB has been working on tightening the Wtt and underlying regulations to, inter alia, prevent or terminate the most risky activities which trust offices execute (*de-risking*). Until that time DNB will strictly supervise the way in which trust offices perform their gate-keeper role.

Trust offices are advised to chart the integrity risks and where necessary to take measures.

DNB furthermore refers to the importance of good transaction monitoring with an eye on compliance with the sanction and anti-money laundering regulations. On the basis of DNB investigations it has turned out that, inter alia, at trust offices this monitoring is not always sufficient. The DNB's attention for trust offices will specifically focus on structures which reinforce anonymity, thereby impeding the oversight of the origin or destination of money flows.

- **Whistleblowers scheme**

The modified "House for Whistleblowers" bill has been passed by the Dutch House of Representatives and will have plenary treatment in the Dutch Senate on 9 February 2016. If the bill is passed, employers who have at least 50 people working for them as a rule will be obliged to establish a whistleblowers scheme. A "House for Whistleblowers" will be founded; an independent administrative body which will have independent powers to advise and investigate companies.

The House for Whistleblowers Act is expected to enter into force in the course of 2016. Trust offices with more than 50 employees must provide a whistleblowers scheme as of that time.

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Outlook 2016

FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR ISSUERS IN 2016

TOPICS

➢ Prospectus Regulation

The European Commission published the proposal for the new Prospectus Regulation on 30 November 2015. In time, this regulation will replace the current Prospectus Directive (2003/71/EC). The proposal is part of the long-term action plan of the European Commission to establish a Capital Markets Union. The speech of Jonathan Hill – European Commissioner dealing with the Capital Markets Union – entails that the proposal for the new Prospectus Regulation will ensure that the drawing up of a prospectus will be simpler, quicker and cheaper. The most important changes in the proposed Prospectus Regulation are:

- Less burdensome prospectus rules for SMEs;
- The exemption for small issues will be expanded;
- Secondary issues for listed companies will be simplified;
- The summary of the prospectus must be limited to a maximum of 6 A4 pages;
- Accelerated approval process for frequent issuers.

The regulation is expected to enter into force in 2016. Issuers will only have to comply with the rules in the Prospectus Regulation 12 months after the date of entry into force.

We hope that under the future rules, issuers and in particular SMEs will truly have easier access to the capital markets and will make use thereof.

➢ Market Abuse Regulation

The Market Abuse Regulation (Regulation 596/2014), which will enter into force as of 3 July 2016, replaces the current rules to prevent market abuse in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*). The Regulation introduces, inter alia, an obligation for issuers to notify the AFM of a postponement of the publication of price-sensitive information. In our perspective this is all the more a reason to take adequate measures with regard to dealing with the situation in which the publication of price-sensitive information is postponed.

➢ Regulation of investment bonds

In our Outlook 2015 we informed you that the legislator had announced it would be working on the further regulation of (managers of) institutions which offer investment bonds. Investment bonds are bonds whereby the funds raised are used for investment purposes. We have understood recently from the Ministry of Finance that the preparation of the relevant bill is still at an early stage. For the time being it is therefore still difficult for issuers to make concrete preparations.

➢ Quarterly reports

The Dutch legislative process relating to the implementation of the Transparency Directive Amendment Directive (Directive 2013/50/EU) has incurred delay. As a result, the date of 26 November 2015 prescribed by the directive has not been met. As the implementation will take place later than planned, the current regime will remain in force for the time being. This raises the question for issuers whether they – in short – have to publish a quarterly report over the first quarter of 2016. The AFM stated in a notice of 27 November 2015 that it will not take enforcement action on this point, because it is foreseeable that the obligation will be cancelled.

Issuers can thus opt in the future to leave out quarterly reporting. We are curious to see whether this will in fact happen. It is possible that a choice will (also) be made to voluntarily continue the existing practice, because investors are used to this.

- **Costs of prospectus**

As of 1 January 2015 lower rates apply for SMEs with regard to the approval process of a prospectus. Whether a company is eligible for these lower rates will be determined on the basis of the last adopted annual accounts. In practice this is likely to result in problems, because not all companies will have annual accounts at the time of the application. For this reason the Financial Markets Amendment Decree 2016, which enters into force on 1 April 2016, clarifies by means of a change of the definition of SME, inter alia, that in addition to the companies which satisfy the criteria on the basis of the last adopted annual accounts – companies for which no annual accounts have yet been adopted may be eligible for the SME rate. This is possible if the counter-value of the securities which are offered with the prospectus is lower than € 25 million.

- **Alternative Performance Measures**

On 30 June 2015 and 5 October 2015 ESMA published guidelines on alternative performance measures (APM). These guidelines apply as of 3 July 2016. APMs are financial criteria of historic or future financial activities which manifest themselves in the adding up of or deduction of amounts from the amounts presented in the financial statements. Examples of APMs are operating result, cash earnings, tax, write-offs and amortisations, etc. The guidelines contain a number of principles which must be complied with.

- APMs must be defined in a clear and legible manner;
- APMs must be accompanied by meaningful specifications which reflect their content and calculation basis;
- Alignment must be sought between the APMs and the most obvious item, total or sub-total;
- The use of APMs must be explained to provide insight into the relevancy and reliability thereof;
- APMs may not be presented more prominently, emphatically or with more authority than ensues directly from the measures ensuing from financial statements;
- APMs must be accompanied by comparative figures for the corresponding preceding periods;
- The definition and calculation of an APM must remain consistent over time.

The goal of the guidelines is to promote the use and the transparency of alternative performance measures set out in prospectuses or regulated information. Toward this end it will be explained how the APMs must be presented. Compliance with the guidelines promotes the comparability, reliability and/or comprehensibility of APM.

The AFM has informed the market that it will integrate the guidelines in the prospectus supervision and in the supervision of regulated information, including annual reports and six-monthly reports. Issuers would be wise to take note of the guidelines in the next half year so that they are not met with surprises upon entry into force.

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➢ Solvency II has entered into force

Solvency II, the new, risk-based supervisory framework for insurance companies finally has entered into force on 1 January 2016. This occurred by the entry into force of the following laws and decrees on 1 January 2016:

- the Omnibus II Directive Implementation Act (with the exception of a single article that already entered into force in July 2015);
- the Solvency II Directive Implementation Act (with the exception of a few articles which already entered into force on 1 January 2013 and 1 January 2014); and
- the Directive and Solvency II Regulation Implementation Decree.

The implementation of Solvency II will have the full attention of the Dutch Central Bank (*De Nederlandsche Bank*, DNB) in its ongoing supervision in 2016. The supervision themes of DNB for the year 2016 are for a big part related to Solvency II (see hereafter). A recent development is that the European Commission adopted three technical standards relating to Solvency II reports at the beginning of December. These are the technical standards relating to supervisory reporting, the publication of reports and the transparency requirements for supervisory authorities. Official publication in the Official Journal of the European Union took place on 31 December 2015, so that as of that time the technical standards have a direct binding effect. With the adoption by the European Commission, the reporting requirements on the basis of which insurance companies must report as of 2016 (at latest 20 weeks after 1 January 2016) have been permanently determined.

➢ DNB Supervision Priorities 2016

DNB published its supervision priorities for the coming year in November 2015. For insurance companies this document contains a number of relevant announcements. Insurance companies must bear in mind that in 2016 they will be confronted with a large number of specific DNB investigations. For example, DNB has announced, inter alia, that in 2016 it will give priority to the following topics:

- ***Data quality***: DNB is going to assess whether insurance companies have implemented the necessary improvements in the area of *data quality*. In the view of DNB the quality of the Solvency II reports in the year 2015 was not sufficient and insurance companies can in particular improve the qualitative explanations;

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- ***Key functions / actuarial function***: DNB is going to assess the quality of the set-up and functioning of the actuarial function. Under Solvency II the obligatory external certifying actuary disappears and the internal actuarial function plays a crucial role with respect to the validation of the technical provisions;
- ***Capital and dividend policy***: DNB is going to actively evaluate the capital and dividend policy of insurance companies with a view to meeting the new Solvency II solvency requirements;
- ***Adjustments to earnings models***: DNB will study the strategies of insurance companies for adjusting their earnings models, inter alia by technological developments;
- ***Search for yield***: DNB will carry out a sector-wide investigation with respect to possible search for yield, inter alia by assessing movements in asset allocation;
- ***Integrity risks of branch offices***: DNB will conduct a theme investigation into integrity risks of branch offices;
- ***Crisis and resolution framework***: DNB will develop a crisis and resolution framework for insurance companies in the Netherlands and will put this topic on the agenda in the EU (see below for more details);
- ***Compliance with the Sanctions Act***: DNB will provide further guidance on the way in which insurance companies can implement the requirements under the Sanctions Act.

➢ **DNB guidance regarding compliance with the Sanctions Act**

Compliance with the Sanctions Act by insurance companies will have the full attention of the DNB in 2016 as well. In the past few years integrity has always been an important supervision theme for DNB. The first cross-sectoral investigation of DNB dates from October 2014, followed by follow-up investigations in the first quarter of 2015 and November 2015. In DNB's view the 'systematic integrity risk analysis' (SIRA) in particular is the weak point for many institutions. That is why in the course of 2016 DNB will come with (cross-sectoral) guidance regarding compliance with the Sanctions Act.

➢ **Exemption for smaller non-life insurance companies and funeral- or benefits-in-kind insurers**

As of 1 January 2016 a new exemption is available for non-life insurance companies and funeral- or benefits-in-kind insurers with a limited risk scope which satisfy certain conditions. To be eligible for the exemption, the annual gross booked premium income may not, e.g., be more than EUR 2,000,000, and the technical provisions may not be higher than EUR 10,000,000. Non-life insurance companies and funeral- or benefits-in-kind insurers which satisfy these conditions are exempt from DNB supervision. This exemption concerns both the licence requirement and ongoing supervision. Non-life insurance companies and funeral- or benefits-in-kind insurers which make use of this exemption must inform their policyholders thereof. In addition, it is also possible, despite satisfying the exemption conditions, to voluntarily opt for DNB supervision and to be working with a SII Basic licence. The insurance company will have to satisfy the relevant requirements.

We advise smaller non-life insurance companies and funeral- or benefits-in-kind insurers to determine as quickly as possible whether they satisfy the conditions for making use of the exemption.

➢ **Inducement ban for unit-linked insurance policies as of 1 April 2016**

As of 1 April 2016, pursuant to the Financial Markets Amendment Decree 2016, insurance companies are prohibited from receiving inducements any longer from an investment fund manager of an investment institution or UCITS with regard to a unit-linked insurance policy for which premiums are invested in the relevant investment institution or UCITS. Provision has been made for a transition scheme on the basis of which there is a non-retroactive effect of individual unit-linked insurance policies concluded before a specific date. For pension insurance which was concluded before a specific date there is a transitional period up to and including 31 December 2020.

As a result of the inducement ban, insurance companies will have to adjust their earnings model with regard to unit-linked insurance policies as of 1 April 2016.

- **Preparation for the PRIIP Regulation**

The PRIIP Regulation (1286/2014/EU) contains regulations for developing and offering on the retail market of Packaged Retail and Insurance-based Investment Products (PRIIP). PRIIPs can be divided into two categories: (i) packaged retail investment products and (ii) insurance-based investment products. Examples of PRIIPs are participation rights in an investment institution or UCITS, life insurance contracts with an investment component, structured products and structured deposits. The developer of a PRIIP must draw up a key information document (KID) for the retail investors, which the seller (usually an intermediary) will have to provide to the customer.

The PRIIP Regulation has in the meantime been adopted and will enter into force on 31 December 2016. This means that insurance companies must have drawn up a KID for the PRIIPs developed by them before the end of this year and have provided it to their sales channels.

- **Remuneration rules apply in full as of 1 January 2016**

On 7 February 2015 the Financial Undertakings Remuneration Policy Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) entered into force with retroactive effect from 1 January 2015 (although an employment court recently held otherwise). The Wbfo contains, inter alia, provisions relating to a sound remuneration policy for insurance companies, publication obligations relating to this remuneration policy, claw-back and adjusting variable remunerations and provisions regarding the amount and conditions for payment of severance packages. The most striking provision of the Wbfo is the limiting of the maximum variable remuneration to 20% of the fixed remuneration (the 20% bonus cap). This bonus cap (but also the prohibition on guaranteed variable remuneration and the provision on the maximum severance package) has a broad scope and few exceptions. The Wbfo contains a transition period of one year for financial commitments relating to variable remunerations which already existed on 1 January 2015. This transition period will therefore end on 1 January 2016. This means that as of 1 January 2016 insurance companies in principle can no longer award variable remunerations of more than 20%.

- **EBA guidelines with regard to remuneration rules**

The Regulation on Sound Remuneration Policies 2014 (*Regeling beheerst beloningsbeleid Wft 2014*, Rbb) is of great importance for the elaboration of the remuneration policy of insurance companies. The Rbb applies to insurance companies. The Rbb forms the implementation of remuneration rules of the Capital Requirements Directive (CRD IV). The European Banking Authority (EBA) drew up Guidelines relating to sound remuneration policy with regard to these rules in 2010. These Guidelines apply in the interpretation of the Rbb by DNB.

On 21 December 2015 the EBA published the final new Guidelines with regard to sound remuneration policy for banks and investment firms. One of the most important topics for the market which is discussed is the principle of proportionality. This principle is currently encompassed in CRD IV and stipulates that an institution must apply the remuneration rules taking account of size, internal organisation and nature, scope and complexity of the activities. Up to now the market interpreted this in such way that under certain circumstances institutions, in view of their specific profile, could not apply certain rules. After an uncertainty of a few months as a result of an EBA opinion on proportionality unfavourable for the market, EBA is proposing to continue the original view on proportionality as laid down in the current guidelines and to adjust/clarify the CRD. The new Guidelines contain interpretations on different topics, such as governance, the payment of variable remuneration in financial instruments and the scope of applicability of the remuneration rules within groups with multiple financial undertakings.

DNB has indicated it will apply the Guidelines to be drawn up by EBA in the Netherlands in the framework of its supervision on compliance with the Rbb (and thus also to all insurance companies). The new Guidelines must be applied as of 1 January 2017 and must be implemented in the remuneration policy of insurance companies.

- **Financial sector oath/affirmation: End of transition period on 31 March 2016**

As of 1 April 2015 the group of persons who must take the oath/make the affirmation has been expanded to all persons who work under the responsibility of an insurance company in the Netherlands and:

(i) whose work can significantly influence the risk profile of the insurance company; or
(ii) who have direct client contact.

Employees must in principle take this oath/make this affirmation within 3 months after taking up employment. However, upon the entry into force of this expansion, provision was made for a transition period for existing personnel: persons who fell under the scope of the expansion and on 1 April 2015 were already working at the insurance company, must take the oath or make the affirmation on 1 April 2016 latest (but only insofar as those persons continue working for or under the responsibility of the insurance company during the year 2016). It is therefore important that insurance companies see to it that the relevant persons have taken the oath/made the affirmation on 1 April 2016 latest.

- **Possible new legislation**

DNB and the Ministry of Finance have expressed many wishes for future legislation for insurance companies. When and whether these wishes will be realised is not yet clear, but because of the relevancy, we are setting out a number of legislative wishes which are important in practice below:

- DNB and the Ministry of Finance are currently looking at a possible expansion and reinforcement of the current instruments relating to the recovery and resolution of (insolvent) insurance companies. Insurance companies would then be obliged to draw up a preparatory crisis plan in which in any event the impact of the UFR (Ultimate Forward Rate) is included, and a resolution plan.

- Since the implementation of the Intervention Act, the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft) provides that shares which have been issued by an insurance company on the basis of a transfer plan approved by the court, can be transferred. DNB wants it to be included in the Wft that a transfer plan can also relate to the transfer of control rights connected with shares (depositary receipts for shares).

- **Unit-linked insurance after-care**

At present, the government is primarily emphasising the after-care for clients with a unit-linked insurance policy in relation to the unit-linked insurance affaire. In order to reinforce this policy, in the summer of 2015 an obligation was laid down in the Further Regulation on Conduct of Business Supervision of Financial Undertakings (*Nadere Regeling Gedragstoezicht financiële ondernemingen*, NRGfo) for insurance companies to 'activate' clients with a unit-linked insurance policy. 'Activate' refers to the efforts of the life insurance company to enable its clients to make a considered choice to continue, alter or stop their unit-linked life insurance policy. This activating of clients will preferably take place by means of a rebalancing advice to the client. The deadline for activating clients with a pension-related or a mortgage-related unit-linked insurance expires on 31 December 2016. The required result of this deadline was specified by the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) at the end of October in its Unit-linked Insurance After-Care Report (*Rapportage Nazorg beleggingsverzekeringen*).

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It is important that insurance companies have satisfied the stipulated deadlines as at the end of 2016. This will remain a point of attention in the supervision by the AFM in the coming year.

- **Expansion of the scope of the transfer scheme**

The Financial Markets Amendment Act 2016 provides that DNB can also apply a transfer scheme as referred to in the Intervention Act to the holding or parent company of an insurance company, instead of only to the insurance company in difficulties itself. The BRRD (*Bank Recovery and Resolution Directive*) also introduced this for banks and investment firms but because insurance companies do not fall under the BRRD, this has to be regulated separately in order to standardise this. As of 1 April 2016 it will therefore be possible under certain conditions that DNB will prepare a transfer plan with regard to the parent company of a Dutch insurance company, provided the parent company's registered office is in the Netherlands. Three conditions must have been satisfied if DNB is to be allowed to do so:

- In the first place, with regard to the insurance subsidiary there must be signs of a dangerous financial development, which is not expected to be reversed to a sufficient degree or in time.
- In addition, either the parent company itself must satisfy the above-mentioned criterion or the insurance subsidiary must be in such bad condition that it forms a threat to the group.
- Lastly, the transfer of assets or liabilities of the parent company or shares issued by the parent company are necessary for the settlement of its insurance subsidiary or the group as a whole.

- **Reporting and transparency obligations for securities financing transactions**

On 12 January 2016, the European Regulation on reporting and transparency of securities financing transactions will enter into force on a phased basis. The regulation relates to securities lending and commodities lending, (reversed) repurchase agreements, buy-sell back or sell-buy back and margin lending transactions. The most important provisions in the regulation relate to:

- the monitoring and reporting of the arising of system risks in the financial system in connection with securities financing transactions (entry into force depends on the entry into force of the ESMA technical regulation standards, currently unknown);

- the provision of information on such transactions to investors whose assets are used in the transactions (the provision of information in periodical reports takes effect commencing on 13 January 2017, the provision of information in pre-contractual documents takes effect commencing on 13 July 2017);

- re-use activities, the re-use by financial institutions of collateral provided to them by their clients (takes effect commencing on 13 July 2016).

For parties with outstanding securities financing transactions made before the date of entry into force, it is important to check whether the remaining term is more than 180 days. In such case the above reporting obligation applies. In addition, it is important in the event of re-use of received collateral to be alert to the fact that a record is made in the underlying documentation regarding the conditions on which re-use is possible and that explicit consent has been granted therefore by the providing counterparty.

- **EIOPA consultation of Guidelines relating to "product oversight and governance"**

In October 2015 EIOPA started a consultation on the "preparatory Guidelines on product oversight and governance arrangements by insurance undertakings and insurance distributors." This consultation is related to the implementation of the *Insurance Distribution Directive* (this directive was previously also called Insurance Mediation Directive II, or IMD II) for which it is currently expected that they will be

implemented in 2018. The consultation contains guidelines for national supervisory authorities, which relate to both insurance companies and insurance intermediaries. The consultation relates to internal processes to put insurance products on the market and to ensure that the products are suitable for the persons who purchase them. The consultation term closes on 29 January 2016.

- **Whistleblowers scheme**

The modified "House for Whistleblowers" bill has been passed by the Dutch House of Representatives and will have plenary treatment in the Dutch Senate on 9 February 2016. If the bill is passed, employers who have at least 50 people working for them as a rule will be obliged to establish a whistleblowers scheme. A "House for Whistleblowers" will be founded; an independent administrative body which will have independent powers to advise and investigate companies.

The House for Whistleblowers Act is expected to enter into force in the course of 2016. Insurance companies with more than 50 employees must provide a whistleblowers scheme as of that time.