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Update

DEVELOPMENTS INVESTMENT FUNDS

Recently, there have been several relevant developments with respect to investment funds. We address these developments in this update.

➤ Go directly to a specific part of this Update by clicking on one of the following links below:

[Points of attention AFM](#)

- [Authorization AIFMD](#)
- [Full compliance-testing with respect to notifications licence holders](#)
- [Conditions of the registration regime](#)
- [Provision of information by investment fund managers](#)
- [Compliance with integrity rules](#)

[UCITS V \(also relevant for AIFMs!\)](#)

- [New rules for depositaries](#)
- [Remuneration rules](#)

[ESMA Opinion - Loan origination by investment funds](#)

[Targeting high net worth individuals by AIFMD-funds](#)

[Inducement ban *unit linked* insurance policies](#)

➤ **How can you contact us?**



FINNIUS

Update

➤ Points of attention AFM

Authorization AIFMD

In her AIFMD newsletter of April 2016, the AFM points out what areas she will in particular take into consideration in the context of an AIFMD licence application:

- governance (functional separation of risk and portfolio management, the presence of sufficient internal checks and balances for control tasks);
- substance of the AIFM;
- controlled business operations and sound operational practices;
- a suitable remuneration policy; and
- the independence and responsibility, or liability of the depositary and the dealing with conflicts of interest

It is important that you carefully pay attention to the implementation of these requirements in, amongst others, the document that you prepare in order to describe your internal organization.

Full compliance-testing with respect to notifications licence holders

The AFM points out in its latest AIFMD newsletter that it regularly receives notifications from licence holders (such as a change of depositary and the appointment of directors). In a number of circumstances, a notification can be a reason for the AFM to test whether the investment fund manager also meets *other* conditions under the AIFMD. This is the case in the following situations:

- The investment fund manager obtained a licence by operation of law in 2014 (these managers may be screened on compliance with the AIFMD for the first time upon a notification).
- The investment fund manager wants to expand its licence because it wants to launch a new investment strategy (for example a new asset category) or wants to offer the participation rights to a new customer segment (for example also to *retail* investors).
- The investment fund manager applies for an extension of the scope of the licence in order to be able to also provide MiFID-services.

In general, it is of course important that you verify on an ongoing basis whether your entire organization meets all obligations under the AIFMD. Please note that at the time that you notify the AFM, you must also be able to *show* full AIFMD-compliance to the AFM.

Conditions of the registration regime

An investment fund manager does not require an AIFMD licence if it meets the conditions of the AIFMD registration regime. One of the conditions is that the participation rights are solely offered:

- To professional investors
- To less than 150 persons
- With a minimum purchase value of EUR 100,000, where the amount is paid in a lump sum
- With a nominal value of EUR 100,000

When registering with the AFM, the investment fund manager must indicate which category he uses. The AFM points out that the combining or stacking of categories is not possible. It is therefore important that you always fully fall within the scope of one of the conditions listed above.

FINNIUS

Update

Provision of information by investment fund managers

During the event of the Morningstar Fund Awards, the AFM pointed out that it will pay closer attention to the provision of information by investment fund managers. In particular, the AFM expressed its concerns on the following subjects as a result of an investigation with bond funds (*obligatiefondsen*):

- In some cases, the mandate of funds is defined very broad as a result of which investment fund managers have a lot of discretionary power to make investment decisions. Because of this, the risk profile of the funds can change as a result of these investment decisions. This in itself does not constitute a problem, but according to the AFM in such cases it is important that investors are notified of a change in the risk profile.
- Funds that invest in bonds must provide information on the effects of the low interest rate current applicable in the market. For instance, does it result in an amendment of the investment policy (higher-risk bonds in exchange for higher return?) and is there a chance that bonds will pay negative interest rates?
- In a general sense the AFM is of the opinion that the provision of information (especially the information in the prospectus) can be much more clearly.

It is important that you ensure that the provision of information (including the information in the prospectus) is clear and comprehensive and that you warn investors against all risks associated with the fund.

Compliance with integrity rules

The AFM announced it already with the publication of its agenda for 2016: it is going to focus on compliance with anti-money laundering regulations by investment institutions. Supervisory authorities show an increasing attention for compliance with the Money Laundering and Terrorist Financing Prevention Act (*Wet ter voorkoming van witwassen en financieren van terrorisme, Wwft*) and the sanction regulations. When conducting an investigation on the application of these rules, the AFM can focus on both licence holders as exempted investment fund managers.

It is important that you have your AML- and sanction procedures in order and documented these well. This is not only important for investment fund managers holding a licence, but also for investment fund managers that operate under the registration regime.

➤ UCITS V (also relevant for AIFMs!)

As from 18 March 2016, the Dutch implementation of the UCITS V (2014/91/EU) directive entered into force in the Netherlands. This also has consequences for AIFMs and, more specifically, for the AIFMD depositaries which they have appointed. The UCITS V implementation can also have an impact on the remuneration policy of AIFMs.

New rules for depositaries

UCITS V provides for new rules for the safekeeping of assets of a UCITS. The legislator takes advantage of the opportunity to align the supervisory framework for depositaries of AIFMs and depositaries of UCITS as far as possible. As an example, the implementation Act UCITS V imposes heavier prudential requirements to all depositaries. One of the other requirements is that depositaries that are not a bank or investment firm, must apply for a licence from the AFM. In these cases, a two-year transitional regime applies. Only for the 'alternative depositary' (*alternatieve bewaarder*) an exemption from the licence requirement applies.

We recommend that investment fund managers verify whether the depositary agreement complies with the new rules. Depositaries must check whether they must apply for a licence and ensure that they meet the new prudential requirements within the prescribed transitional period.

FINNIUS

Update

Remuneration rules

On the basis of UCITS V a UCITS investment fund manager must have a remuneration policy that is consistent with a healthy risk management and that must meet certain minimum requirements. On 31 March 2016, ESMA published the final Guidelines on sound remuneration policies under the AIFMD and UCITS Directive. The Guidelines are prepared on the basis of the new UCITS V directive, but also provide for, as the name already suggests, an amendment of the earlier prepared guidelines by ESMA on the basis of the AIFMD.

The Guidelines must be applied by UCITS and AIFMs starting from 1 January 2017. Investment fund managers of UCITS will have to prepare a remuneration policy that meets the guidelines. AIFMs must check their current remuneration policy again on the basis of the amended Guidelines.

➤ ESMA Opinion - Loan origination by investment funds

On 12 April 2016, the European supervisory authority ESMA published an opinion on loan origination by investment funds. ESMA observes that in a number of member states, these activities are only possible if certain rules are complied with, while in the majority of the member states these activities are not regulated (among of which is the Netherlands). Funds that offer their participation rights cross-border must therefore comply with different rules per member state. Later this year, the European Commission will launch a consultation for a European regulatory framework for loan origination by investment funds. ESMA has been requested to provide input for this consultation. ESMA identifies a number of risks associated with loan origination by investment funds and advises a harmonised regulatory framework on this point. Possibly, such funds should be subject to a specific regime, with rules on, inter alia, the business operations of the fund and the type of investors that they can attract.

We advise managers of loan originating funds to follow these developments closely.

➤ Offering of AIFMD funds to high net worth individuals

In principle, investment fund managers with an AIFMD license are only allowed to offer participation rights to retail investors in the Netherlands if they comply with a number of *top-up* requirements, such as additional information requirements. Under the AIFMD, retail investors include all investors that do not qualify as a professional investor (for example a bank or a pension fund) within the meaning of the AIFMD. For the Dutch market this is changed as of 1 April 2016 as a result of the entering into force of the Financial Markets Amendment Act 2016. At this time, the *top-up* regime is not applicable with respect to offers to 'retail' investors, if:

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

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

Please note that this adjustment is only meaningful for the offering of investment funds on the Dutch market. A European passport only offers the ability to perform marketing activities in other member states to professional investors within the meaning of the AIFMD. Prior to targeting high net worth individuals outside the Netherlands, it must be verified per member state what the national regime is for that category of investors.

➤ Inducement ban *unit linked* insurance policies

FINNIUS

Update

As of 1 April 2016, it is prohibited for insurance companies to receive inducements from an investment fund manager of an investment institution or UCITS in respect of a unit linked insurance policy from which inserted premiums in these investment institutions or UCITS are invested. A transitional regime applies on the basis of which individual unit linked insurance policies that are concluded before a certain date are excluded from the scope. For pension insurances that are concluded before a certain date a transitional period applies up to and including 31 December 2020.

As a result of the inducement ban, insurance companies must have adjusted their earnings model in respect of unit linked insurance policies by now. That has impact on the current money flows between the investment fund manager and the insurance companies.