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Outlook 2017

FINANCIAL MARKETS LEGISLATION
WHAT WILL BE CHANGING IN 2017?

➢ *2016 in review*

Financial regulatory law has developed steadily in 2016. The year turned out to be one where European developments predominated. For instance, 2016 was the year in which the harmonization of the supervisory methods within the European Banking Union took shape. Also, the EU gave us a relentless stream of delegated regulations, technical standards, guidelines and Q&A's. In addition, EU Directives found their way into Dutch law. The Mortgage Credit Directive and the Payment Accounts Directive were both implemented in the Dutch Financial Supervision Act (Wft) during 2016. On the other hand however, Great Britain chose to leave the EU in 2016. As always, the Netherlands presented its own 'national' regulatory initiatives such as the InnovationHub, aiming to improve facilitating market access for Fintech initiatives.

2016 was also a year where it seemed that the expansion of financial regulatory law would possibly cease to a halt. Complaints on the regulatory framework being too comprehensive, too detailed, too opaque and too disproportionate increased. The European Commission even decided to open a 'call for evidence' so that it could make an inventory of the various complaints. In the Netherlands, it was decided not to create or a Financial Markets Amendment Act 2017 and a full-scale reorientation on the Wft has been set in motion.

➢ *Outlook 2017*

It nevertheless seems that 2017 will also become a year with a multitude of regulatory developments. A financial regulatory legislation stand still in the near future seems quite unlikely, at the least. In addition, various supervisory authorities have already announced many of their plans, investigatory topics and priorities for the coming year.

In this Outlook we will provide you an overview of the upcoming developments, and we will share our own expectations on financial regulatory law. We will discuss both new regulations and the focal priorities of the supervisory authorities. One thing is for certain: never a dull (regulatory) moment in 2017.

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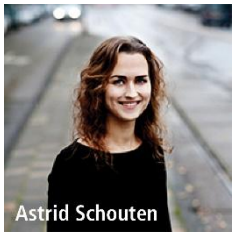

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- ***What are you interested in?***

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FINANCIAL MARKETS LEGISLATION
GENERAL DEVELOPMENTS

TOPICS

➢ Consultation on revision of the Dutch Financial Supervision Act

The Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft) entered into force in 2007 and has been frequently amended since then. In addition, financial regulatory law is increasingly laid down in EU directives and regulations. At this time it is being explored whether the Wft should be revised. Toward this end, on 22 November 2016 the Ministry of Finance published a consultation document aiming to explore how to safeguard the accessibility of the Wft and how the Wft will stand up in the future or how to improve it. The consultation primarily relates to the set-up and realisation of the Wft and describes five different options for a possible revision of the Wft:

- **Option 1 ('zero option'):** no revision. This option can be considered if the usefulness and the need of a revision is questionable or non-existent or if the costs do not weigh up against the benefits.
- **Option 2:** legal and editorial improvements. The structure of the Wft will not be altered. The focus is on textual ambiguities, inaccuracies, inconsistencies and an improved explanation.
- **Option 3:** improvements within the current functional model. The adding of new cross-sectoral components with rules which apply to all financial enterprises. For example, rules about the management and the set-up of the business activities. These components can currently be found at several points in the Wft.
- **Option 4:** introduction of a sectoral model. The Wft will be restructured and the rules for each category of financial enterprises, type of service or type of product will be placed near each other as much as possible. Alignment will be sought with the European directives for the relevant scoping of the sectors.
- **Option 5:** introduction of separate sectoral laws. In this option each subject or category of financial enterprise, financial service or product will have its own regulatory framework.

The consultation is intended to gather opinions on bottlenecks in the Wft and possible modifications in the set-up and structure. Or in the words of the minister: "*To ultimately be able to make a well-considered choice about a revision of the Wft, there must be proper insight and a complete overview of all problems.*". After this exploratory round the possible solutions will be laid down in an outline memorandum, which will be sent to the Dutch Parliament for deliberation. Any proposals to revise the Wft will follow subsequently.

We advise market parties who have an interest in a more organised regulatory framework, to determine what stumbling blocks they see in the current Wft, and to highlight it at this stage. Market parties have up to 1 March 2017 to respond.

- **Inventory of expansion of consumer provisions of the Wft to cover independent contractors and SMEs**

In the autumn of 2016 the Ministry of Finance held a consultation on the effectiveness and desired degree of protection under the Wft for independent contractors (*zzp-ers*) and small and medium enterprises (SMEs) when they make use of financial services. Currently, the existing protection of independent contractors and SMEs differs per financial product and per type of customer, while the Wft protection vis-à-vis consumers applies to all financial products and services. Currently small business customers are protected when it comes to insurance and investment products, but only consumers enjoy protection with regard to payment services, savings products and credit provision. Past problems in services to small business customers resulted in the question whether the Wft offers sufficient effective protection to this group and whether it has to be modified or expanded. A number of options are presented in the consultation document to expand the protection of small business customers, such as:

- an expansion of the general duty of care in Section 4:24a of the Wft with regard to consumers to cover small business parties, so that the Netherlands Authority for the Financial markets (*Autoriteit Financiële Markten*, AFM) will gain enforcement powers in the event of evident abuse;
- an expansion of the scope of disclosure and advisory duties with regard to consumers to cover small business customers;
- an expansion of the ban on commissions of Section 86c Market Conduct Supervision Financial Institutions Decree (BGfo) to products for small business customers;
- opening up the Financial Services Complaints Authority (KiFiD) for small business customers to offer a low-threshold alternative to going to court.

These options are suggestions only. It is not yet established that the Wft protection for independent contractors and SMEs will be modified or expanded. The result can also be that the existing protection is sufficient. The minister of Finance has indicated to inform Parliament in the beginning of 2017 on the consultation outcome. Market parties are advised to follow the developments in this area.

- **Developments in the area of EMIR**

The European Markets Infrastructure Regulation (EMIR) sets requirements for all parties which make use of derivatives. EMIR sets provisions for the trade in and clearing of OTC derivatives. EMIR entered into force on 16 August 2012, but the lower regulations, on the basis of which regulation can be effected, will enter into force in stages.

- ***Postponement of mandatory clearing for small financial entities.*** ESMA asked the European Commission to postpone the clearing obligation for Category 3 entities. These are entities which qualify as a financial counterparty or alternative investment funds as referred to in the AIFMD, which are non-financial counterparties and which belong to a group for which the derivatives portfolio over a period of 3 months has a value of EUR 8 billion or less. For category 3 entities the clearing deadline

is set for 21 June 2017. The new proposed date for the introduction of the clearing obligation is 21 June 2019. See press release.

- ***The delegated regulation on the techniques for the mitigation of risks in non-cleared OTC derivatives***. The delegated regulation contains provisions for risk-mitigating measures which market parties have to take for their OTC derivatives which are not centrally cleared. Three core topics are addressed in the delegated regulation:

  - Risk management procedures, with, inter alia, provisions on the quantity and the type of collateral that has to be provided and segregation requirements;
  - The procedure which has to be followed by counter-parties and regulators if use is made of the exception for intragroup OTC derivatives transactions;
  - Criteria on the basis of which the practical and legal impediments can be considered in the situation that there must be immediate transfer of the equity and there are repayment obligations under the heading of OTC derivatives contracts between counter-parties which belong to the same group.

- ***The implementation regulation concerning the extension of the transfer periods in connection with the own funds requirements***. The implementation regulation seeks to prevent that higher equity requirements are set for institutions which will centrally clear their derivatives via a central counterparty during the process of licence granting to and recognition of existing central counterparties. The CRR provides for a transition period in which all central counterparties (with and without licence) can be deemed qualified central counterparties so that the higher equity requirements do not apply during this period. This transition period in principle ended on 15 December 2016. Because the recognition process of central counterparties has not yet been completed, the transition period will be extended by six months to 15 June 2017.

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

On 12 January 2016 the EU Securities Financing Transactions Regulation entered into force gradually. The Regulation relates to securities and commodity loans, (reversed) repurchase agreements, buy-sell back or sell-buy back and margin loan transactions. The most important provisions in the regulation which enter into force in 2017 relate to:

- the providing of information in periodic reporting and prospectuses about the aforementioned securities financing transactions to investors, the assets of which are used with those transactions. These requirements apply as of 13 January 2017;

- information on securities financing transactions and reuse of security must be included in the precontractual information. These requirements apply as of 13 July 2017.

We advise market parties with (proposed or existing) securities financing transactions to check whether the precontractual information includes anything about securities financing transactions or the reuse of security.

➢ **Developments in the area of integrity legislation**

- ***Entry into force of Fourth Anti-Money Laundering Directive***.
  This directive must be implemented in Dutch legislation. The consultation relating to the draft bill has now been closed. The final bill is expected to be published in the first half of 2017. With the implementation of the Fourth AML Directive, important changes are being made to the Dutch Money

Laundering and Terrorist Financing Prevention Act (Wwft). We have set out the most significant changes for financial market parties below:

- ***Risk assessment***. Greater emphasis is put on a risk-based approach. This includes, inter alia, that Wwft institutions are obliged to make a full risk assessment of its business taking into account specific risk factors (such as client, product, geographical area and delivery channel risk), record the identification and assessment of risks relating to customers, keep them up to date and on request present them to the regulator. This risk assessment must form the basis of the development of its customer due diligence (CDD) policy to limit and effectively manage the identified risks.
- ***Own assessment simplified or more enhanced customer due diligence***. At present the Wwft identifies certain institutions, products or services which are eligible for a simplified CDD. The Fourth AML Directive changes this. The annexes to the Fourth AML Directive contain lists of factors which lead to a potentially higher or lower risk. Listed companies which are subject to disclosure requirements, for example, constitute a lower risk. Business relations or remote sales transactions constitute a potentially higher risk. On the basis of these factors Wwft institutions must determine themselves in what manner a customer review is to be carried out. A consideration must be made, inter alia, as to whether there is room for a simplified CDD or that the circumstances of the customer give rise to an enhanced CDD.
- ***Politically Exposed Persons***. Politically Exposed Persons (PEPs) are, in short, persons who hold or held a prominent public position, like heads of state and government leaders. At present, institutions only have to conduct an enhanced CDD for PEPs if they do not live in the Netherlands or are not Dutch nationals. The distinction between domestic and foreign PEPs has lapsed. This means that from now on institutions will have to conduct enhanced CDD if a domestic PEP is involved in a business relationship with a customer. Institutions will therefore have to conduct enhanced CDD in a greater number of cases.
- ***UBO register***. All market parties are obliged to keep information on the ultimate beneficial owner (UBO) in a central UBO register. A UBO is, in short, a natural person who has more than 25% of the shares or the voting rights or can exercise de facto control over a legal entity or trust. The definition has been expanded with the provision that in the event no UBO can be determined on the basis of the shareholding or the control, persons who are among the higher management can also be deemed UBOs.
- ***Territorial effect***. Market parties which fall under the working of the Fourth AML Directive are responsible for the implementation of group policy with regard to branch offices and majority-owned subsidiaries which are based in countries outside of the European Union. This means that branch offices and subsidiaries must comply with the Wwft, even if the law of the state where they are based themselves has less stringent standards to combat money laundering or the financing of terrorism.
- ***Enforcement***. With the implementation of the Fourth AML Directive the maximum fines which the regulators can impose upon breach of the Wwft will be increased and they have the possibility of imposing a revenue-related fine. In addition, the enforcement instruments available to the regulators have been expanded by the possibility of revoking an institution's licence upon breach of the Wwft.

The directive will be effective as of 26 June 2017 and it must then have been implemented in national legislation and regulations. However, the Ministry of Finance has indicated that this implementation term is ambitious.

As both the AFM and the Dutch Central Bank (*De Nederlandsche Bank*, DNB) actively enforce compliance with the Wwft, we advise market parties which fall under the Wwft to subject their internal procedures to a timely review and where necessary bring them in line with the Fourth AML Directive.

- ***ESA guidelines: risk-based approach for supervision.***
  The guidelines elaborate on the way in which regulators must regulate the risk-based approach which is central in the Fourth AML Directive. The guidelines will indicate where the emphasis of the regulator will come to lie and we advise market parties to take this into account in the way in which the risk-based approach within the organisation is applied. We advise market parties which are interested in the way in which regulators will hereafter supervise the Wwft to take note of the guidelines. These guidelines will apply as of 16 November 2017.

- ***ESA guidelines: simplified and a more stringent customer review and risk factors.***
  The ESAs started a consultation on the guidelines on 21 October 2015. The guidelines are currently not yet final, but we expect that the final version will be published in the first half of 2017. The guidelines contain risk factors which market parties must take into consideration when assessing the risk of money laundering and terrorism financing with a specific customer or incidental transaction. The guidelines are divided into a general part that applies to all Wwft institutions and an industry-specific part. The general part gives market parties the basis they need to make risk-based decisions in the identification, assessment and management of the risks of money laundering and terrorism financing. The industry-specific part of the guidelines forms an addition to the general part and contains per sector a number of risk factors which are particularly important for that sector. The industry-specific risk factors will, where relevant, be discussed in the individual parts of this Finnius Outlook.

➢ **Preparation for PRIIPs Regulation**

The PRIIPs Regulation contains regulations for developing and offering on the *retail* market of *Packaged Retail and Insurance-based Investment Products* (PRIIPs). 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 AIF 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 PRIIPs Regulation was initially to enter into force on 31 December 2016. However, the European Commission decided in mid-November 2016 to postpone the entry into force of the PRIIPs Regulation by one year, after the European Parliament had rejected the Regulatory Technical Standards belonging with the PRIIPs Regulation in mid-September 2016. This means that market parties have one extra year to draw up a KID for the PRIIPs developed by them and to present that to their sales channels. Market parties which offer PRIIPs will have to ensure that they comply with the obligations of the PRIIPs Regulation by the end of 2017.

➢ **Developments in the area of the Benchmark Regulation**

The Benchmark Regulation regulates the offering of benchmarks, the use of benchmarks for financial products and the providing of input details for benchmarks. The Benchmark Regulation makes the offering of benchmarks subject to the requirement of having a licence and prohibits financial undertakings from making use of benchmarks without a licence. A benchmark is an index on the basis of which the amount to be paid under the heading of a financial instrument or agreement or the value of a financial instrument is to be determined or an index which is used to measure the performance of an investment fund. An important benchmark is, for example, EURIBOR. As of 1 January 2018 market parties must comply with the Benchmark regulation. The most important subjects regulated by the Benchmark Regulation are:

- Licence or registration obligation for managers of benchmarks. The manager is the person who has control over offering a benchmark;
- Institutions which are regulated may not make use of benchmarks if the manager of the benchmark does not possess a licence;
- Miscellaneous requirements relating to the conduct and the organisation of a benchmark manager;
- Requirements for the code of conduct for market parties which provide information on the basis of which a benchmark will be determined.

We advise market parties to determine whether they will offer a benchmark or provide information which is used in determining an index which qualifies as a benchmark as referred to in the Benchmark Regulation. If you offer a benchmark, it is important to review whether the licence or registration requirement applies. It is also relevant that market parties which offer benchmarks ensure that their organisation and conduct rules are in line with the rules in the Benchmark Regulation. If a market party provides information on the basis of which a benchmark is determined, it is important to determine whether there is willingness to comply with the benchmark manager's code of conduct.

➢ **DNB Supervision Priorities 2017**

On 1 November 2016, DNB published its supervision priorities for 2017. 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:

- ***Complexity of the financial system:*** In 2017 DNB will identify a number of unintended effects of legislation and regulations (e.g. rules which conflict with each other or which encourage new risky behaviour) and draws national and/or international attention to this matter.
- ***Technological innovation:*** In 2017 DNB will identify the bottlenecks in the regulations for Fintech companies and where necessary formulate policy recommendations.
- ***Outsourcing risks:*** DNB will examine in the first half of 2017 how the risks relating to the outsourcing of operating processes are managed. DNB will particularly focus on small and medium-sized banks, payment institutions, investment companies and managers of investment institutions.
- ***Cybercrime:*** Cybercrime remains a regulatory area of attention in 2017. In 2017 DNB will introduce, inter alia, a framework with which a cyber-attack can be simulated from start to finish by means of ethical hacking.
- ***Climate risks:*** In the second quarter of 2017, DNB will start a follow-up study into the transition to a climate-neutral economy. Said study will chart risk management methods for climate risks.
- ***Change capacity and strategic decision making:*** In the second and third quarter of 2017 DNB will be examining change capacity, in particular in the area of technological innovation. The quality of the change strategy and the interventions used therefore are the subject of examination.
- ***Quality of strategic decision making:*** In 2017 DNB will examine the quality of strategic decision making in insurance companies and pension funds.
- ***Systematic integrity risk analysis (SIRA):*** In 2017 DNB wants to further follow up the substantive quality of SIRAs and the translation to practice, whereby the focus will be on the question whether the SIRA leads to a correct weighing up of risks and an appropriate management policy. In the second and third quarter of 2017 DNB will hold on-site investigations into the an institution's Product Approval and Review Process and financial technology in relation to the SIRA.
- ***Aggressive tax planning and customer anonymity:*** In 2017 DNB will be continuing its study of the involvement of financial institutions in the facilitation of constructions which impede the visibility of persons and companies for government agencies.
- ***Terrorism financing and sanctions:*** In 2017 DNB will review to what extent previously established shortcomings to manage the risk of involvement in terrorism financing have been resolved. In the

third and fourth quarter of 2017 DNB will hold on-site investigations into terrorism financing combatting and sanctions compliance.

We advise market parties to pay specific attention to those parts of their business operations to which DNB's supervision priorities relate and those which market parties believe can be internally improved.

- **ESMA Supervision Priorities 2017**

On 30 September 2016, ESMA published its supervision priorities for the financial industry in the Netherlands for 2017, as viewed from the ESMA's perspective. The most important general points of attention for ESMA in 2017 are:

- Focus on the quality of data which is made available by transaction registers to which reports are made on the basis of EMIR and the SFTR;
- Benchmarks and the capital market union: the establishing of technical regulatory standards and various actions which contribute to the establishing of the capital market union;
- Supervision of *credit rating agencies* and transaction registers.

- **EBA Supervision Priorities 2017**

EBA published its Work Programme for 2017 at the end of September. In the Work Programme it listed all its priorities for technical standards, guidelines and reports for specific rules under CRD IV and CRR to be presented, but also with regard to, e.g., the BRRD, payment services, shadow banking or anti-money laundering regulations. The EBA supervision priorities are important for various market parties, including for banks, investment firms and payment institutions. A few important points for attention for EBA – not related to a specific institution – in 2017 are:

- Focus on the risk-based approach to the anti-money laundering regulations. This will result in, inter alia, guidelines with risk-mitigating measures for market parties which do business in countries outside of the EU which do not have any adequate anti-money laundering regulations.
- Shadow banking. EBA will review the possible proposals of the European Commission relating to shadow banking and the risks ensuing therefrom.
- Quality of financial reporting and administration. EBA will issue guidelines in the area of this subject-matter and will follow developments closely.
- Crisis management for non-bank entities. In 2017 EBA will primarily follow the developments in the area of recovery and resolution in the financial sector. This is with the goal of gaining a better understanding of the relationship between the financial market infrastructures and other financial institutions. Think of such things as a system that makes clearing of derivatives possible via a CCP or payment systems.
- Consumer protection. EBA will, inter alia, issue technical regulatory standards with which a standard terminology is applied for payment services which are linked to a payment account under the Payment Account Directive (PAD) and which contain a format for the representation of information about fees under the PAD.

- **Systematic integrity risk analysis (SIRA)**

The SIRA was a key regulatory subject for DNB in the past few years. In 2017 it will again be a leading topic. DNB will conduct various studies into different aspects of the SIRA. We will mention the two most important points on which DNB will focus:

- ***DNB study of integrity risk appetite***. The integrity risk appetite indicates what integrity risks an institution can run in the realisation of its goals or mission. The DNB study will focus on banks,

insurance companies, pension funds, trust offices and payment institutions. DNB will study to which extent the correct risks have actually been included in the SIRA. In addition, DNB will study to which extent the risks which are identified in the SIRA have led to policies and procedures for adequately managing these risks. The first studies have already started and will continue into 2017. DNB will particularly look at:

- the use of scenarios in the determination of the most important risks;
- the substantiation of the weighing up of the risks;
- the review against risk appetite; and
- the involvement and role of employees/departments in the establishing of the risk appetite.

- ***In-depth DNB study of substantive quality of SIRA***. DNB will conduct in the second and third quarter of 2017 in-depth on-site investigations regarding the extent to which the SIRA actually results in what DNB deems a proper risk assessment and fitting risk management policies. DNB's attention will particularly be aimed at the following topics:

  - the Product Approval and Review Process (PARP);
  - initiatives in the area of FinTech;
  - corruption and conflicts of interests in investments by pension funds and insurance companies; and
  - the facilitation of an integrity culture.

We advise market parties to carry out internal research into the above-mentioned topics and to pay special attention to the quality of the (recording of the) risk assessments and the risk management policies.

➢ **Improvements in the fit and proper testing process**

In May 2016 DNB and the AFM appointed an external assessment committee to carry out an assessment of the fit and proper (i.e. suitability and integrity) testing process of DNB and the AFM. The Minister of Finance sent the Report on the External assessment of the testing process of the AFM and DNB on 13 December 2016 together with the response of DNB and the AFM to the Netherlands Parliament (see the parliamentary letter). The report concludes that the parties involved acknowledge the added value of the review process of DNB and the AFM and a number of improvements are possible. In their response the regulators indicated they will take the recommendations of the final report to heart and will adjust the review process where necessary. A number of follow-up steps have been established. These encompass, in short:

- **More attention for transparency**. The information provision on the review process will be improved as information is often poorly accessible for candidates. The information on the review process will be improved both on the websites of DNB and the AFM and with regard to individual candidates. For specific functions which require more knowledge, DNB and the AFM will clarify their expectations and keep in contact with relevant training institutions so that better alignment can be sought with the expectations of DNB and the AFM.

- **Careful opinion-forming and decision-making.** The assessment shows that both regulators have set up the structure and working method of the review process so that these adequately meet the statutory requirements. As an improvement, DNB and the AFM will clarify the correlation between supervision and re-testing. DNB and the AFM will make it clearer to the candidate what the specific goal of a testing interview is and what this means for the scope of such a discussion. With regard to re-testing it is emphasised that these cannot and may not be used to force a financial institution to change its behaviour. A separate decision-making procedure has been established for re-testing to

safeguard the objectivity and independence in the process and to view it from an integral perspective, whereby decision making will take place at the highest level. DNB and the AFM will further examine their organisation structure in this context. Furthermore, the position of a candidate in a testing interview is seen as vulnerable. DNB and the AFM are therefore examining the involvement of external senior experts (i.e. experienced directors and supervisory directors) in the performance review which from their administrative experience and expertise can make a contribution to the review process.

- **Greater importance of diversity and attention for the functioning of the collective**. An important conclusion of the assessment committee is that the financial sector's perception appears that in suitability tests emphasis is on financial knowledge. This can result in only nominating candidates with a specific – financial - background. This is undesirable because diversity in the collective of management board and supervisory board is deemed important. DNB and the AFM are going to emphasise that institutions may also select those candidates which they deem most suitable for that position at that time. An important exception in this respect is formed by the suitability tests with significant banking institutions, whereby the ECB has final responsibility.

- **Improvement of efficiency.** Institutions can contribute to the efficiency of the process by thorough preparation and submitting a complete file. DNB and the AFM will improve their communication, so that submitting a complete file becomes easier for institutions. Furthermore, where possible DNB and the AFM will align their working methods documents and procedures to each other. Where DNB and the AFM have joint responsibility there will be better agreements on working methods and roles.

  The EBA and ESMA are consulting new guidelines for the fit and proper tests. The ECB also consults a guide with regard to the methodology of the testing process. The consultations will run until 28 January 2017 and 20 January 2017 respectively. The intention is to realise a further harmonisation of the testing process within the EU. Also see the 'Banks' Chapter. To what extent this will influence the current working method of DNB and the AFM is not yet known.

➢ **Brexit**

In a referendum on 23 June 2016 the citizens of Great Britain voted for Great Britain to leave the European Union (Brexit). It is not yet clear what the concrete legal consequences of Brexit will be. For the time being we expect the most important consequence to be the loss of the EU passport for branches and cross-border services. In 2017 there will be more clarity on whether Amsterdam will be an attractive hub for financial undertakings that wish to leave the UK because of Brexit. An important aspect is to which extent the Dutch 20% bonus cap will apply to these undertakings.

October 2018 at the latest the EU and Great Britain will have to have reached agreement on Brexit. We advise market parties to seek advice on the possibilities and statutory requirements applying to their activities on the English market after Brexit. They should also assess the consequences for possible group entities which are currently based in Great Britain. Great Britain will have to notify the European Council of its intention to leave the EU, by end of March 2017 (Article 50 notification). Subsequently, the leave negotiations will start.

➢ **Accelerated introduction of capital markets union**

In September 2015 the European Commission presented its action plan for establishing a capital markets union. With this action plan the European Commission seeks to reinforce Europe's economic growth potential by strengthening and diversifying financing sources for European undertakings and long term investment projects. The action plan covers a wide array of topics and a great diversity of proposed actions. On 14 September 2016 the European Commission published a plan to accelerate the capital

markets union. For 2017 the goal is to complete the first actions for the establishing of a capital market union:

- the proposal for the regulation on simple and transparent standard securitisation transactions, increasing available capital at banks that can be used for other financing purposes;
- the proposal for the Prospectus Regulation which makes it easier and less costly to have a prospectus approved; and
- the proposal for amendments to the Venture Capital Regulation and Social Entrepreneurship Regulation, which seeks to simplify investing in small and medium-sized innovative enterprises for investors.

Actions that will take form in 2017 and which directly affect market parties will be discussed in the relevant sections of the Finnius Outlook.

➢ **Publication bill Repair Act Financial Markets 2017**

The Repair Act Financial Markets 2017 aims to repair technical mistakes in the Dutch Financial Supervision Act that are the result of the implementation of EU legislation. Due to its mere repairing nature no public consultation is held. We expect this act to enter into force in the first quarter of 2017.

➢ **AFM & Consumer Behaviour – An exploratory review**

In October 2016 the AFM published its exploratory review 'AFM & Consumer Behaviour'. The review is the first guidance of the AFM on the way in which it applies insights on consumer behaviour in its supervision. The AFM often uses behavioural sciences in its supervision. This field of science demonstrates that consumers act with limited rationality (intuitively) and that they need more than just information to make proper financial decisions. In the past, policy makers and regulators often based their views on the 'rational consumer'; i.e. the consumer who balances advantages and disadvantages in making decisions and checks afterwards whether he made the right decision. Knowledge from the behavioural sciences shows that practice and theory are not aligned. In its report 'Consumer behaviour on the market for consumer credit – Impact of the environment of options on the decision making behaviour of consumers' the AFM shows how this can be used in the context of consumer credit supervision.

The knowledge from the behavioural sciences and the application thereof in the supervision of the AFM also has consequences for the way in which the AFM carries out its supervision. For example, in the future the AFM will pay greater attention to the manner in which information is offered and to the decision making tools provided by financial undertakings. The AFM wants to encourage parties to use behavioural sciences in a positive manner for the customer, simplifying making appropriate financial decisions. The AFM will also ask financial undertakings more frequently to review the effect of certain actions on consumer behaviour. The exploratory review lastly includes an invitation for cooperation to science, the financial industry and other relevant parties with the goal of further developing financial sector behavioural science.

We expect that the AFM will emphasise consumer behaviour in 2017. We advise market parties which offer services to consumers to take note of the AFM exploratory review.

➢ **Entry into force of the General Data Protection Regulation**

Finally, somewhat *off topic* in this General Outlook, a very relevant development for market parties active in the financial sector: the revision of EU privacy legislation. This resulted in the General Data Protection Regulation. An important consequence of the regulation is that this entails more obligations for market parties which process personal data. Important points for attention from the regulation are:

- The requirement for market parties to report the processing of personal data to the Data Protection Authority will be deleted. Market parties will themselves have to keep an overview of all processing of personal data.
- Risky processing of personal data must be preceded by a privacy impact assessment. In certain cases the consent of the Data Protection Authority is necessary.
- Market parties which process a lot of personal data are obliged to appoint a data protection officer.
- The enforcement options of the Data Protection Authority will increase. Under the regulation the Data Protection Authority is authorised to impose administrative fines up to a maximum of EUR 20 million or a maximum of 4% of the market party's worldwide annual turnover.

The regulation will enter into force as of 25 May 2018. We advise market parties to assess in 2017 whether their current privacy policy satisfies the stringent requirements of the regulation.

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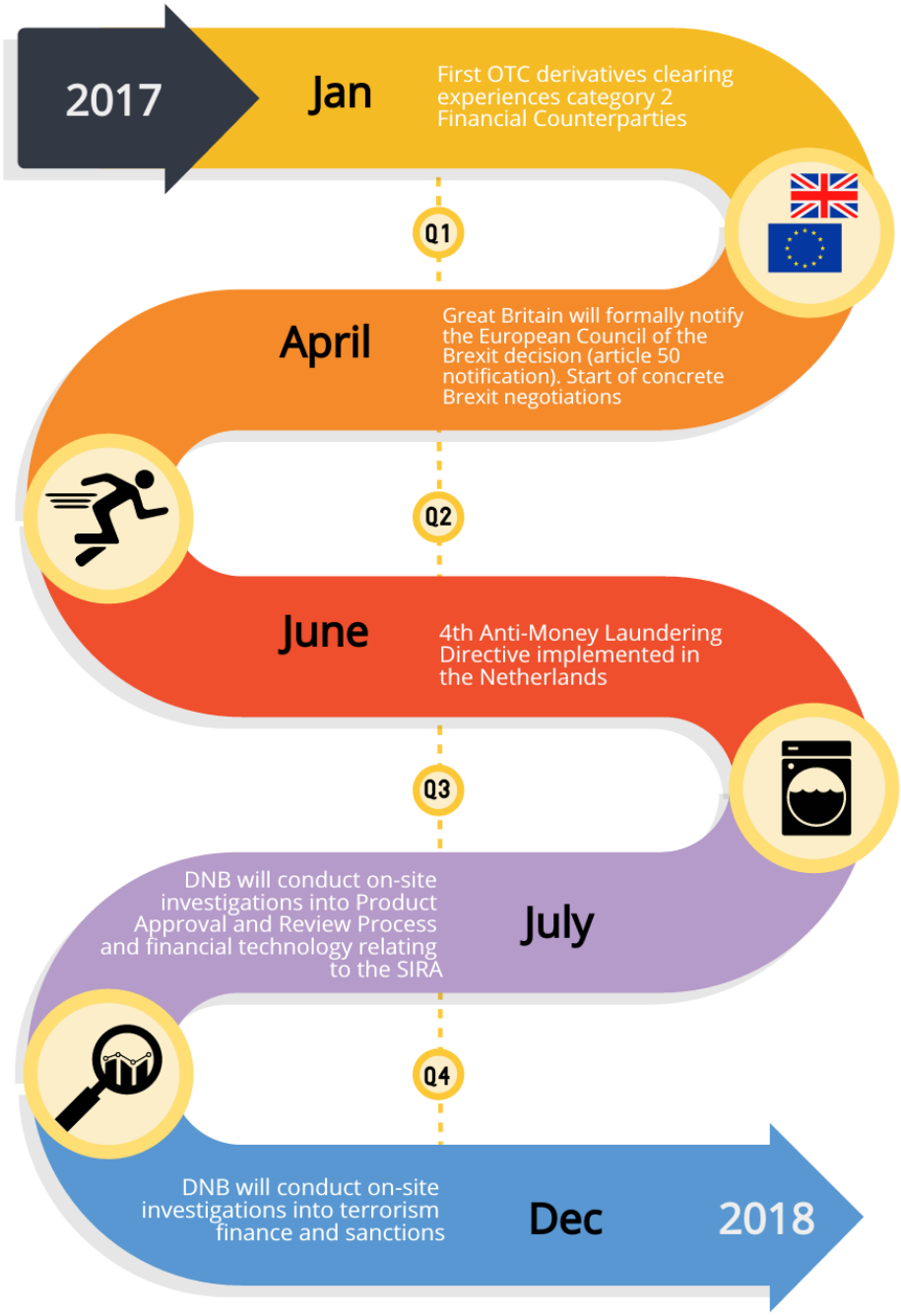
- **Timeline General Developments**



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FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR PAYMENT PROCESSING INSTITUTIONS

TOPICS

➢ CPMI-IOSCO Guidance on cyber resilience for Financial Market Infrastructures

The Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) have in June 2016 published a guidance report on Cyber resilience for *Financial Market Infrastructures* (FMI) ("Cyber Guidance"). The Cyber Guidance is a supplement to the Principles for Financial Market Infrastructures (PFMI). See press release.

'Cyber resilience' defines the ability of an FMI to anticipate cyber attacks and counter these and - in case of a cyber attack - the ability of an FMI to resist these and to quickly repair any damage incurred. The Cyber Guidance document stresses, amongst other things, the importance of stable cyber governance, good identification mechanisms for threats and the embedding of cyber awareness at all levels of the organisation.

Under the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft), these PFMIs apply in full to payment processing institutions, meaning that the Dutch Central Bank (*De Nederlandsche Bank*, DNB) strictly applies the PFMIs in its supervision of payment processing institutions. We advise payment processing institutions to assess whether their organisation and policy adequately meet the Cyber Guidance requirements.

➢ Legislative initiative DNB: delete duty of notification and approval

Some payment processing institutions have an obligation towards DNB, despite being excluded from DNB license obligation under the terms of the Wft. DNB has made a proposal for change to the Ministry of Finance. Small payment processing institutions can operate without DNB authorisation, but are required, under the current rules, to report to DNB. Under another current rule, Dutch payment processing institutions may only conduct operations via foreign branch offices with DNB approval, although DNB subsequently does not supervise those activities. DNB has in its legislation letter 2016 made the following proposal to the Minister of Finance:

- to scrap the duty of notification for small payment processing institutions;
- to scrap the duty of approval for the activities of payment processing institutions that are conducted through foreign branch offices.

The Minister has responded to these proposals by declaring his willingness to study the desirability and feasibility of these changes. See letter to the Dutch House of Representatives.

- **SEPA Instant Credit Transfer**

The European Payments Council (EPC) and various market parties are developing a new infrastructure for Instant Payments, whereby a transfer is immediately credited to the bank account of the recipient, making the funds available within seconds. The SEPA Instant Credit Transfer (SCT Inst) Scheme Rulebook of the EPC comprises the (technical) standards to be met by payment service providers in order to participate in the payment programme. The 2017 STC Inst Rulebook (version 1.0) will come into effect on 21 November 2017.

This new European standard for real-time euro payments within SEPA creates a new payment programme which includes the following characteristics:

- ***10 seconds*:** the maximum processing time of a transaction is 10 seconds;
- ***EUR 15,000*:** the maximum amount for transfers is EUR 15,000, unless participants in the payment programme have agreed on a higher amount;
- ***Voluntary*:** participation in the payment programme is on a voluntary basis;
- ***24/7/365*:** SCT services are available every hour of the day and every day of the year.

Rules regarding clearing and settlement, which are relevant in particular for payment processing institutions that wish to enable instant payments, explicitly fall outside the scope of the SCT Inst Rulebook.

FINNIUS

Outlook 2017

FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR BANKS IN 2017

TOPICS

➢ SSM: ECB supervisory priorities

The European Central Bank (ECB) published its supervisory priorities for 2017 in December 2016. These supervisory priorities primarily apply to significant banks, which are the banks directly supervised by the ECB. As further set out below, the Dutch Central Bank (*De Nederlandsche Bank*, DNB) will adopt most of the ECB supervisory priorities for its supervision of less significant banks.

The ECB has identified a large number of risks for 2017: from geopolitical uncertainties to cybercrime and from budgetary imbalances in the EU to cases of misconduct by banks. To enable banks to address these key risks effectively, the ECB has streamlined its supervisory priorities. For 2017 three priority areas will guide banking supervision:

- ***Business models and profitability drivers***: The ECB will continue to drive forward its thematic review of banks' business models and profitability drivers, especially in view of protracted low interest rates. A further point of supervisory attention will be the possible repercussions of Brexit for supervised banks and their business models. In addition, the ECB will explore potential risks for banks' business models emanating from the emergence of "FinTech" and non-bank competition.

- ***Credit risk, with a focus on non-performing loans (NPLs) and concentrations***: A number of banks continue to exhibit a high stock of NPLs. Via its NPL Task Force the ECB will continue to support the Joint Supervisory Teams (JSTs) in follow-up actions and supervisory dialogues with respect to the NPL guidance and the assessment of NPLs. Also excessive concentrations of credit risk in certain asset classes (e.g. shipping loans) will be investigated. The ECB has consulted a guidance document on NPLs. The guidance will likely be finalised in the beginning of 2017.
- ***Risk management***: In the area of risk management the ECB has highlighted four initiatives that will receive special attention. Firstly, the ECB will finalise its ongoing thematic review of banks' compliance with the Basel Committee's principles for effective risk data aggregation and risk reporting (BCBS 239), and JSTs will follow up with institutions, as appropriate. Secondly, in 2017 the ECB will roll out its multi-year targeted review of internal models (TRIM) used for determining capital requirements, including the launch of on-site inspections. Thirdly, the ECB will test institutions' ICAAPs and ILAAPs, verifying that banks have implemented adequate processes to assess and maintain their capital and liquidity adequacy. Fourthly, the ECB will start a thematic review to take stock of banks' outsourced activities and scrutinise how they are managing the associated risks (e.g. IT risks).

For each of these priorities, the ECB will carry out a number of supervisory initiatives in 2017, which will be carried out with respect to each bank individually. We advise banks to consult with their supervisory team of the relevant supervisory authority about the – foreseeable – supervisory planning for 2017.

➢ **Uniform method Supervisory Review and Examination Process (SREP)**

In December 2016 the ECB published its 2016 version of the SREP Methodology Booklet. In it, the ECB sets out which harmonised methods it used to prepare the 2016 SREPs of significant banks, and how it has calculated the required capital for these banks for 2017. DNB has indicated that i twill also use this method for Dutch less significant banks.

The most relevant new elements of the 2016 SREP Methodology Booklet, in comparison to the 2015 SREP, are:

- A bank's Pillar 1 capital does no longer have to be fully met with Common Equity Tier 1 capital.
- It introduces the cconcept of Pillar 2 guidance. This means that the supervisory authority can express its expectations with respect to long-term capital growth.

De 2016 SREP besluiten van DNB voor de minder significante banken worden in januari 2017 verwacht. Het is onze verwachting dat ook de 2017 SREP zoals aangegeven in de 2016 SREP Methodology Booklet zal verlopen. Het is dus zaak voor banken om de relevante SREP methodologieën goed door te nemen en hier in hun kapitaalplanning rekening mee te houden.

➢ **SSM: ECB harmonisation of options and national discretions**

In 2016 the ECB has published a regulation and a guide on how to harmonise national laws and regulations implementing CRD IV and CRR (so-called 'options and national discretions' (ONDs)). It aims to eliminate approximately 120 options for the implementation and use of supervisory legislation provided for in CRD IV and CRR and to harmonise these options within the SSM. In principle the ECB Regulation and Guide only apply to significant banks.

In November 2016 the ECB held a public consultation on a draft guideline and recommendation on the exercise of ONDs by national supervisory authorities in relation to less significant institutions. The

guideline is legally binding on national supervisory authorities and the recommendation is non-binding. In short, the national supervisory authorities are requested to largely comply with the ECB guide on ONDs.

This will have a major impact on Dutch banks to the extent the ECB policies deviate from the current DNB policies. We therefore advise to carefully monitor any differences with respect to the current DNB practice. In our opinion DNB should at least provide a motivated decision for any deviations from the ECB policies.

- **CRD 5 and CRR 2**

Although CRD IV and CRR have entered into force only three years ago, the European Commission (EC) has already reviewed and revised CRD IV and CRR in 2016. The EC has presented its proposals at the end of November 2016. The proposed measures aim to further reduce the risk in the banking sector and, in line with this, closely relate to the – political sensitive – discussion regarding the European Deposit Guarantee Scheme.

Whilst we expect that the proposed measures will not be finalised in 2017, we advise banks to closely monitor the progress and possible implications of these measures. Some of the proposed measures may have a major impact on banks and once determined banks shall have to anticipate on these measures as soon as possible.

It is outside the scope of this outlook to discuss each of the proposed measures. We have highlighted some of the proposed measures that we expect to have the greatest impact on banks.

1. **Measures regarding banks' capital requirements**

- ***Trading book***: The proposals include amendments as a result of the *fundamental review of the trading book* (FRTB) carried out by the Basel Committee. This includes, for example, more risk sensitive capital requirements for banks trading in securities and derivatives. These requirements particularly apply to market risk, counterparty credit risk and exposures to qualifying central counterparties

- ***Amendment of large exposures framework***: The quality of capital that can be taken into account to calculate the large exposures limit (only Tier 1 capital) will be improved. Furthermore, the large exposures limit for G-SIBs (Global Systemically Important Banks) will be increased from 10% to 15%.

- ***New rules for financial holdings***: The new rules introduce an authorisation requirement for the holding companies of banking groups and financial conglomerates. The purpose is to bring these holding companies under direct supervision and make them responsible for ensuring compliance with requirements on a consolidated level. An EU intermediate holding company is required for non-EU significant bank groups with more than two EU entities.

- ***Pillar 2 capital add-ons***: The conditions under which supervisory authorities may require Pillar 2 add-ons will be harmonised and enhanced. Furthermore, supervisory authorities may make a distinction between a Pillar 2 requirement (which the relevant bank must comply with) and a Pillar 2 guidance. The latter means that the supervisory authority can express an expectation with respect to long-term capital growth. This concept has already been introduced by the ECB in the 2016 SREP (see 'Uniform method Supervisory Review and Examination Process (SREP)' above).

- ***Leverage ratio***: A binding leverage ratio of 3% will be introduced. It remains to be seen whether the Netherlands has the degree of discretion to be able to continue to pursue efforts to a leverage

ratio of 4%. The Dutch cabinet indicates that it will continue to pursue efforts to a leverage ratio of 4% at an international level – at least for systemically important banks.

- ***Net Stable Funding Ratio***: The binding Net Stable Funding Ratio (NSFR) will be mandatory to comply with. Pursuant to the current requirement the NSFR only has to be reported.

- ***Solo waivers***: The supervisory authority can waive the application of own funds and liquidity requirements at solo level for banks that are part of a bank group. Pursuant to the new proposals, this possibility will be extended to subsidiaries in other SSM Member States (if, in short, the same supervisory authority supervises parents and subsidiaries).

2. Measures to improve banks' lending capacity

- ***SME finance***: The proposed measures intend to increase banks' lending capacity to provide loans to small and medium-sized enterprises (SMEs) and fund infrastructure projects. One of the proposed measures is a capital reduction in respect of SME loans.

- ***Proportionality with respect to remuneration***: The proposals include amendments that aim to make the rules on remuneration more proportionate for non-complex, small banks. One of the amendments consists in exempting deferred variable remuneration and pay-out in instruments with respect to (i) banks with a balance sheet total of EUR 5 billion or (ii) persons receiving variable remuneration of less than EUR 50,000 (which is also less than 25% of that person's annual salary). The national supervisory authority will retain the flexibility to apply stricter rules on remuneration, so it remains to be seen whether the Netherlands will follow this proposal. The Dutch cabinet has already indicated that it considers the threshold for exemption to be too high. In other words, the cabinet wants to communicate within the EU discussions that the possibilities for exemption must be limited.

- ***Proportionality with respect to reporting and disclosure***: Some of the current reporting and disclosure requirements do not seem to be justified for small and non-complex institutions. From the EC's Call for Evidence related to administrative burden on institutions resulting from supervisory requirements it appeared that the current rules could be applied in a more proportionate way, taking into account the specific situation of a bank.

De new legislative proposals will now be submitted for approval to the European Parliament and the Council. We expect that these proposals will not be adopted before the end of 2017 or the beginning of 2018. In accordance with the current proposals it will then take another two years until the proposals enter into force.

➢ **BRRD / SRMR revisions**

In addition to the revision of CRD IV and CRR, the EC has proposed to amend the Bank Recovery and Resolution Regulation (BRRD) and the Single Resolution Mechanism Regulation (SRMR). These proposals, inter alia, concern:

- ***Total Loss Absorbing Capacity (TLAC) requirement***: The proposals introduce the Total Loss Absorbing Capacity (TLAC) requirement for *Global Systemically Important Institutions* (G-SIIs). G-SIIs are required to hold a minimum level of capital and other instruments that can bear losses in case of resolution of the G-SII. This requirement will be integrated in the existing MREL requirement (minimum requirement for own funds and eligible liabilities). The MREL requirement is applicable to all banks and will also be substantially amended on some points. What is more, in December 2016 EBA has made some recommendations to further strengthen the MREL framework. This includes for

example the determination of MREL as a percentage of risk-weighted assets (with a leverage exposure as backstop). The cabinet has indicated to pursue efforts to a MREL requirement with 8% of total liabilities being "bail-inable".

- ***Moratorium prior to resolution***: The proposals include a moratorium tool that can be applied by the supervisory authority in respect of a bank's payment obligations. These payment obligations can be suspended for a maximum of five days. The moratorium tool that currently exists can be applied in the course of a resolution, but the proposal introduces another moratorium tool that can be applied in the early intervention phase. The Dutch cabinet has indicated that the legislation must provide for a prudent use of this tool, as it may result in loss of market confidence.
- ***Harmonised priority ranking of debt instruments***: The ranking of debt instruments is currently determined on a national level. The European Commission proposes a harmonised national insolvency ranking of unsecured debt instruments (senior debt) to facilitate banks' issuance of such loss absorbing debt instruments. As a result of this proposal, this senior debt will rank between subordinated capital instruments and regular unsecured claims. The EC's aim is that these rules enter into force mid-2017. The cabinet welcomes this measure and would like to see this proposal to be dealt with independently of the other proposals.

➢ **SRM: SRB priorities 2017**

The Single Resolution Board (SRB) has published its 2017 Work Programme. The SRB is responsible for resolution of significant and cross-border banks of the Euro area and management of the Single Resolution Fund (SRF).

In 2017 the SRB will focus on three main areas that have a direct impact on banks:

- ***Sound resolution planning***: The SRB's focus will be on operationalising resolution strategies for significant banking groups, bail-in execution and identifying obstacles to resolvability. In addition, the SRB will further work on setting the Minimum Requirements for own funds and Eligible Liabilities (MREL).
- ***The Single Resolution Fund***: The SRF will be built up over an eight-year transitional period, starting in 2016. Among other things, the SRF will be filled with ex ante contributions from all credit institutions within the scope of the SRM. The SRB's main objective is to collect these contributions, including from Dutch banks, in accordance with their size and risk profile, by 30 June 2017.
- ***Policy and cooperation***: The SRB must ensure consistency and harmonization of resolution activities within the SRM. The SRB will therefore build an oversight function for less significant banks in 2017. Among other things, the SRB will be responsible for assessing draft resolution measures relating to less significant banks to be adopted by the national resolution authorities (DNB in the Netherlands).

➢ **DNB Supervisory Priorities 2017**

In November 2016 DNB has published its supervisory priorities for 2017 relating to banks. With respect to CRD IV supervision, DNB is primarily bound by the ECB's priorities, but it also has some priorities of its own.

Banks should be prepared that DNB will confront them in 2017 with the following assessments and points of supervisory attention.

- ***Low interest rate and business model***: The low interest rate has a major negative impact on banks' business models. It will be a continuing point of supervisory attention for DNB, for example as part of the regular supervisory meetings. DNB will also focus on individual banks to assess whether they will take more risks to preserve their profits. Like the ECB under the SSM, in 2017 DNB

will continue its review of individual banks to assess the interest risk and the impact of a low interest rate on business models. DNB will also include this topic in its annual Supervisory Review and Evaluation Process (SREP) in respect of each individual bank.

- ***Changing legislation concerning banks***: DNB concludes that a large number of significant changes in legislation concerning banks are in the pipeline for 2017. These include, inter alia:

    - The revision of Basel III will be finalised by the Basel Committee. DNB is committed to reduce the unsubstantiated differences in risk weighting, and also to maintain the capital requirement based on a bank's risk profile. DNB does not exclude the possibility that this revision will result in increased capital requirements for certain individual banks.
    - As of 2017 the EMIR requirements relating to the exchange of collateral and margin will affect the capital requirements and capital needs of Dutch banks with significant derivative positions.
    - On 1 January 2018 the new international accounting standards of the International Financial Reporting Standard (IFRS) 9 enter into force. This particularly affects the provisions banks have to establish. In 2017 DNB will continue to carry out an impact study concerning the financial consequences of IFRS 9 and expand the scope of the impact study to include the entire banking sector.

- ***Reassessment of internal models***: Under the SSM the ECB reviews the internal models used by significant banks in SSM Member States to determine, inter alia, market risk, counterparty risk and credit risk. This assessment, which will also be carried out in respect of Dutch significant banks, will take two years and requires substantial use of DNB's supervisory capacity. DNB will carry out on-site inspections with the ECB. The aim is to harmonise the supervision within the SSM on internal models used by banks.
- ***Reduction of non-performing loans (NPLs)***: In Europe under the SSM there is great concerning regarding NPLs on banks' balance sheets. In the Netherlands in principle there are less NPLs than in certain other SSM Member States. The ECB's approach aims to reduce the current stock of banks with a high level of NPLs by using a harmonised SSM methodology. This SSM methodology applies to a bank even if the level of NPLs is high in only one of that bank's sub-portfolios. This is relevant for Dutch banks.
- ***Credit risk management***: In 2017 DNB will continue to focus on banks' credit risk management. This year DNB will focus on (i) loans to small and medium-sized enterprises (SMEs), (ii) commercial real estate and (iii) commodity and trade finance. If possible, DNB will use available information retrieved from previous reviews. DNB will review the quality of SME loans using an Asset Quality Review (AQR). The AQR should provide an insight of the quality of the loans and the valuation of collateral. DNB will also pay attention to the extend banks are exposed to commercial real estate risks. DNB identifies another phase of overheating in certain regions. In this real estate review DNB will assess to what extent banks have followed-up on the recommendations made after the previous review that was carried out by DNB in this respect.
- ***Outsourcing risks***: In the first half of 2017 DNB will investigate how the risks that accompany the outsourcing of business processes are managed. Banks would be well advised to look into their current outsourcing relations, policies and contracts in preparation of DNB's review in this respect.
- ***Integrity risk appetite and systematic integrity risk analysis (SIRA)***: The integrity risk appetite indicates what integrity risks an institution can run in the realisation of its goals or mission. In its study, DNB includes banks, and focuses in particular on the question to what extent the correct risks have actually been included in the SIRA (systematic integrity risk analysis). In addition, DNB will study to what extent the risks that are identified in the SIRA have led to policies and procedures for adequately managing these risks. The first studies have already started and will continue into 2017. DNB will, in particular, look at: (i) the use of scenarios in the determination of the most important risks; (ii) the substantiation of the weighing up of the risks; (iii) the testing against the risk appetite; and (iv) the involvement and role of employees/departments in the establishing of the risk appetite.

- **Basel 4**

  It is expected that the Basel Committee will adopt some long awaited revisions of the Basel 3 framework (Basel 4, or also known as Basel 3.5). It is expected that the new requirements may be implemented in phases until 2025.

  Particularly relevant for Dutch banks is whether this legislation provides for the requirement that the calculation of credit risk based on internal models (*Internal Ratings Based* (IRB)) must meet a minimum threshold (capital floors), calculated based on the Standardised Approach. This capital floors approach could exclude Dutch banks' own commonly used internal models.

  Furthermore, Dutch banks must closely monitor whether the proposals regarding the revision of the current Standardised Approach will be carried out. Especially with respect to the calculation of risk weight of mortgage loans the new calculations could have a negative impact on Dutch banks' capital. The reason is that the revised Standardised Approach is based on a risk weighting of mortgage loans using solely the level of the relevant Loan-to-Value (LTV) ratio. The LTV of Dutch mortgage loans is always relatively high.

  With a view to the negative impact of the proposals for Dutch and other EU banks, within the Basel Committee there are still significant discussions on the exact details of the proposals. We expect that the first Quarter of 2017 will bring more clarity on the final proposals.

- **EBA priorities 2017**

  EBA has published its Work Programme 2017 at the end of September 2016. In its Work Programme EBA has listed all of its priorities with respect to technical standards, guidelines and reports regarding specific rules that must be delivered under CRD IV and CRR, but also with respect to, for example, BRRD, payment services, shadow banking or anti-money laundering legislation. The EBA has indicated that in 2017 it will focus on, inter alia, the further harmonisation of the Single Rulebook for banks and proportionality of legislation concerning small banks and less complex banks.

  These documents will, in fact, largely make up the legislative framework for banks, as the ECB and DNB are committed thereto. Taking into account the great impact it has on banks, it is important to closely monitor the EBA proposals. Some of these proposals are addressed below.

- **EBA guidelines on internal governance**

  In October 2016 the EBA has published its revised Guidelines on Internal Governance. These guidelines will replace the 2011 governance guidelines. The ECB and DNB use these guidelines to assess the organisation of governance of banks.

  The new guidelines put more emphasis on the role of the supervisory board to emphasise the risk culture of banks. The management board and supervisory board must be increasingly involved in risk management and the role of risk committees becomes more important. The status of the risk management function will be further enhanced.

  Other examples are the requirements for banks to be transparent with respect to their offshore activities (know-your-structure), partly in respond to the Panama Papers, and to specifically take into account the risk exposure of change processes. The guidelines also include a useful list of focus areas for the set-up of internal governance.

We advise to closely monitor the new guidelines and to implement the guidelines in the existing governance of banks as much as possible. We expect that the supervisory authorities will focus on the new topics included in the guidelines when carrying out a review of a bank's governance structure. The guidelines are expected to be adopted in the first half of 2017 and to be applicable before the end of 2017.

- **EBA guidelines on ICT risk assessment**

The EBA has held a consultation on its Guidelines on the assessment of the information and communication technology (ICT) risk in the context of the Supervisory Review and Evaluation Process (SREP). The ECB has identified an increasing importance of ICT risk management within the banking sector.

The guidelines, inter alia, address what supervisory authorities should expect with regard to management of ICT risks at senior management level and management body level, as well as the assessment of a bank's ICT strategy and its alignment with the business strategy.

We expect an increased focus in SREP on ICT risks in 2017. The guidelines are expected to be final mid-2017. We therefore advise banks in 2017 to compare their ICT structure with these new guidelines, to prepare for the 2018 SREP on ICT.

- **EBA technical standards on the application for authorisation for banks and for a declaration of no-objection**

In November 2016 the EBA has published a draft Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) on information that must be delivered when applying for authorisation for banks or a declaration of no-objection (DNO).

The RTS consists of a large number of detailed requirements regarding the topics in respect of which an applicant must deliver information. With respect to the application for authorisation for banks, this includes, inter alia, information on historical data, information on equity capital and shareholders, a business plan, the compliance function, the internal audit function and relevant internal policies. The RTS provides for some flexibility. The possibility for phased delivery of information may be included. The ITS include the draft of the relevant application form.

It is expected that the proposals will be adopted in Q2 2017 and will subsequently enter into force six months later. The proposals have major impact on parties applying for an authorisation for banks or a declaration of no-objection. The information that must be delivered is described in more detail than under the current DNB forms. An applicant will therefore be better informed of what is expected from him.

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

As of 1 January 2017, the EBA Guidelines on sound remuneration policies have entered into force, which are relevant for the remuneration policy of banks. The guidelines were published by the European Banks Authority (EBA) in 2015. These new guidelines replace the earlier CESB (the predecessor of EBA) guidelines with respect to remuneration policies from 2010. The new guidelines contain interpretations on different topics, such as governance, the payment of variable remuneration in financial instruments and the scope of application of the remuneration rules within groups with multiple financial undertakings. DNB has indicated that it will apply the guidelines drawn up by EBA in the Netherlands within the framework of the supervision of compliance with the Controlled Remuneration Policy Regulations 2014 (*Regeling beheerst beloningsbeleid*, Rbb) (and thus to all banks).

- **Joint ESMA and EBA guidelines on the assessment of suitability**

  In October 2016, ESMA and EBA published the consultation document of their joint 'Guidelines on the assessment of the suitability of members of the management body and key function holders'. The guidelines, which are based on the requirements of CRD IV and MiFID II, are aimed at improving and harmonising the suitability test within the EU. The guidelines contain criteria for assessing the knowledge, competence and experience of key function holders and members of the management body (including the daily policymakers and internal supervisory officials), as well as criteria for assessment of reliability, integrity and independence. Also included are criteria regarding time commitment, while the importance of diversity he stressed. EBA and ESMA have developed a model suitability matrix for assessment of the collective.

  The revised guidelines will replace the current EBA guidelines, which date from 2012. Parties have until 28 January 2017 to respond to the consultation. Implementation by the national regulatory authorities is expected in mid-2017.

- **SSM: ECB guide to the assessment of suitability and integrity**

  In Q1 2017 the ECB will probably publish a new guide to the assessment of banks' management board and supervisory board members. A public consultation regarding the relevant proposals is currently pending. The guide explains, in light of the harmonisation within the SSM, how the ECB evaluates the qualifications, skills and proper standing of a candidate for a position on the management or supervisory board of a significant bank. The ECB guide does not replace the EBA guidelines on this topic (as described above). The ECB and local supervisory authorities (such as DNB) follow these EBA guidelines.

  The ECB guide provides a useful framework to prepare the screening of a candidate for a position on management or supervisory board of your bank. This particularly applies to significant banks. We expect that DNB will also adopt these new guidelines with respect to the assessment of board members of less significant banks.

  DNB was chairman of the SSM practice group that drafted this guide and hence a part of common practice in the Netherlands is incorporated in this guide. In other parts the ECB approach seems to be more measurable and less subjective than under the Dutch practice. We note the importance for the development of the Dutch supervisory testing practice the 'Report on the external assessment of the DNB and AFM testing process'. We refer you to 'General developments' under 'Improvements in the fit and proper testing process'.

- **Amendment decree countercyclical capital buffer**

  On 1 January 2017 the amendment decree on countercyclical capital buffers enters into force. Consequently DNB is able to, if necessary, fully apply the countercyclical capital buffer to banks with a statutory seat in the Netherlands. The countercyclical capital buffer is one of the components of the combined capital buffer, which a bank needs to maintain. The countercyclical capital is designed to help counter pro-cyclicality in the financial system. Capital must be accumulated during the upswing of the financial cycle and may be reduced during the downswing of the financial cycle. Without this amendment decree this buffer should have been phased in and BNB would only have been able to fully apply this buffer as of 1 January 2019.

- **Entry into force IFRS 1 January 2018**

On 1 January 2018 the new international accounting standards of the International Financial Reporting Standard (IFRS) 9 enter into force. This particularly affects the provisions banks have to establish. DNB will carry out an impact study concerning consequences of IFRS 9 on Dutch banks. The proposals for CRD 5 and CRR 2 include a phased implementation period of 5 years with respect to the IFRS 9 rules on banks' capital requirements. For many banks 2017 will be dominated by (further) preparations for these new standards.

- **Access to basic payment accounts**

On 11 November 2016 the Implementation act on access to basic payment accounts have entered into force. This act implements the Payment Account Directive in, inter alia, the Dutch Financial Supervision Act (*Wet op het financiëel toezicht*, Wft). This new act has three objectives:

- improving the transparency and comparability of fees related to consumer payment services;
- facilitating that consumers can easily switch banks; and
- improving the accessibility of payment services for consumers.

In short, a bank offering payment accounts to consumers in the Netherlands is required to, inter alia, enable consumers residing in the EU to open a basic euro payment account upon request. The account must be opened within 10 days after the account opening request.

This new legislation has major impact on the ability of banks offering payment accounts to refuse a consumer to open an account. We expect that this will result, inter alia, in additional compliance costs.

- **AnaCredit**

In May 2016 the ECB has adopted the AnaCredit Regulation (Regulation on the collection of granular credit and credit risk data). An important point for attention is the introduction of credit data-analysis system AnaCredit (analytical credit datasets). This regulation should help the ECB's statistics division to gain insight into individual credits of individual banks. On the basis thereof banks will have to furnish an enormous quantity of detailed information regarding individual credit facilities on a monthly basis. This encompasses 127 data fields per credit facility.

The gathering of data will start in September 2018. We advise banks to use 2017 to assess to what extent they can comply with the requirement to deliver such detailed information, and to prepare for that requirement. Multiple parties, such as national supervisory authorities and the European Commission, can use the data collected under AnaCredit. We advise banks to – jointly or otherwise – review the limits of such use of data, and to consider to take a view in this respect.

- **Additional security measures cybersecurity**

On 8 august 2016 the Directive on security of network and information systems (the NIS Directive) entered into force. The NIS Directive must be implemented no later than 9 May 2018. The NIS Directive concerns cybersecurity and imposes security measures on "operators of essential services". Banks among others are identified as such. They will, inter alia, have to take appropriate security measures in connection with cybersecurity and notify serious incidents to the relevant national authority.

We advise banks to closely monitor the legislative proposals on this topic. We expect these legislative proposals in the course of 2017. They may have a major impact on banks' organisation of the ICT structure. Furthermore, banks' compliance departments may have to revise their incident notification policy.

- **Approval supervisor of declaration of joint and several liability / 403-declarations**

Pursuant to the proposal of the Financial Markets Amendment Act 2018 it is required to obtain prior approval from the supervisory authority for guarantees to be issued by (inter alia) banks to guarantee the payment obligations arising from (nearly) all acts committed by third parties. This approval requirement also applies to guarantees issued by banks' holding companies or group entities that perform critical services. Furthermore, the supervisory authority has the power to prohibit, or to establish special conditions for, the payment of a claim under the declaration of joint and several liability. The ECB is under certain circumstance the primary approving authority with respect to significant banks. DNB is the competent authority in all other cases. The approval requirement only applies to declarations of joint and several liability issued after the legislation has entered into force.

It is expected that this legislation enters into force mid-2018. We advise to closely monitor the exact legislative proposals on this topic during 2017 and assess the consequences thereof with respect to guarantees that are envisaged to be issued by your bank, for example 403-declarations and other recurring guarantees within your group.

- **Revised General Banking Conditions**

All banks that are members of the Netherlands Bankers' Association (*Nederlandse Vereniging van Banken*, NVB) use the same general conditions with respect to their clients: the General Banking Conditions (*Algemene Bankvoorwaarden*, ABV). In 2016 the ABV are restated to be more comprehensible and they are substantially amended on some points.

Banks use their own separate contracts and general product conditions for more specific services and products. The most significant amendments of the ABV concern the protection of consumer rights that follow from the ABV. In principle if a provision of the special conditions is contrary to the ABV, the special conditions prevail. However, this principle cannot affect consumers' rights or protection under the ABV.

Some significant other amendments are listed below:

- ***Comprehensible***: The new ABV explicitly include a provision stating that banks aim to provide comprehensible products and services and comprehensible information about these products and services.
- ***Outsourcing***: The ABV provides that the bank remains the client's point of contact and counterparty if a bank involves third parties to perform its operations or outsources its operations.
- ***Special costs***: A provision is included in the ABV stating that if a statutory provision regarding special costs exists, that statutory provision applies. With respect to litigation costs this means that, if the bank is successful in legal proceedings against a client, it will claim litigation costs in accordance with the statutory provision and will not claim the actual litigation costs.
- ***Changes of rates and fees***: The ABV explicitly state that a bank must inform clients of the changes of their rates or fees.

The ABV enter into force on 1 March 2017. Banks must inform their clients, to the extent they have not already done so.

- **Preparation PRIIPs Directive**

The PRIIPs Directive includes provisions concerning the development of Packaged Retail and Insurance-based Investment Products (PRIIP) and the offering of PRIIPs in the retail market. PRIIPs can be divided in 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. Banks can be a developer of PRIIPs.

The PRIIP Directive was initially scheduled to enter into force on 31 December 2016. However, after the European Parliament had rejected the Regulatory Technical Standards relating to the PRIIPs Directive mid-September 2016 the EC decided to postpone the entry into force of the PRIIPs Directive by one year. This means that banks have another year to prepare a KID for the PRIIPs developed by them and to furnish them to sales channels. Banks that offer PRIIPs must ensure to comply with the PRIIPs Directive ultimately at the end of 2017.

- **Execution of the Uniform Remedy Framework SME Interest Rate Derivatives**

Also in 2017 banks will have a lot of work involving the re-evaluations of the interest rate derivatives that have been sold to small and medium enterprises (SME). In 2014 already banks started the re-evaluation of SME interest rate derivatives at the instruction of the Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM). However, in 2016 the AFM indicated that banks' efforts to resolve the problems identified with respect to the interest derivatives and to compensate clients had appeared to be insufficient.

In light thereof Mr Dijsselbloem, minister of Finance, appointed three experts to negotiate a uniform remedy framework with the banks, as recommended by the AFM. These experts form the independent Derivatives Committee. On 5 July 2016 the Derivatives Committee presented the 'Uniform Remedy Framework SME Interest Rate Derivatives'. The remedy framework provides instructions for the re-evaluation of the interest rate derivatives and the remedy steps that must be carried out to compensate damages suffered and prevent further damages. In the period July – November 2016 the Derivatives Committee engaged into discussions regarding the remedy framework banks, client representatives, external evaluators and the AFM. The involved parties put numerous questions to the Derivatives Committee regarding the interpretation and execution of the remedy framework.

The remedy framework is finalised in December 2016. This means that banks can start to apply and execute this framework on their SME interest rate derivatives. For banks this entails a substantial amount of additional work. The AFM expects banks to inform their relevant clients by end January 2017 on process and timing. The expectation is that banks will make the first compensation proposals to their clients will in the beginning of of 2017. The AFM will report in March and September 2017 to the minister of Finance on the progress and quality of the banks' work in this regards.

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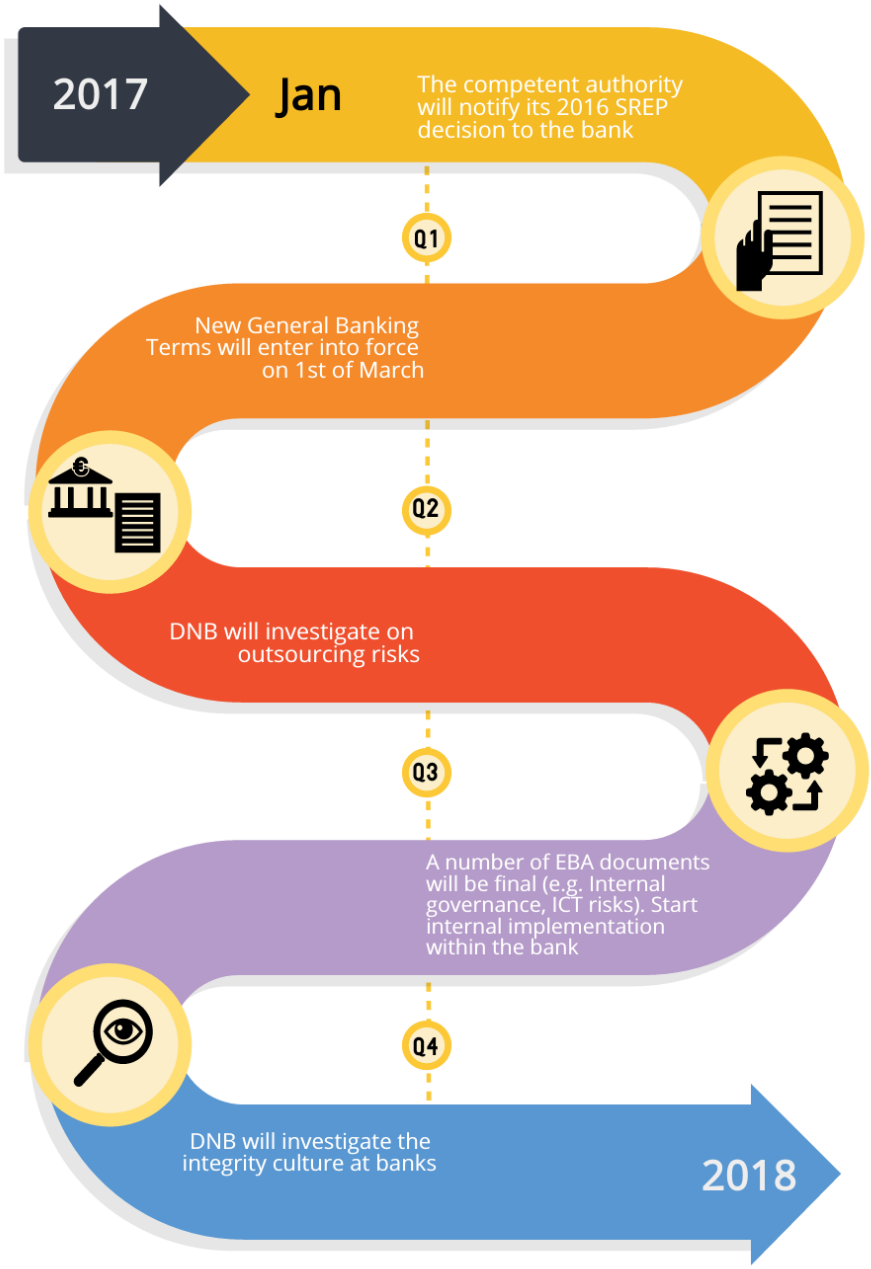
➢ **Timeline Banks**



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Outlook 2017

FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR FUND MANAGERS OF INVESTMENT FIRMS IN 2017

TOPICS

➢ MiFID II: Impact for managers

On 03 January 2018 – after having been postponed for a year - MiFID II will enter into force in the Netherlands. The MiFID II package consists of a directive (2014/65/EU), a regulation (600/2014/EU) and further guidance issued pursuant thereto in level 2 legislation and level 3 legislation. MiFID II is primarily relevant for investment firms. However, MiFID II will also have an impact on certain managers which must not be underestimated:

- Managers who provide MiFID services: First of all, MiFID II is relevant for managers who pursuant to their AIFMD or UCITS licence are permitted to provide certain MiFID services. The AIFMD and UCITS permit a manager – after the approval of the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) – to, in short, offer individual portfolio management services and in addition advise on financial instruments and take custody of participation rights in AIFs or UCITS. A manager who also provides MiFID services must, in accordance with specific provisions in the AIFMD and UCITS, comply with specific requirements of MiFID I, such as those relating to information provision and business operations (such as mitigating conflicts of interests). These requirements are further expanded under MiFID II. These relate to, among others, product governance, rules on cross-selling, suitability requirements, disclosure of *all* costs of a service, inducement rules and the calculation of research costs. With regard to these provisions MiFID II thus directly applies to these managers. For a more detailed explanation with regard to a number of the topics mentioned here, see the section Investment Firms of this Outlook.

- Managers who work together with investment firms: In addition, MiFID II is relevant for managers who make use of the services of investment firms, e.g. distributors, to offer participations in AIFs and UCITS. These investment firms must of course primarily themselves implement certain changes in

order to be able to comply with the new requirements of MiFID II. However, because a number of these requirements impact the *products* they offer, specific elements of these requirements will also apply to managers of AIFs and UCITS. These include product governance (including determining the target group), providing insight – on behalf of the investment firm – into the costs of that part of the service that relates to the AIFs or UCITS which are offered and amended inducement rules. MiFID II thus does not apply directly to these managers, but they are affected by MiFID II, due to the fact that investment firms will need to rely on input from managers in order to be able to comply with MiFID II.

Managers who fall under one of these categories will – whether or not in cooperation with their distributors – have to prepare for implementation of MiFID II in the coming year.

- **Proposal to amend EuVECA and EuSEF Regulation**

On 14 July 2016, the European Commission published a proposal for changes to the Venture Capital Regulation (also called the EuVECA Regulation) and the Social Entrepreneurship Regulation (also called the EuSEF Regulation) (the Proposal). The current EuVECA Regulation and EuSEF Regulation provide for the possibility for small managers who fall under the AIFMD-registration regime to, in addition to that registration, apply for a 'EuVECA label' or 'EuSEF label' for one or more investment funds under management. This label then works as a European passport for the relevant investment fund, which means that participation rights can be offered within the EU without further restrictions. This is an interesting option for registered managers, because the registration regime does not provide for a European passport. In order to obtain such label, a number of conditions must have been satisfied (such as disclosure requirements to investors, a mandatory conflict of interests policy and capital requirements). In the Proposal the conditions for a label are made more flexible so that it becomes easier to apply for a label.

The most important proposed amendments in the Proposal are:

- In addition to registered managers, managers who have an AIFMD licence can also apply for a label.
- The assets in which EuVECA funds can invest will be expanded. Consequently, more types of undertakings (such as SMEs under certain conditions) will qualify as venture capital undertaking within the meaning of the EuVECA Regulation, so that EuVECA funds are permitted to invest in them.
- Simplification of the registration procedure, a limitation of the related costs and the determination of the minimum own funds that managers must have available. These amendments must ensure that it is clear in advance what the registration process encompasses and how much own funds must be maintained.

It is currently not clear yet when the Proposal will be passed and when the amendments will enter into force. Managers who primarily invest in venture capital undertakings or social entrepreneurship undertakings can determine whether this label can be interesting for them, allowing them easier access to capital of investors in the entire European market.

- **ESMA guidelines on sound remuneration policies under AIFMD and UCITS**

On 14 October 2016 the European Securities and Markets Authority (ESMA) published Guidelines on sound remuneration policies under the AIFMD (AIFMD Guidelines) and Guidelines for a controlled remuneration policy under UCITS (UCITS Guidelines) (together the Guidelines). The UCITS Guidelines were drawn up on the basis of the UCITS V Directive. UCITS V requires that the UCITS Guidelines must be aligned as much as possible with the AIFMD Guidelines. This has led to an important change with respect to the guidelines previously drawn up by ESMA on the basis of the AIFMD.

For managers of AIFs, the AIFMD Guidelines provide for an amended regime for managers which form part of a (banking) group. The AIFMD Guidelines stipulate that these Guidelines must always be applied to a manager of AIFs, regardless of whether it forms part of a bank group. In line with guidelines of EBA under CRD IV, provisions have been included that a manager who forms part of a (banking) group, must also apply the industry-specific remuneration rules of that bank, if specific subjects are regulated therein which are not regulated in the AIFMD Guidelines. In principle, this applies specifically to employees of the relevant managers who must be deemed *identified staff* for the application of those industry-specific guidelines. This can thus entail that employees of a manager are deemed *identified staff* for application of the CRD IV remuneration rules and with regard to these employees the group must comply with the remuneration guidelines issued by EBA under CRD IV (including the bonus cap). These guidelines will then apply in addition to the AIFMD Guidelines. In the Netherlands this may have extra consequences in light of the Financial Markets Amendment Act 2018 (see below).

The Guidelines entered into force as of 1 January 2017. Managers of UCITS must have established a remuneration policy which complies with the UCITS Guidelines. Managers of AIFs which form part of a group must check whether their remuneration policy complies with the AIFMD Guidelines.

- **Managers that form part of a group: Impact of the proposal for the Financial Markets Amendment Act 2018**

On 27 July 2016, the Minister of Finance presented the draft Financial Markets Amendment Act 2018 to the market for consultation (available in Dutch only). A far-reaching change therein for *managers who form part of a group* is the restriction of the overall exception to the bonus cap. As set out above, the Guidelines on sound remuneration policies under the AIFMD stipulate that a manager who forms part of a (banking) group, must also take into account the industry-specific remuneration rules of that bank (in principle only with regard to *identified staff*). This requirement is currently not in line with the Dutch remuneration rules, as currently the bonus cap has an exception for *all* managers of AIFs and UCITS (and thus also managers who form part of a group).

The proposal for the Financial Markets Amendment Act 2018 therefore provides for an amendment with regard to the existing Dutch remuneration rules. The legislative proposal states that the bonus cap applies to these managers in so far as they form part of a group which is subject to consolidated supervision. As in the Netherlands no distinction has been made between remuneration rules for ordinary employees and for *identified staff*, the restriction of the exception to the bonus cap applies to all employees of the manager. In addition, not only will managers who operate in a banking group be subject to the bonus cap, but also managers who operate in another group which is subject to consolidated supervision (such as insurance companies or investment firms). For the percentage of the bonus cap alignment is sought with CRD IV. This means that the variable remuneration of the employees of said managers may be a maximum of 100% (or 200% with the consent of the shareholder) of the fixed remuneration of that employee on an annual basis. The standard 20% bonus cap will thus not apply to them.

The consultation round has since ended. Managers who form part of a group to which prudential consolidated supervision applies, should keep a close eye on what the legislator does with the consultation responses received regarding this point.

- **Preparation for PRIIPs Regulation**

The PRIIPs Regulation contains regulations for manufacturing and selling to the retail investors so called *Packaged Retail and Insurance-based Investment Products* (PRIIPs). 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 repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more

assets which are not directly purchased by the retail investor. Examples of PRIIPs are participation rights in an AIF or UCITS. As the PRIIPs Regulation also applies to fund managers, the manufacturer 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 PRIIPs Regulation was initially expected to enter into force on 31 December 2016. However, the European Commission decided in mid-November 2016 to postpone the entry into force of the PRIIPs Regulation by one year, after the European Parliament had rejected the Regulatory Technical Standards drafted for the PRIIPs Regulation in mid-September 2016. This means that market parties have an extra year to draw up a KID for the PRIIPs manufactured by them and to present that to their sales channels. Fund managers will have to ensure that they comply with the obligations of the PRIIPs Regulation by end 2017 latest.

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

In 2016, ESMA conducted further research into the options for creating a European passport for non-EU AIFMs who are subject to the AIFMD. Currently, a non-EU AIFM cannot make use of a European passport on the basis of which it is able 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 has given ESMA the assignment to evaluate the following factors to come to a positive recommendation relating to the non-EU AIFM passport: investor protection, market distortion, competition and the supervision of system risk (the Factors). ESMA will carry out this research per jurisdiction. ESMA has in the meantime studied the following countries: Australia, Bermuda, Canada, the Cayman Islands, Guernsey, Hong Kong, the Isle of Man, Japan, Jersey, Switzerland, Singapore and the USA.

ESMA published the results of the study on 12 September 2016. In said study ESMA advises the European Parliament, the Council and the European Commission about the application of the European passport to non-EU managers from these jurisdictions. ESMA's advice, in short, reads as follows:

- With regard to Guernsey, Jersey, Hong Kong, Singapore and Switzerland, ESMA has established that there are no obstacles with regard to the Factors.
- Certain obstacles have been identified in Australia, Canada, Japan and the USA, but these are not seen as so significant that they should impede the granting of a passport.
- In Bermuda, the Cayman Islands and the Isle of Man, ESMA cannot (yet) give definite advice, because certain pending legislation still has to be passed or is lacking for the time being.

A next step is that the European Commission, on the basis of ESMA's advice, makes a decision on the application of the passport to managers from the above-mentioned third countries. The European Commission has indicated previously that it will take such decision after a sufficient number of non-EU jurisdictions have been assessed. ESMA will in the meantime continue to review various non-EU jurisdictions.

- **European Commission commences review of AIFMD (AIFMD II?)**

Ultimately on 22 July 2017 the European Commission must start a review of the AIFMD. The European Commission must consult the market in relation to this review. The subject-matters which the European Commission must assess relate to, inter alia:

- the marketing of AIFs within the EU;
- the investments in AIFs by or on behalf of European professional investors;
- the potential negative impact on small investors;
- the impact of the AIFMD on the depositary function;

- the impact of reporting, reporting obligations and disclosure obligations;
- the impact of the AIFMD on the viability of private equity and venture capital funds;
- the impact of the asset-stripping regulations.

It is currently not yet clear how the European Commission will consult the market with a view to this review (for example by a market consultation or a call for evidence). We expect that more will be known about this in the run-up to 22 July 2017.

We advise managers who in practice encounter problems in (the implementation of) one or more of the above-mentioned subject-matters to express their views in the consultation.

➢ **Guidance + Q&As AFM and ESMA with regard to AIFMD and UCITS**

The AFM and ESMA have published Questions & Answers (Q&As) on their websites relating to the AIFMD which they continually update. In addition, ESMA publishes Q&As about the scope and application of UCITS. The most recent Q&As of ESMA are from 16 December 2016 (AIFMD) and 21 November 2016 (UCITS). The most recent Q&A of the AFM is from 15 September 2015.

In addition, ESMA previously indicated in an Opinion on the functioning of the European passport and the national private placement regimes under the AIFMD that there is a need for further clarification as to what constitutes *marketing* within the meaning of the AIFMD. It would be good if such guidance was made available in 2017.

We recommend to periodically consult the websites of the regulatory authorities for the latest news regarding interpretation and application of the AIFMD and UCITS.

➢ **Trending topics in AFM supervision of AIFMs**

In practice we see that the AFM, in its supervision of managers of AIFs, critically assesses, inter alia, the following topics:

- Delegation structures: The AFM takes a critical stance with regard to delegation structures. Under specific conditions managers may delegate certain tasks mentioned in Annex I of the AIFMD to third parties, but may not delegate so many tasks to such extent that in essence they qualify as letter-box entity and consequently can no longer be seen as the manager. We see this as a point of attention in particular for managers who operate in a group and rely to a large extent on the services of group companies.

- Separation between risk and portfolio management: In our experience, the AFM specifically looks at the separation between the risk management and the portfolio management functions. The AIFMD stipulates that managers must safeguard a functional and hierarchical separation between the risk management function and operation activities, including portfolio management. In practice this means, among others, that at least one director will need to be responsible for risk management and that this director may not also have (final) responsibility for portfolio management or other operational tasks.

- Conflicts of interests: Conflicts of interest are also in the AFM's spotlights. Managers must take measures to prevent conflicts of interests and must, if they are unavoidable, recognise, manage and control conflicts of interests and where necessary disclose such to investors. The AFM expects managers specifically specify those situations in which conflicts of interests might occur. The manager must also formulate measures for those situations which will be taken to mitigate the risk that the conflict will actually manifest itself.

Managers would do well to critically review their organisation with regard to these elements and where necessary modify their policy in the light of the AIFMD and the application thereof by the AFM.

- **Mortgage funds: legislative wishes of the AFM**

In July 2016, the Minister of Finance sent his annual legislation letter (only available in Dutch) on financial markets to the Dutch House of Representatives, in which he informed the House about the most important intentions regarding laws and regulations. With this letter, the Minister responds to legislative wishes presented to him by the AFM and the Dutch Central Bank (*De Nederlandsche Bank*, DNB).

One of the AFM's wishes relates to mortgage funds. The AFM wants statutory safeguards for mortgages financed by investors. According to the AFM, possible future developments, such as decreasing margins on investment mortgage or higher yields on other assets, could cause investors to lose their interest in investing in mortgages. As a result, the mortgage provider could decide at the end of a fixed rate period to raise the interest rate in order to discourage consumers from staying with the same mortgage provider. Consumers could in that case be confronted with unnecessarily high interest rates. The AFM has established that there are at present no legal safeguards that adequately address the risk of unnecessarily high interest rates for existing consumers. With that in mind and owing to the possible serious consequences for homeowners, the AFM wishes to - together with the Ministry of Finance - study possibilities for reducing the risk, in a general sense, of unnecessarily high interest rates for existing consumers. The Minister has stated his willingness to consult with the AFM to determine the need for supplementary measures.

We advise managers of mortgage funds to closely follow the developments relating to this point.

- **DNB Regulatory Priorities 2017**

DNB has indicated what it will (particularly) focus on in 2017. The general regulatory priorities are set out in the General part of this Outlook. Specifically with respect to (managers of) investment funds, DNB has pointed out that it will focus on the following topics in 2017.

(i) Stress-test for open-end funds

In 2017 DNB will focus on liquidity risks in open-end investment funds. In this respect DNB refers to the risk that in the event of a deterioration in market circumstances (for example in connection with Brexit) a large quantity of invested capital can be withdrawn from the fund in a short period of time. According to DNB this can lead to both (i) direct loss on the part of individual funds, but also to (ii) broader contamination risks for other financial institutions. By means of a stress test DNB will identify whether there are (groups of) investment funds with a material liquidity risk. The results will be shared with the industry.

DNB will select managers and will conduct the analysis of the stress-test in Q1 of 2017. DNB expects to compare the results and provide feedback in Q2 of 2017. We advise to prepare for this as much as possible by, for example, charting to what extent liquidity risks can play a role or have played a role.

(ii) On-site investigations

DNB has announced that in 2017 it will also execute a number of on-site investigations at managers of investment funds. DNB will particularly look at risks of the business model (see below as well), risks relating to outsourcing, IT risks and internal models for the calculation of capital (see below as well).

We would expect that DNB would announce such an on-site investigation by means of a letter. It is recommended in such a situation to prepare for a DNB visit, for example by gathering as much information as possible on the relevant topic and speaking with employees who will speak with DNB staff.

(iii) Adequate capital buffers and healthy business operations

DNB already indicated last year that in 2016 it was going to focus on the adequate capital buffers and healthy business operations with managers of investment funds. DNB has now indicated that it will continue to do so in 2017. DNB will pay particular attention to the viability of business models. In addition, DNB will pay extra attention to the improving of the data quality and the accuracy of submitted reports.

We advise you to 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.

- **Focus areas for ICAAP in 2017**

Managers who also provide investment services must annually execute an *Internal Capital Adequacy Process* (ICAAP). In the summer of 2016 DNB executed an integral assessment of the ICAAP document of the biggest investment funds which have to draw up an ICAAP. This assessment has shown that specific risks were not sufficiently elaborated on in the ICAAP of a number of funds. In the ICAAP for 2017, managers should pay extra attention to the following risks: (i) dependency on the shareholder, (ii) risk arising from financial interdependencies within the group, (iii) IT risk and (iv) outsourcing risk. DNB has indicated that in 2017 it will not only request the ICAAP for the biggest investment funds, but also for a group of smaller and medium-sized funds.

- **Implementation of Fourth Anti-Money Laundering Directive and industry-specific risk factors in the framework of the customer review**

The implementation of the Fourth Anti-Money Laundering Directive will enter into force in the Netherlands in 2017. For an overview of the consequences thereof, we refer to the General section of this Outlook. Specifically with regard to managers it is relevant that the ESAs started a consultation on 21 October 2015 for draft guidelines with regard to a simplified and enhanced customer due diligence and the risk factors which must be taken into account in this respect. The guidelines contain a number of risks factors per sector which are in particular relevant for that specific sector. One example of a risk factor relating to an investment fund is a customer who deposits more money in the fund than necessary and then requests the fund to repay that excess amount or the changing of a customer's bank details on a regular basis.

The guidelines are not final not yet, but we expect the final version to be published in the first half of 2017. We advise managers to consult the guidelines as soon as they are final and to process the risk factors mentioned therein in their internal policy and to modify their customer due diligence accordingly.

- **Change to AFM Wwft Guide, Wwft BES and Sanctions Act**

The implementation of the Fourth Anti-Money Laundering Directive will enter into force in the Netherlands in 2017. For an overview of the consequences thereof, we refer to the General section of this Outlook. The AFM has indicated in connection with the implementation of this directive that it will also be revise its Wwft Guidance, Wwft BES and Sanctions Act. As the Fourth Anti-Money Laundering Directive must have been implemented by mid-2017, we expect a revised guidance document in the first half of

2017. On 25 October last, following a Wwft investigation among investment firms, the AFM published good practices which managers can use in practice in order to comply with the Wwft.

- **Start of reporting obligation relating to securities financing transactions**

The European regulation on reporting and transparency of securities financing transactions entered into force on 12 January 2016. The regulation relates to securities lending and commodities lending, (reversed) repurchase agreements, buy-sell back or sell-buy back and margin lending transactions. One of the obligations encompasses the disclosure of information on such transactions to investors whose assets are used in the transactions. The disclosure requirement in periodic reporting applies as of 13 January 2017. The disclosure requirement in precontractual information applies as of 13 July 2017. In a recent Q&A of ESMA of 6 October 2016 on the application of this regulation, ESMA again confirms that managers of UCITS and AIFs must include the information on the use of securities financing transactions for the first time in the next yearly or half-yearly report which will be published after 13 January 2017.

Managers of UCITS or AIFs which make use of securities financing transactions must include this information in their next yearly and half-yearly report.

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FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR INVESTMENT FIRMS IN 2017

TOPICS

➢ MiFID II

Following a one-year delay, MiFID II will come into force in the Netherlands on 3 January 2018. The MiFID II package consists of a directive (MiFID II), a regulation (MiFIR) and further guidance issued pursuant thereto in level 2 legislation and level 3 legislation (the website of the EC contains a practical overview of all RTS and ITS). With 3 January 2018 as the date of entry into force, most preparations for MiFID II will need to take place in 2017.

MiFID II changes the rules applicable to investment firms. Important changes will impact various topics, for example: scope (more financial instruments, more activities and more parties will become subject to MiFID II), the introduction of a new trading platform (the organised trading facility (OTF)), third country regime for investment firms, algorithmic trading, commodity derivatives and position limits, and product development and product intervention.

A number of important aspects that we want to bring to your attention in this Outlook are:

- **Timely submission of MiFID II authorisation application**
  MiFID II will lead to a large number of new license applications. The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) therefore warns that the handling time of applications may become lengthy. Applications for MiFID II licenses can be submitted with the AFM from 1 April 2017. The AFM expects that it will not be able to guarantee timely handling of applications submitted later than 1 June 2017 and/or applications that are incomplete. The AFM will in the coming months publish further information on the procedure and the requirements of the license application. If you intend to apply for a MiFID II license, we recommend to closely monitor the AFM website.

- **National implementation act**
  While MiFIR has direct effect in all Member States, MiFID II requires implementation in our national law. In October 2016 the proposal for the Implementation Act Markets in Financial Instruments Directive 2014 (only available in Dutch), accompanied by an explanatory memorandum (only available in Dutch) were published.

- **Transaction reporting rules**
  A much-discussed subject of MiFID II is transaction reporting, whereby transactions and financial instruments must be reported to the AFM. In October 2016, ESMA published the 'Guidelines Transaction reporting, order record keeping and clock synchronisation under MiFID II'. These guidelines enable parties to timely comply with the reporting obligations imposed by MiFID II, whereby examples of transaction reports are included. These were later followed by more specific MiFIR Reporting Instructions. The AFM has already stated that it adhere to the ESMA rules without any changes being made and will thus implement these in full in its entry system. Market parties are thus advised to consult these guidelines while preparing for MiFID II.

- **ESMA guidelines cross-selling**
  MiFID II introduces rules for cross-selling by investment firms. Cross-selling is defined as the offering of an investment service together with another service or other product as part of a package or as condition under which the package is made available. The investment firm must, in case of cross-selling, comply with certain specific disclosure requirements. In July 2016, ESMA published the 'Guidelines on cross-selling practices' to inform investment firms what is expected of them in terms of a code of conduct and organisational requirements. While the guidelines will enter into force on 3 January 2018 together with MiFID II, the AFM has indicated its intention to further develop the guidelines in 2017 and to inform market parties about this process. We advise investment firms that (may) participate in cross-selling practices to monitor these developments closely.

- **ESMA guidelines product development requirements MiFID II**
  Also much discussed are the product development requirements laid down in MiFID II, which make a distinction between investment firms that *develop* financial instruments and investment firms that *distribute* financial instruments. The product governance requirements for the developers differ from those applicable to the distributors. It is of course possible that an investment firm is both a developer and distributor, in which case both sets of rules will apply. An investment firm that develops investment products for sale to clients must apply a process for the development, approval and revision of investment products (this process is comparable to the PARP obligation currently imposed by the BGfo for products other than financial instruments). An important element is that the developer must identify a target group of clients in the approval process. On the other hand, an investment firm that distributes financial instruments (namely offers or advises on these, but has not developed them itself) must ensure the receipt of adequate information on the financial instrument in order to understand the characteristics and the intended target group of the financial instrument.

  The MiFID II product governance requirements have raised numerous questions in the market. A lack of clarity exists in particular on the manner how the aforementioned target group must be determined. In October 2016, ESMA published a Consultation Paper with further guidance for the product governance requirements. This Consultation Paper specifically explains how the target group must be identified. It is expected that ESMA will publish a final report on this subject in Q1 or Q2 of 2017.

- **ESMA Guidelines for the assessment of knowledge and competence**
  Under MiFID II, investment firms must be able to prove to the AFM that all its employees that provide investment advice or information on financial instruments, structured deposits, investment services

or ancillary services, have the necessary knowledge and competence to perform these tasks. In March 2016, ESMA published the 'Guidelines for the assessment of knowledge and competence' to provide further clarification on this requirement. ESMA intends with these guidelines to promote the convergence of professional skills. Employees of investment firms that inform and/or advise clients must therefore have qualifications that at least meet the ESMA guidelines and are required to periodically keep their knowledge and competence up to date. While the guidelines will enter into force on 3 January 2018 (together with MiFID II), the AFM has indicated its intention to further develop the guidelines in 2017 and to inform market parties about this process. We advise investment firms to closely monitor developments in this area.

- **ESMA Q&A investor protection MiFID II**
  In October 2016, ESMA published a Q&A on certain investor protection topics under MiFID II with the intention of providing clarity on these topics and answering questions from both market parties and supervisory authorities. The following topics were handled:
  - best execution (2 questions)
  - suitability and adequacy (7 questions)
  - recording of telephone and electronic communication (11 questions)
  - record keeping (1 question)
  - independent investment advice (1 question)
  - placement of financial instruments (1 question)
  - inducements (1 question)

  The questions and answers are both highly pragmatic and concrete in nature. This means that this Q&A is of high practical value for investment firms.

- **ESMA website**
  We advise to closely monitor the website of ESMA in 2017. As appeared from the points referred to above, ESMA frequently publishes relevant MiFID II documents on its site, whether in the form of consultations or Q&As. Below is a selection of recent ESMA documents, which are not further discussed above:

  - 4 November 2016: Questions and Answers on MiFID II and MiFIR transparency topics
  - 10 November 2016: Consultation Paper - Draft RTS on package orders for which there is a liquid market
  - 18 November 2016: Questions and Answers on MiFID II and MiFIR market structures topics

The AFM tends to follow the rules of ESMA in her supervisory practice.

➢ **DNB Regulatory Priorities 2017**

In November 2016, the Dutch Central Bank (*De Nederlandsche Bank*, DNB) published its regulatory priorities for the coming year. The general regulatory priorities are discussed in the general part of this Outlook. Specifically with respect to investment firms, DNB reports that that it will focus on the following subjects in 2017:

- Study into outsourcing risks
  In the first half of 2017, DNB will examine how the risks relating to the outsourcing of business processes are managed.

- Focus on adequate capital buffers and healthy business operations

In 2016, DNB has pursued an active enforcement policy in case of non-compliance with regulatory capital requirements. It will continue this approach in 2017 and will apply a strict and more standardised approach towards capital shortfalls and the late filing of reports.

- Study into earnings models
  In 2017, DNB will (continue to) give specific attention to the viability of business models in the sector and in particular the earnings model of asset managers who form part of a group of financial institutions. If a group company is also the largest customer of such an asset manager, and the group company has control over the payable management fee, DNB will closely review the business model of the investment firm.

- On-site investigations
  DNB has announced to perform a number of on-site investigations into large investment firms in 2017, thereby giving specific attention to the risks of the earnings model, risks regarding outsourcing, IT risks and internal models for the calculation of capital.

➢ **Deletion of exception to bonus cap dealers on own account in a financial group**

Op 27 July 2016, the Ministry of Finance published the draft Financial Markets Amendment Act 2018 for consultation. One of the amendments that will have far-reaching impact on investment firms that only deal on own account is the deletion of the general exception to the bonus cap. Currently, the bonus cap does not apply to this category of investment firms. According to the draft Financial Markets Amendment Act 2018, the bonus cap will become applicable to these dealers insofar as they form part of a group which is subject to consolidated supervision. In other words, the bonus cap will apply if a dealer on own account forms part of an insurance group, banking group or financial conglomerate. As regards the maximum percentage of the bonus cap, alignment is sought with CRD IV. This means that the variable remuneration of employees of the aforementioned investment firm may constitute a maximum of 100% (or 200% with the permission of the shareholder) of the fixed annual remuneration of the employee. The standard 20% bonus cap will thus not apply to them. The consultation period has since ended. We recommend dealers on own account that form part of a group of financial undertakings to closely monitor the actions taken by the legislator in response to the consultation reactions on this matter.

➢ **Rules for robot advice**

It is expected that as of 1 July 2017 new rules will come into effect for investment firms that provide automated advice (robot advice, defined as 'a form of advice provided without the intervention of natural persons') to consumers. These rules form part of the entry into effect of the Financial Markets Amendment Decree 2017 (only available in Dutch), of which to date only a consultation version has been available. On the basis of the new rules, sufficient information must be gathered, the automated advice must be based on the accumulated information and the advice must be explained. Additionally, at least one employee must be designated per financial product as being responsible for the robot advice and periodic review thereof. This person must have the Wft diplomas required for advising on that specific product.

The consultation round has since ended. We recommend investment firms who provide robot advice to closely monitor what the legislator will do with the consultation reactions. It is expected that the new rules will enter into force on 1 July 2017.

➢ **Change to Nrgfo Wft asset separation**

The AFM has in 2016 held two consultations (only available in Dutch) on a change to the Further Regulations Financial Enterprise (Regulation of Conduct) Decree Wft (Nrgfo) as regards asset segregation

by investment firms. At the time of the first consultation, the AFM wanted to delete the investor giro (*beleggersgiro*) system as a means of asset segregation from the Nrgfo, but has revised its position on this following a review of the consultation reactions. The AFM does, however, propose to modify both the name and the conditions for the investor giro system. Also, the AFM proposes to also permit safekeeping under the Dutch Securities Giro Transactions Act (*Wet op het giraal effectenverkeer*) for investment firms without a bank permit.

The proposed new rules will enter into force as of 1 February 2017. We recommend investment firms that hold instruments and/or funds from clients to assess whether their custody structure is sound and prudent. They must also assess to which extent they must adjust their asset segregation measures to the new rules.

- **Payment of commissions from an investment account falls under the inducement ban**

Some investment firms offer financial service providers the option of having the commissions owed by the customer to the financial service provider to be paid from the investment account of the customer with the investment firm. This practice will - following (the consultation version of) the Financial Markets Amendment Decree 2017 - be in violation of the inducement ban. The commission must be paid directly by the customer to the financial service provider. The consultation round has since ended. It is expected that the new rules will enter into force on 1 July 2017.

- **Information request Investor compensation scheme**

DNB has announced that in Q1 2017, she will issue information requests with respect to the Investor compensation scheme as laid down in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft) (ICS). DNB manages the ICS. To be able to assess the required coverage of the ICS, DNB needs insight in the size of the guaranteed assets, as this determines the exposure for purposes of the ICS. The total amount of customers of investment firms that fall with the scope and the total assets managed by investment firms, provides insufficient insight in the guaranteed assets, also given the fact that the guarantee under the ICS is capped at EUR 20.000 per customer per investment firm. To gain better insight, in the beginning of 2017 DNB will request information from all investment firms concerned with respect to:

  - The number of clients with an invested capital < EUR 20.000 plus the total assets under management for this group of clients;
  - The number of clients with an invested capital > EUR 20.000 plus the total assets under management for this group of clients.

In Q1 2017, DNB will send a letter with this information request to the parties concerned.

- **Preparation for PRIIPs Regulation**

The PRIIPs Regulation contains regulations for manufacturing and selling to the retail investors so called *Packaged Retail and Insurance-based Investment Products* (PRIIPs). 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 AIF or UCITS, life insurance contracts with an investment component, structured products and structured deposits. The manufacturer 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 PRIIPs Regulation was initially expected to enter into force on 31 December 2016. However, the European Commission decided in mid-November 2016 to postpone the entry into force of the PRIIPs Regulation by one year, after the European Parliament had rejected the Regulatory Technical Standards drafted for the PRIIPs Regulation in mid-September 2016. This means that market parties have an extra

year to draw up a KID for the PRIIPs manufactured by them and to present that to their sales channels. Investment firms that offer PRIIPs will have to ensure that they comply with the obligations of the PRIIPs Regulation by end 2017 latest.

- **Focus areas for ICAAP in 2017**

In the summer of 2016 DNB executed an integral assessment of the *Internal Capital Adequacy Process* (ICAAP) document of the largest investment firms. One conclusion of this assessment is that inadequate measures have been taken to address certain risks in the ICAAP of several institutions. We therefore recommend investment firms to pay extra attention to the following risks in their ICAAP for 2017: (i) dependency of the shareholder, (ii) risk arising from financial interdependencies within the group, (iii) IT risk and (iv) outsourcing risk. DNB has indicated in 2017 to not only request the ICAAP from the largest investment firms, but also from a group of smaller and medium-sized firms.

- **Changes to AFM Guidance Wwft, Wwft BES and Sanctions Act**

The implementation of the Fourth Anti-Money Laundering Directive will enter into force in the Netherlands in 2017. For an overview of the consequences thereof, we refer to the General section of this Outlook. The AFM has indicated in connection with the implementation of this directive that it will also be revise its Wwft Guidance, Wwft BES and Sanctions Act. As the Fourth Anti-Money Laundering Directive must have been implemented by mid-2017, we expect a revised guidance document in the first half of 2017. On 25 October last, following a Wwft investigation among investment firms, the AFM published good practices that investment firms, which focus on retail investors, can use in practice to ensure compliance with the Wwft.

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

As of 1 January 2017, the EBA Guidelines on sound remuneration policies have entered into force, which are relevant for the remuneration policy of investment firms. The guidelines were published by the European Banks Authority (EBA) in 2015. These new guidelines replace the earlier CESB (the predecessor of EBA) guidelines with respect to remuneration policies from 2010. The new guidelines contain interpretations on different topics, such as governance, the payment of variable remuneration in financial instruments and the scope of application of the remuneration rules within groups with multiple financial undertakings. DNB has indicated that it will apply the guidelines drawn up by EBA in the Netherlands within the framework of the supervision of compliance with the Controlled Remuneration Policy Regulations 2014 (*Regeling beheerst beloningsbeleid,* Rbb) (and thus to all investment firms).

- **EBA consultation on new prudential regime investment firms**

Currently, the prudential regime of CRD IV and CRR applies not only to banks but also to investment firms. It has long been criticised that this regime is not appropriate and too complex for investment firms. In December 2015, EBA published a first report on this, in which it concluded that the prudential regime of CRD IV and CRR is too complex for investment firms. Further to this first report, the European Commission requested EBA to analyse how to better design a prudential regime for investment firms. This second report ('Discussion Paper') was published by EBA on 4 November 2016, titled '*Designing a new prudential regime for investment firms',* to which market parties can respond until 2 February 2017. It is proposed in this report to coordinate the prudential framework to the a specific category of investment firm, whereby three categories can be distinguished:

(i) systemic and 'bank-like' investment firms (prudential supervision in accordance with CRD IV and CRR);
(ii) other investment firms (less stringent prudential supervision); and

(iii) very small investment firms with 'non-interconnected' services (light prudential supervision).

EBA must provide its proposals in a final report to the EC by mid-2017. DNB will in 2017 by means of seminars and newsletters maintain dialogue with the sector on the possible design of new prudential requirements, with the main objective of drafting a prudential framework that is both understandable and designed to address the appropriate risks. DNB has encouraged market parties to respond to the consultation and to receive a copy thereof. This, in order to be able to represent the Dutch interests as good as possible in further EBA negotiations.

- **EBA consultation guidelines on internal governance**

In October 2016, EBA submitted its proposal for revised guidelines for internal governance to the market for consultation. It is the intention that these guidelines replace the current EBA governance guidelines from 2011. The newly proposed guidelines place greater emphasis on the role of the Supervisory Board in determining the risk culture of the investment firm. Also, the board of directors and Supervisory Board must obtain a greater role in risk management, while the role of committees will become more important. The status of the risk management function is further strengthened. Additionally, also following the Panama Papers, transparency will be required with respect to the offshore activities of an investment firm (know-your-structure). Furthermore, more attention must be given to the risks involved in change processes. The guidelines also include a useful list of points of attention for the development of internal governance. We recommend to closely monitor the new guidelines and incorporate these in the existing governance of the investment firm. It is expected that the new guidelines will become applicable mid-2017.

- **Implementation Fourth Anti-Money Laundering Directive and sector-specific risk factors in the customer review process**

The implementation of the Fourth Anti-Money Laundering Directive will enter into force in the Netherlands in 2017. For an overview of the consequences thereof, we refer to the General section of this Outlook. Specifically with respect to investment firms it is relevant that the ESAs started a consultation on 21 October 2015 for draft guidelines with regard to a simplified and enhanced customer due diligence and the risk factors which must be taken into account in this respect. The guidelines contain a number of risks factors per sector which are in particular relevant for that specific sector. An example of a risk factor for an investment firm is a customer who regularly changes the particulars that are relevant to the customer due diligence.

The guidelines are currently not yet definite, but we expect the final version to be published in the first half of 2017. We advise investment firms to consult the guidelines as soon as they are final and to process the risk factors mentioned therein in their internal policy and to modify their customer due diligence accordingly.

- **Joint ESMA and EBA guidelines on suitability**

In October 2016, ESMA and EBA published the consultation document of their joint 'Guidelines on the assessment of the suitability of members of the management body and key function holders'. The guidelines, which are based on the requirements of CRD IV and MiFID II, are aimed at improving and harmonising the suitability test within the EU. The guidelines contain criteria for assessing the knowledge, competence and experience of key function holders and members of the management body (including the daily policymakers and internal supervisory officials), as well as criteria for assessment of reliability, integrity and independence. Also included are criteria regarding time commitment, while the importance of diversity is also stressed. EBA and ESMA have developed a model suitability matrix for assessment of the collective board.

The revised guidelines will replace the current EBA guidelines, which date from 2012. Parties have until 28 January 2017 to respond to the consultation. Implementation by the national regulatory authorities is expected in mid-2017.

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Outlook 2017

FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR PAYMENT SERVICE PROVIDERS IN 2017

TOPICS

➢ DNB Regulatory Priorities 2017

The Dutch Central Bank (*De Nederlandsche Bank*, DNB) has indicated what it will (particularly) focus on in 2017. DNB will reinforce its regulatory activities towards payment institutions and take a more intensively attitude, including taking enforcement action. The general regulatory priorities are discussed in the 'General Developments' section of the Finnius Outlook. As regards payment service providers, in particular, DNB reports that it will focus on the following subjects in 2017:

- ***Recovery and resolution plans***: DNB will request payment service providers to draw up recovery and settlement plans. Recovery plans describe the measures that will lead to recovery if the institution is confronted with negative developments or scenarios. A resolution plan describes the concrete steps required for resolution of the licensed activities, e.g., by transferring these or winding them down. Following assessment of the plans by DNB in Q2, the institutions will receive feedback. We advise payment service providers to assess whether their recovery and resolution plans are ready and whether they adequately address the relevant risks, capital requirements and measures.
- ***Integrity supervision***: DNB will in 2017 devote attention to the concrete application, in day-to-day practice, by payment service providers of the systematic integrity risk analysis (SIRA). Compliance with the Wwft and Sanctions Act remain leading points of attention, as does the manner in which payment service providers control the risks related to the outsourcing of core processes and functions.
- ***Intensified supervision***: In 2017 DNB will intensify its regulatory activities with respect to large and medium-sized payment service providers. This will take the form of periodic consultations and in-depth studies.
- ***Futureproof earnings models***: According to DNB, the profit margins of payment service providers have come under pressure. This motivated DNB in 2016 to take a close look at the earnings models of payment service providers and enabled it to identify those parties that it considers vulnerable. DNB will demand from these service providers that they improve the long-term viability of their earnings model. In cases where this cannot be realised, DNB can force the service provider to make a controlled exit.
- ***Interventions regarding capital deficits***: DNB announced swifter and more decisive interventions for payment institutions facing capital deficits as from 1 January 2017. In case of a capital deficit DNB will – as a first step - issue a cease and desist order as a means for recovery. In case of a repeated violation within a timeframe of 25 months DNB will impose a fine. In the case of unwillingness to comply the fine may be imposed also on the director(s) involved. DNB stated it will consider revoking the license of payment institutions who are repeatedly and continuously violating the capital requirement rules.

➢ **Developments in the area of PSD2**

The EU Payment Services Directive (PSD) has been revised. This revised Payment Services Directive (PSD2) must be implemented in Dutch law by January 2018. One of the objectives of PSD2 is to increase competition on the payment services markets and increase the options available to users. Following completion of the consultation round of the implementation act of PSD2, the legislative proposal will be further detailed in Q1 2017. The scope of the directive will be expanded to include the regulation of 'payment initiation services' and 'account information services' as new payment services. Also, a number of exceptions to the authorisation requirement will acquire a more restricted formulation (e.g., 'limited network', 'telecom exception' and 'commercial agent'), thereby bringing more parties within the scope of this financial regulation. See consultation.

With a view to the preparatory activities in anticipation of the implementation of PSD2, the following specific topics for 2017 are highlighted:

- EBA will publish guidelines on the information to be submitted to the authorities to acquire authorisation as payment services provider or electronic money institution or the registration as account information service provider. These guidelines are linked to the implementation of the PSD2 and are made available by EBA for consultation (until 3 February 2017). See consultation.
- In order to increase the security of payments, PSD2 imposes the obligation of a stringent customer authentication when performing payment transactions. EBA is developing this in context with technical regulation standards for authentication and communication. These were opened for consultation in 2016 and will apply to market parties from 13 January 2018. See consultation.
- Under PSD2, providers of payment initiation services and account information services will be obliged to cover occupational risks by means of an insurance or comparable guarantee. EBA will publish guidelines that member states must take into account when prescribing the minimum amount of cover to be provided by these service providers in the form of insurance or comparable guarantee. The consultation round was concluded at the end of November 2016. See consultation.
- Under PSD2, payment service providers will be obliged to report *major incidents* to the regulatory authority. EBA is developing guidelines for payment service providers to recognise such incidents and qualify them as such. Additionally, EBA is developing an incident report form for payment service providers. The consultation round regarding these guidelines started in early December 2016 and ends on 7 March 2017. See consultation.
- As regards the detailing of the Regulatory Technical Standards, EBA has reported to be slightly behind schedule. It intends to publish these standards approximately one month after 13 January 2017 (which is the date prescribed in the PSD2). See EBA message.

➢ **Asset separation for payment service providers and electric money institutions**

Following consultation by DNB in 2016 of the policy rule regarding asset separation by payment service providers and electronic money institutions and the comments thereon by the Minister of Finance in response to parliamentary questions, it is expected that DNB will publish the definitive policy rule in the first half of 2017. In this policy rule, DNB works out the minimum standards applicable to the use of a depositary body affiliated to a payment service provider or an electronic money institution to ensure that other creditors of the service provider cannot recover their claims from the customer funds held by such undertakings. Assurance must also be provided via a separation between management, operational finance and group finance and it must be prevented that customer funds are deployed for own use. The strict separation of functions proposed by the draft proposal received serious criticism during the consultation round, meaning that it will probably be revised.

- **Coming into force Regulation on information accompanying transfers of funds**

The purpose of the Regulation on information accompanying transfers of funds is to increase insight into payment flows. This regulation replaces the first regulation on the transfers of funds. The regulation applies to the transfer of funds in all currencies that are sent or received by payment service providers (a collective term that in this context includes not only payment service providers, but also (exempted) electronic money institutions and banks). The most important changes are:

- The payment service provider of the payer is obliged in the transaction statement accompanying the transfer to include information not only on the payer (name, account number and address/date of birth), but also on the payee (name and account number).
- The payment service provider that does not serve as the payment service provider of the payer or the payee, but which performs the transaction as an intermediary, is obliged (i) to check whether all requested information has been received, (ii) to intercept transactions that do not contain all required information and (iii) to draw up internal procedures for recording whether transactions without the required information are carried out, refused or postponed, as well as the prescribed follow-up action in such a situation.
- The payment service provider of the payee is obliged (i) to intercept all transactions that do not contain all the prescribed information, (ii) to verify the identity of the payee and (iii) to develop internal procedures for recording whether transactions without the required information are carried out, refused or postponed, as well as the prescribed follow-up action in such a situation.

The regulation will come into force on 26 June 2017 and have direct legal effect. We advise market parties to check to what degree their current systems require adaptation in order to ensure compliance with the regulation.

- **EBA guidelines on product oversight and governance arrangements**

The EBA published Guidelines that are applicable to retail banks, payment service providers, e-money institutions and mortgage loan providers (EBA/GL/2015/18). The guidelines relate to product oversight and governance with respect to, inter alia, payment accounts, payment services and electronic money offered to consumers. The guidelines are applicable to all products that are introduced into the market after the execution date of these guidelines (3 January 2017) and to all existing market products that are significantly adjusted after that date. The guidelines provide for specific recommendations which payment service providers must meet when developing products and marketing them.

- **Inventory of expansion of consumer provisions of the Wft to cover independent contractors and SMEs**

The Ministry of Finance has in the autumn of 2016 held a consultation round on the effectiveness and desired level of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft) protection for independent contractors and SMEs as regards financial services. At present, the protection of independent contractors and SMEs differs per financial product and type of customer, while the Wft protection of consumers applies to all financial products and services. While small business customers currently enjoy protection in case of insurance and investment products, only consumers are protected when it comes to payment services, savings products and credit services. Problems in the provision of service to small business customers in the past have raised the question whether the Wft offers sufficient adequate protection to this group or whether an expansion in scope is necessary.

A number of options are presented in the consultation document to expand the protection of small business customers, such as:

- expanding the general duty of care under Article 4:24a Wft towards consumers to small business parties, giving the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) enforcement powers in case of evident misconduct;
- expanding the scope of information and advisory obligations as applicable to consumers to include small business customers;
- expanding the inducement ban under Article 86c Bgfo to products for small business customers;
- opening the Financial Services Complaints Authority (KiFiD to small business customers as a low threshold alternative to court proceedings.

It should be noted, however, that the options in the consultation document are only suggestions and it has not been established that Wft protection for independent contractors and SMEs will be amended or expanded. It may be concluded on the basis of the consultations that the existing protection is adequate. The Minister of Finance has indicated that the Dutch House of Representatives will be informed about the findings of the consultation in the beginning of 2017. Payment service providers are advised to follow current developments in this area.

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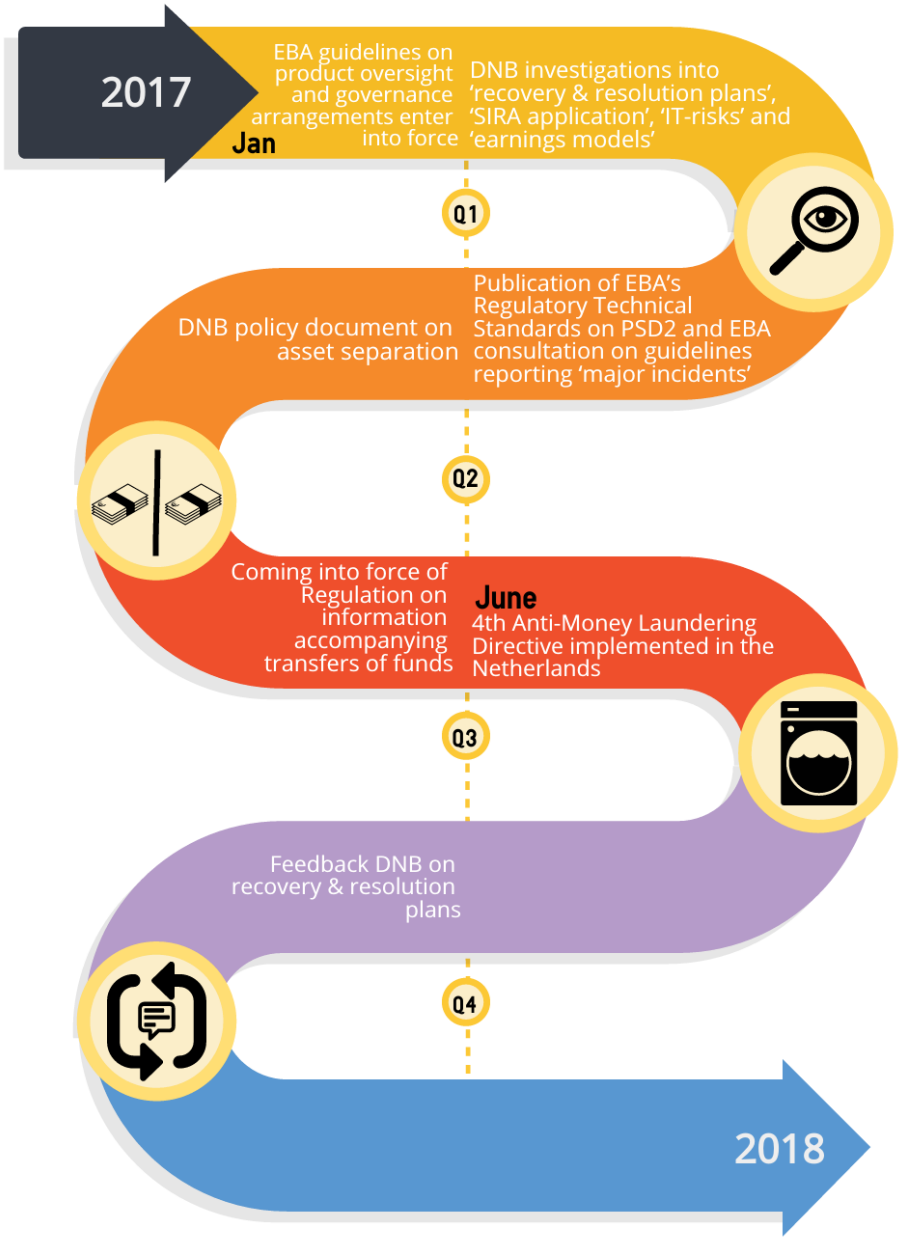
➢ **Timeline Payment Service Providers**



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Outlook 2017

FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR CROWDFUNDING AND FINTECH IN 2017

TOPICS

➢ Developments in the field of crowdfunding

2016 was, once again, a turbulent year for the crowdfunding sector. On 1 April 2016, new rules came into effect for crowdfunding platforms; among others an increase of the investment limit (*investeringsgrens*) and the introduction of an investment test (*investeringstoets*). These rules apply in principle to both loan based and equity based crowdfunding platforms. In addition, the implementation of the Financial Markets Amendment Decree 2016 (*Wijzigingsbesluit financiële markten 2016*) on 1 April 2016 introduced (i) an exception to the inducement ban for investment firms (for equity based crowdfunding) and (ii) a specific exemption regime for acting as an intermediary in attracting repayable funds (for loan based crowdfunding). Further information on the current supervisory regime is available on the website of the AFM (only available in Dutch). The agenda for 2017 once again includes new developments in the area of crowdfunding.

(i) Evaluation of statutory regulations

The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) is currently evaluating the crowdfunding regulations that were introduced on 1 April 2016. This evaluation is twofold.

Firstly, the AFM has on its website (only available in Dutch) published a discussion document to which parties could respond until 9 December 2016. In this document, the AFM asked market parties to provide input on the regulations as currently applicable to crowdfunding. The AFM has announced its intention to publish the outcome of the evaluation in the spring of 2017.

Secondly, the AFM conducted various consumer surveys. In November 2016, the AFM published the first findings of the surveys on its website (only available in Dutch). Based on the initial results, the AFM has drawn the provisional conclusion that investors may potentially underestimate the risks related to crowdfunding. The AFM expects to publish the final survey report in the spring of 2017.

(ii) Asset separation

Asset separation is one of the operational aspects of crowdfunding platforms that the AFM attaches value to. The assets of a crowdfunding platform must be separated from the assets of investors and borrowers. According to the AFM, this implies that payments between investors and borrowers may not flow through the own account of the platform. The AFM indicates that this asset separation can be realized in two ways: (i) by cooperating with a licensed payment service provider or electronic money institution or (ii) by incorporating a separate legal entity (generally a foundation) that maintains an own account for the payment flows. For platforms that are licensed as investment firm, Articles 6:14 to 6:20 of the Further Regulation on Conduct of Business Supervision of Financial Undertakings Wft (*Nadere regeling gedragstoezicht financiële ondernemingen Wft*, Nrgfo) are relevant.

The AFM has indicated (only available in Dutch) its intention to issue further regulations regarding asset separation, including guidelines which the foundation's board of directors must comply with, guidelines for the operational structure, and guidelines for the permitted activities of the foundation, payment service provider or electronic money institution. Although it was the AFM's original intention to publish these guidelines during the course of 2016, these are now expected to appear sometime in 2017. Crowdfunding platforms must take into account that they may need to make certain operational or organizational changes in order to comply with these guidelines of the AFM.

(iii) Uniform statutory framework?

In July 2016, Minister of Finance Dijsselbloem sent his annual legislation letter (only available in Dutch) on financial markets to the Dutch House of Representatives, in which he informed the House about the most important intentions regarding laws and regulations. With this letter, the Minister responded to the legislative wishes of the AFM and the Dutch Central Bank (*De Nederlandsche Bank*, DNB). In its legislation letter, the AFM signaled the absence of a clear uniform statutory framework for crowdfunding. The applicable supervisory framework and the underlying requirements depend on the qualification of the crowdfunding platform as investment firm (equity based) or financial service provider/consumer credit provider (loan based).

To counter this fragmentation, the AFM expressed the wish for a new uniform statutory framework that would regulate crowdfunding activities. It is the purpose of the AFM to offer fund recipients and applicants a certain degree of protection and impose continuity requirements. Also, the AFM wishes to introduce a higher level of transparency with respect to bankruptcy, yield, the financial situation of fund applicants and how to deal with defaults. The AFM would prefer to embed general requirements in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft) rather than introduce highly detailed legislative requirements, which when implemented may already prove to be outdated or hamper market growth. According to the AFM, such general rules will provide better options to respond to market changes.

The minister has indicated to share the concerns of the AFM as regards the absence of a clear uniform own framework for crowdfunding. Crowdfunding platforms must take into account that 2017 may see concrete steps being taken towards formulating a general statutory framework, which will probably be preceded by a consultation round. We therefore advise crowdfunding platforms that wish to provide input to closely monitor current developments.

- **FinTechs and access to financial services market**

The AFM and DNB have on 21 December 2016 published a joint document called “More space for innovation in the financial sector”. In this document the supervisors present policy options that could help in introducing new financial innovative products or services in the market by new market entrants or existing market parties. This document builds on a discussion document (only available in Dutch) that the

AFM and DNB published earlier on 9 June 2016 and in which market parties and stakeholders were asked to provide input on three policy options identified by the supervisors.

DNB and the AFM have formulated four policy options with the objective of making it easier for innovative initiatives to gain access to the financial services market. These options are:

1. **Regulatory sandbox**
   This option provides for a controlled environment – with close involvement of the regulatory authority - for the testing of innovative financial products, services and business models. Applicable requirements will be enforced by the regulators, but in a way that accommodates innovation. The supervisors will assess if the FinTech initiative can *reasonably* not comply with certain specific requirements and in the assessment of new initiatives they will take into account the underlying purpose of specific policy, laws or regulations. If such purpose is met, the supervisors will take all legal space they have to accommodate the initiative (for instance by alternative interpretations of open norms or formal exemptions of certain requirements). Both market entrants and existing parties can participate in the regulatory sandbox.

2. **Partial license**
   This option may be useful for financial market parties that will not from the start conduct all activities to which a specific license pertains, for instance because the market party specializes only in a specific niche. An example would be a banking license. With this license the market party may conduct a lot of activities, but the market party may not want to conduct all those activities in the first instance. With a partial license, the market party will only need to comply with those requirements that apply to the activities that it wishes to conduct.

3. **License with conditions**
   This is a license to which the AFM or DNB attach certain conditions, for instance in limiting the groep of clients to which products may be offered. This allows the market party to start business, but then only under specific conditions.

4. **Opt-in license**
   This is a voluntary banking license for quasi-banking institutions. These are institutions that do not comply with the definition of bank, but are very similar: (i) raising of withdrawable funds from parties other than the public, and lending activities for own account (missing here is the element 'from *the public*') or (ii) raising of withdrawable funds from the public and making of investments, not being lending activities (missing here is the element '*lending activities* for own account').

As a general condition under all options, the DNB and the AFM have stipulated that the market party must draw up an exit strategy for an orderly market exit if the entry ultimately proves to be unsuccessful. Market parties are required to implement procedures and take measures in this respect.

DNB and the AFM may start using these options in practice as of 1 January. Market parties that aim to launch a FinTech initiative in 2017 may make use of one of these options.

- **Rules for robo advice (automated advice)**

The Ministry of Finance has, in the summer of 2016, published the draft Financial Markets Amendment Decree 2017 (only available in Dutch) for consultation. The Amendment Decree lays down rules for market parties that provide automated advice to consumers on financial products (such as investment or mortgage advice). This is a form of advice provided without the intervention of natural persons (robo advice), namely via the internet or (mobile) applications.

It is proposed in the Amendment Decree that certain financial undertakings, including consumer credit providers and investment firms, that provide automated advice must comply with procedures and measures that guarantee that the advice meets the requirements of the Wft, namely the gathering of information on clients with respect to his or her financial position, knowledge, experience, objectives and risk appetite (the so-called *know your customer* (KYC) test). When it comes to fulfilling the KYC obligation, the Online Service Manual (only available in Dutch) of the AFM can be both useful and relevant. Ultimately, the advice must be based on the KYC information and the customer must be informed of the considerations on which the advice is grounded. Additionally, the procedures and measures must in any event appoint one or more natural persons within the organization who are responsible for the automated advice (one person per financial product) and the checking (periodic and whenever there is reason for such) of the appropriateness of the automated advice and whether it meets the statutory rules. The designated person or persons must therefore have the necessary professional expertise with respect to the advised product and it must be possible to give the automated advice directly to the consumer. The designated person or persons must be in possession of the Wft diplomas that are prescribed for the advised product. If, for example, the system advises on mortgages, then the designated person must have the Wft diploma Mortgage Credit Adviser and must keep this diploma valid by means of regular PE exams.

The new rules of the Amendment Decree are expected to come into effect on 1 July 2017.

- **PSD2 and new market entrants**

The Payment Services Directive (PSD) provides for regulation of payment services within the EU. A revision of the PSD has since been adopted: PSD2. On 17 November 2016, the act on implementation of PSD2 was presented to the market for consultation (only available in Dutch). For general information on PSD2, we refer you to the section on Payment Service Providers of this Outlook. Of specific importance to the FinTech sector is the fact that two new types of services will fall within the scope of PSD2: (i) payment initiation services and (ii) account information services.

Payment initiation services are, in short, services whereby on behalf of consumers payment orders are initiated charged against the current account of that consumer with his or her bank, e.g., in case of online purchases in a web store. Account information services are, in short, services whereby consolidated Ainformation is shown of one or more current accounts that the customer maintains with one or more payment service providers. Many of such services will be available via online channels or (mobile) applications. Parties providing these services must obtain a license from DNB.

Consultation on the implementation act has since closed. PSD2 must be implemented in the Netherlands by 13 January 2018 at the latest. We advise market parties to timely consult the legislative proposal and to assess whether they offer payment or account information services, for which authorization must be requested from DNB.

- **Developments in the framework of InnovationHub**

DNB and the AFM have in 2016 started a joint initiative under the name 'InnovationHub'. In this joint initiative, the regulatory authorities are seeking to provide more space for innovation within the financial sector. Through InnovationHub, both market entrants and existing market parties can submit their questions on innovative financial services directly to the regulatory authorities. The regulatory authorities hereby wish to further accommodate FinTech developments in the sector. DNB and the AFM have processed 114 questions in the first six months of the InnovationHub. These questions came predominantly related to PSD2, blockchain and alternative financing. 14% of the questions came from regulated market parties and the remaining 86% from non-regulated entities

DNB will in 2017 also use the InnovationHub to answer questions from market parties on the scope of PSD2, with the purpose of facilitating an efficient and transparent authorization process for market entrants as a result of PSD2.

➢ **Crowdfundplatforms should improve disclosure of risks**

Just before the start of the new year, the AFM published (only available in Dutch) on its website a news item directed at disclosure of information by crowdfunding platforms. According to the AFM, the information that crowdfunding platforms disclose to consumers is insufficiently realistic about the risks involved in crowdfunding investments. Moreover, the AFM observes that the presented information on websites lacks diligence at times. The AFM states that regularly, statistics come without explanation, while context and origin of the information is important. The AFM is of the opinion that crowdfunding platforms should at least disclose the following information in a clear and understandable way on their websites:

- The gross amount of arranged sums
- Repayments and paid interest
- The gross amount of defaults and write-downs
- Breakdown of defaults
- Due amount of repayments

In the spring of 2017, the AFM will check if crowdfunding platforms have adhered to this notice. We advise crowdfunding platforms to review how they currently point out risks associated with crowdfunding investments to consumers, taking into account above-mentioned minimum requirements.

➢ **DNB supervision priorities 2017**

DNB has indicated what it will (particularly) focus on in 2017. The general supervision priorities are discussed in the 'General Developments' section of the Finnius Outlook. As regards FinTech, in particular, DNB (only available in Dutch) reports that that it will focus on the following subjects in 2017:

- Signaling of bottlenecks in laws and regulations: DNB will in 2017 identify a number of bottlenecks in laws and regulations that hinder the technical innovation of financial services and, where necessary, formulate a number of policy recommendations.

- Blockchain: DNB will study the technology on which blockchain is based, relevant market developments and possible impact of blockchain on the tasks of DNB as central bank and regulatory authority.

- Dialogue: DNB will in 2017 continue its dialogue with market parties. Purpose of this dialogue is to facilitate the entry of new innovative financial services and activities. Please also refer in that context to the developments relating to InnovationHub.

- Insurance companies and technological innovation: DNB has in 2016 as part of a sector-wide study into the influence of technological innovation on the financial sector identified that insurance companies make relatively little use of technological innovation, although the potential impact is large. In 2017, DNB will further study the impact of FinTech on the strategic and durability of earnings models in the insurance sector. DNB will (i) gain insight into the degree in which insurance companies use FinTech in the design, distribution and pricing of insurance products and the related prudential risks, (ii) ascertain to what degree insurance companies use FinTech strategy in cost-savings programs, (iii) chart the possible consequences of FinTech for the structure of the sector and (iv) identify prudential risks and study how FinTech can impact on the nature of regulatory activities.

Market parties for whom technical innovation in financial services will be a priority in 2017 are advised to closely monitor publications by the regulatory authority on the subject and to stay up to date as regards FinTech-related products or services.

- **EBA priorities 2017**

EBA has at the end of September 2016 drawn up its Work Programme for 2017. In this document, it has summarized all its priorities for deliverable technical standards, guidelines and reports for specific rules that fall under its scope of operations, such as payment services and electronic money. One of the subjects that EBA will monitor in 2017 includes financial innovation, whereby it will study (i) the advantages and risks of the use of big data, (ii) the developments and use of digital currency, such as the bitcoin and (iii) the advantages and risks of new payment methods.

We advise market parties focusing on these activities in 2017 to regularly consult the EBA website and check the latest developments.

- **EC establishes Task Force on Financial Technology**

The European Commission has this past November decided to establish a Task Force on Financial Technology (TFFT). The task force will be staffed by members of the European Commission with expertise in various fields, such as financial and digital services, digital innovation and security, competition and consumer protection. The TFFT will analyze what financial technology can mean for the financial sector and develop strategies to address potential risks. It has set the objective of producing policy suggestions and recommendations on financial technology by mid-2017 at the latest.

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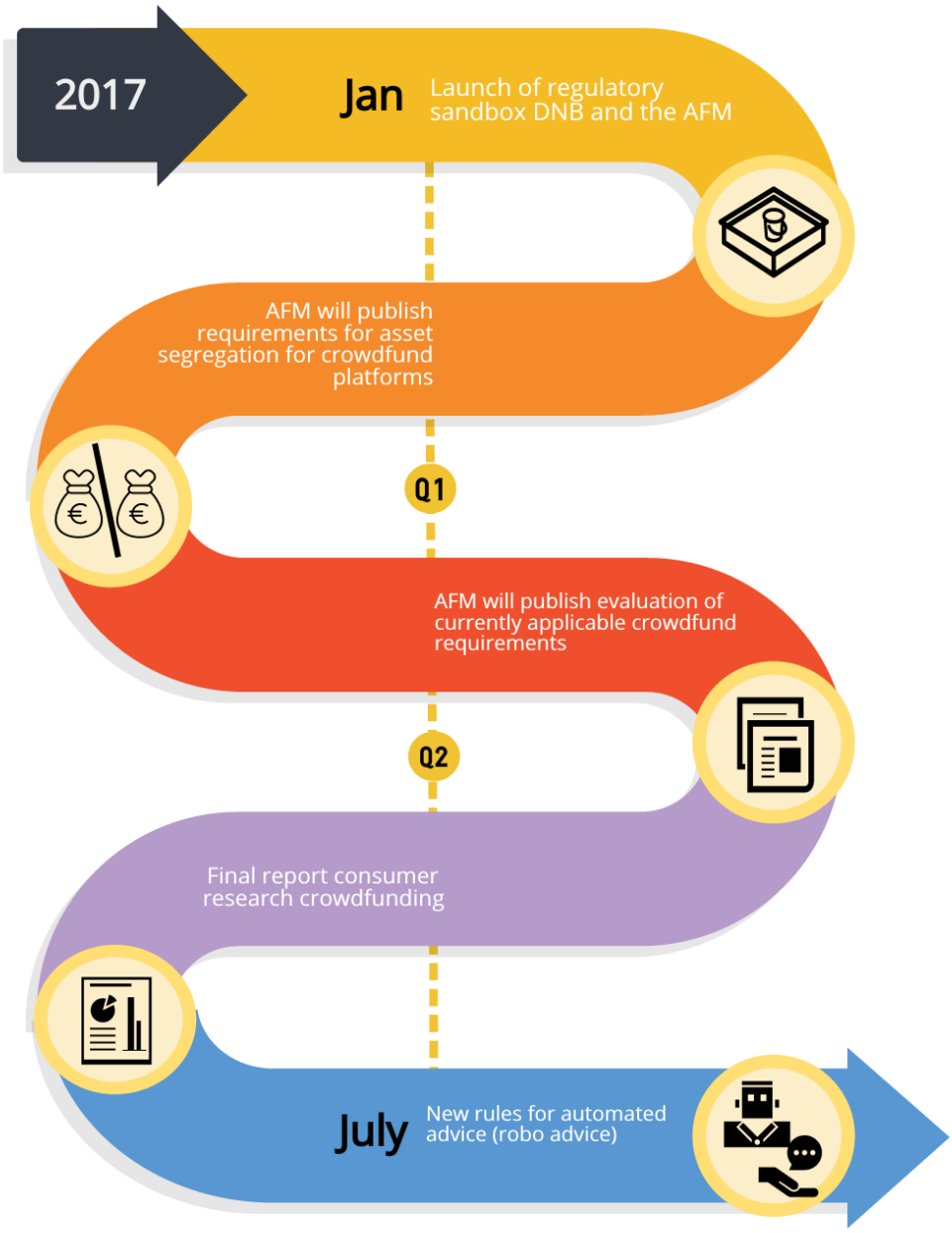
➢ **Timeline Crowdfunding and FinTech**



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Outlook 2017

FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR FINANCIAL SERVICES PROVIDERS IN 2017
(SUCH AS ADVISERS AND INTERMEDIARIES)

This part of the Finnius Outlook deals with important developments in 2017 for financial services providers. This catch-all category includes, inter alia, advisers and intermediaries 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

➢ Entry into force Act on Consumer Credit Agreements, Purchase Financing and Loans

The Act on Consumer Credit Agreements, Purchase Financing and Loans (hereafter: the Act) entered into force on 1 January 2017. This Act embodies earlier parliamentary promises to regulate the remaining private-law provisions of the Consumer Credit Act (Wck) as well as the provisions of 'instalment purchase' and 'hire purchase' of Title 5A, Book 7A Dutch Civil Code (DCC) and the Interim Rent-to-Own Immovable Property Act together in a supplement to Book 7 DCC. The purpose of the restructuring is to cut back or relax existing rules and to improve coordination between them. Changes resulting from the Act include:

- Title 2A, Book 7 DCC contains provisions regarding *consumer credit agreements*. A second section has been added to this title, containing several provisions of a general nature from the Wck. Deviation to the detriment of the consumer from the rules included under this title is not permitted. Important changes resulting from the Act include the application of the maximum annual interest rate (currently 14%) also on loans above € 40,000,- and the scrapping of this maximum annual interest rate for a fee that can be requested from the borrower in case of early redemption of the credit facility. For a fee like that specific rules already apply included in Section 68, Book 7 DCC.
- The new Title 2B, Book 7 DCC contains provisions regarding *purchase financing* (credit for acquiring the enjoyment of property). This title applies not only to consumers, but to all borrowers, including companies, and is only mandatory if it concerns a credit agreement with a consumer. The term 'purchase financing' comprises not only 'instalment purchase' and 'hire purchase', but also a range of relationships between three or more parties, whereby the supplier and financier are different undertakings, as well as various forms of financial lease. Also included is purchase financing whereby the financier of the property acquires security in the form of a right of pledge on the property. Different than before purchase financing does not include service credit. Therefore, a separate definition of 'service credit' has been included (credit for acquiring the enjoyment of a service).

While a spouse requires the permission of the other spouse for agreements relating to purchase financing, such permission is not required for agreements regarding service credit.

- The first section of Title 2B, Book 7 DCC comprises – in brief – the provisions of Title 5A, Book 7A DCC (old) (instalment purchase and hire purchase) and the other provisions from the Wck that relate specifically to purchase financing. The section is limited to movable, non-registered property. The second section concerns the hire purchase of immovable property and the third section contains the content of the former title 2B, Book 7 DCC on mortgage credit.
- The new Title 2C, Book 7 DCC comprises provisions regarding *loans*, which exclusively concern money loans (credit whereby a sum of money is made available to the borrower).

The new rules apply exclusively to credit agreements concluded after 1 January 2017. Financial services providers are advised to identify the possible impact that the new rules might have on their operations.

➢ **End transition period new Wft diplomas professional competence**

Since 1 January 2014 there is a new professional competence system for financial services providers that provide advisory services. The last transition period for complying with the new diploma obligations ended on 31 December 2016. This means that all advisers must have the necessary diploma(s) as prescribed by the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft) as of 1 January 2017. The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) expects that financial services providers and/or its personnel will have the required diplomas as of that date and will check whether this is indeed the case. If the professional competence requirements are not met, the AFM has published instructions indicating what the AFM expects from the financial services provider in that case.

Financial services providers that provide advisory services must comply with the new professional competence requirements as of 1 January 2017 and must ensure that its employees with customer contact have the correct new diplomas.

➢ **Exit qualifications and test targets financial services Wft exams**

At the end of last year the Dutch Ministry of Finance has published a change to the Regulation on exit qualifications and test targets financial services Wft exams for consultation purposes. One of the changes concerns the inclusion in this regulation of the test targets for the Permanent Education (PE) exams, which PE exams can be taken as of 1 April 2017. Within the context of permanent education each adviser is required during every PE period, not being the PE period in which the diploma or certificate was acquired, to successfully pass a PE exam in order to continue providing advisory services after the PE period. The amended Regulation should enter into force on 1 April 2017.

➢ **AFM & Consumer Behaviour – A survey**

In October 2016 the AFM published its survey 'AFM & Consumer Behaviour' (*AFM & Consumentengedrag*). With this survey, the AFM for the first time has provided information to the sector about the manner it applies insights on consumer behavior to its supervision. The AFM makes use of knowledge drawn from the behavioural sciences in its supervision more often. That knowledge shows that consumers are limited in their rational (intuitive) decision-making process and that they require more than just information to take good financial decisions. Policy makers and supervisors have in the past often assumed the notion of the 'rational consumer', i.e. the consumer that balances advantages and disadvantages when making decisions and afterwards checks whether the right decision was made. Knowledge obtained from the behavioural sciences shows that practice deviates from this notion. The AFM shows in its report 'Consumer behaviour on the market for consumer credit – Impact of the decision-making environment on the decision-making behaviour of consumers' (*Consumentengedrag op de markt voor consumptief krediet - Impact van de*

keuzeomgeving op het beslisgedrag van consumenten) how these insights can be elaborated on in the context of consumer credit.

The knowledge from the behavioural sciences and the application thereof in the supervision of the AFM also has consequences for the manner in which the AFM carries out its supervisory task. For example, in the future the AFM will pay greater attention to the manner in which financial undertakings provide information and the decision-making environments they provide. The AFM wishes to encourage parties to use insights obtained from the behavioural sciences in such a way that it benefits consumers as a result of which it becomes easier for them to make appropriate financial decisions. The AFM will also ask financial undertakings more frequently to review the effect of certain actions on consumer behaviour. The survey lastly encompasses an invitation to cooperate with science, the sector and other relevant parties with the purpose of further developing the knowledge from the behavioural sciences.

We expect that consumer behaviour will be an important topic for the AFM in 2017. We advise financial services providers to take notice of the AFM survey.

- **Intended evaluation inducement ban**

Since 1 January 2013 an inducement ban applies to intermediary and advisory services regarding payment protectors, complex products, mortgage credit, individual invalidity insurance, term life insurance and funeral insurance. As regards the intermediary and/or advisory services regarding these products the intermediary and/or adviser must be remunerated directly by the customer. It was stated on the introduction of the inducement ban that it will be evaluated in 2017. Last summer, the Dutch Minister of Finance sent the Dutch House of Representatives a letter informing them of the contours of the intended evaluation. The evaluation has been prepared in 2016, whereby the following themes were identified:

- Evaluate to what extent the desired culture change in the financial services sector (from product-driven sales to customer-oriented advice) has taken place, whereby attention will be given in particular to the development of the quality of the advisory services and to what extent there still is a risk of undesired steering towards the provider of the product / the product. The scope of the inducement ban will also be evaluated.
- Evaluating the accessibility of advice for consumers, whereby attention will also be devoted to the development of the price of advice since the introduction of the inducement ban.
- Evaluating the effectiveness of the information provision document.

The minister expects that the results of the evaluation of the inducement ban can be presented to the Dutch House of Representatives in 2017.

- **Rules for robot advice**

It is expected that as of 1 July 2017 new rules will enter into force for financial services providers that provide automated advice (robot advice, defined as 'a form of advisory services where the advice is provided without intervention of natural persons') to consumers. This will probably follow the entering into force of the Financial Markets Amendment Decree 2017, of which to the present date only a consultation version has been available. On the basis of the new rules sufficient information must be gathered, the automated advice must be based on that information and the advice must be explained. Additionally, at least one employee must be designated per financial product as being responsible for the robot advice and periodic control thereof. This person must have the Wft diplomas required for advising on that specific product.

The consultation period has ended. Financial services providers that provide robot advice are advised to closely monitor in 2017 what the legislator will do with the received consultation reactions. It is expected that the new rules will enter into force on 1 July 2017.

- **Evaluation general duty of care Wft**

The Dutch Minister of Finance has sent, by letter to Parliament on 30 December 2016, the evaluation of the general duty of care that was adopted into the Dutch Financial Supervision Act as of 1 January 2014 to the Dutch House of Representatives. Financial services providers must, according to the general duty of care, carefully take into account the legitimate interests of the consumer or beneficiary and, if they advise, must act in the interest of the consumer or beneficiary. With the introduction of the general duty of care it was also determined that within 3 years after entry into force the effectiveness and impact of the general duty of care in practice would be evaluated.

The evaluation did not give rise to adjustments in laws and regulations by the Minister of Finance . The administrative-law basis of the general duty of care has been introduced as a supplement to the system of consumer protection (normative effect) and as a safety net provision on the basis of which the AFM can take measures if specific rules in the Dutch Financial Supervision Act are absent (punitive effect). According to the Minister the general duty of care functions well in these respects.

Hard empirical data on the general duty of care in the Dutch Financial Supervision Act are not available, because to the present date there has been no formal enforcement on the basis of the general duty of care and therefore administrative case law is lacking. The Minister therefore is of the opinion that it is too early to draw any farther reaching conclusions regarding the effectiveness and impact of the general duty of care and sees cause for a new evaluation. The Dutch States General will receive a report with the findings of this evaluation no later than 1 January 2022.

- **Inventory expansion of Wft consumer provisions to independent contractors and SMEs**

In the autumn of 2016 the Dutch Ministry of Finance has held a consultation on the effectiveness and desired level of Wft protection for independent contractors and SMEs as regards financial services. At present, the protection of independent contractors and SMEs differs per financial product and type of customer, while the Wft protection of consumers applies to all financial products and services. While small business customers currently enjoy protection in case of insurance and investment products, only consumers are protected when it comes to payment services, savings products and credit services. Problems in the provision of services to small business customers in the past have raised the question whether the Wft offers sufficient adequate protection to this group or whether an expansion in scope is necessary. In the consultation document a number of options for expanding the protection of small business customers are presented, such as:

- expanding the general duty of care included in Section 4:24a Wft towards consumers to small business parties, giving the AFM enforcement powers in case of evident misconduct;
- expanding the scope of information and advisory obligations as applicable to consumers to include small business customers;
- expanding the inducement ban included in Article 86c Bgfo to products for small business customers;
- opening the Financial Services Complaints Tribunal (*Klachteninstituut Financiële Dienstverlening*, KiFiD) to small business customers as a low threshold alternative to court proceedings.

It should be noted, however, that these options are only suggestions and it has not been established that Wft protection for independent contractors and SMEs will be amended or expanded. It may be concluded on the basis of the consultation that the existing protection is adequate. The Minister of Finance has

indicated that the Dutch House of Representatives will be informed about the findings of the consultation in the beginning of 2017. Financial services providers are advised to monitor developments in this area.

- **Changes to AFM Guideline Wwft, Wwft BES and Sanctions Act**

  The implementation of the Fourth Anti-Money Laundering Directive will enter into force in the Netherlands in 2017. For an overview of the consequences thereof, we refer to the General part of this Outlook. In connection with the implementation of this directive, the AFM has indicated that it will also revise its Guideline Wwft, Wwft BES and Sanctions Act. As the Fourth Anti-Money Laundering Directive must be implemented by mid-2017, we expect a revised Guideline Wwft, Wwft BES and Sanctions Act in the first half of 2017.

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FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR CONSUMER CREDIT PROVIDERS IN 2017

TOPICS

➢ Entry into force Act on Consumer Credit Agreements, Purchase Financing and Loans

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definition of 'service credit' has been included (credit for acquiring the enjoyment of a service). While a spouse requires the permission of the other spouse for agreements relating to purchase financing, such permission is not required for agreements regarding service credit.
- The first section of Title 2B, Book 7 DCC comprises – in brief – the provisions of Title 5A, Book 7A DCC (old) (instalment purchase and hire purchase) and the other provisions from the Wck that relate specifically to purchase financing. The section is limited to movable, non-registered property. The second section concerns the hire purchase of immovable property and the third section contains the content of the former title 2B, Book 7 DCC on mortgage credit.
- The new Title 2C, Book 7 DCC comprises provisions regarding *loans*, which exclusively concern money loans (credit whereby a sum of money is made available to the borrower).

The new rules apply exclusively to credit agreements concluded after 1 January 2017. Consumer credit providers are advised to identify the possible impact that the new rules might have on their operations.

➢ **Consumer credit: Responsibility of consumer credit providers in case of debt collection problems**

In November 2016 the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) published its guideline 'Consumers and Debt Collection Processes' (*Consumenten en Incassotrajecten*), in which the AFM notifies providers of consumer credit of their responsibilities in case of debt collection problems. In the guideline the AFM specifies its advised approach in tackling payment arrears of consumers. According to the AFM, consumer credit providers must observe the responsibilities laid down in the guideline and take measures in case of misconduct. Additionally, the AFM expects that consumer credit providers perform a gap analysis between the guideline and their own practice, resulting in a plan of approach for improvement.

In the guideline the AFM distinguishes between (i) the prevention of payment arrears, (ii) the arising of payment arrears and (iii) the finding of a solution. The AFM indicates per subject what it expects from consumer credit providers. These expectations include:

- that consumer credit providers actively contact the customer and look for appropriate solutions together with the customer in case of payment arrears;
- that the communication with the customer is laid down in the customer file;
- that consumer credit providers clearly explain to the customer the costs of payment arrears and how these are calculated, whereby the AFM stresses that it is not permitted to also charge collection costs in case of payment arrears in addition to the late payment fee (the interest due by the customer on the overdue amounts); and
- that consumer credit providers together with the customers agree on a repayment schedule that prevents the payment arrears from unnecessarily running up and from becoming an earnings model for the consumer credit provider in itself.

Specifically as regards working with debt-collection agencies, the AFM provides the following clarification in its guideline:

- Before resorting to a debt-collection agency, the AFM requires that consumer credit providers first try to find a solution together with the customer.
- If consumer credit providers subsequently outsource the collection of claims to a debt-collection agency, the consumer credit provider remains responsible for its own customers: consumer credit providers must ensure that the debt-collection agency operates fairly and must perform regular checks to ascertain this.
- The debt-collection agency in principle requires a licence as credit intermediary if it performs more activities than just the collection of claims, such as agreeing on new repayment schedules with customers (because the debt-collection agency then assists in managing the credit agreement).

- If a debt-collection agency (or other third parties) take over a claim(s) or the credit from the consumer credit provider, it in principle requires a licence as consumer credit provider. According to the AFM, reselling of a claim or the credit should be an exception rather than the rule.

Consumer credit providers have significant responsibilities when it comes to preventing and resolving payment arrears of their customers. Consumer credit providers are advised to study the guidelines and to take on the recommendations of the AFM, starting with the gap analysis that the AFM expects consumer credit providers to perform.

➢ **End transition period new Wft diplomas professional competence**

Since 1 January 2014 there is a new professional competence system for financial services providers that provide advisory services. The last transition period for complying with the new diploma obligations ended on 31 December 2016. This means that all advisers must have the necessary diploma(s) as prescribed by the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft) as of 1 January 2017. The AFM expects that financial services providers and/or its personnel will have the required diplomas as of that date and will check whether this is indeed the case. If the professional competence requirements are not met, the AFM has published instructions indicating what the AFM expects from the financial services provider in that case.

Consumer credit providers that also provide advisory services must comply with the new professional competence requirements as of 1 January 2017 and must ensure that its employees with customer contact have the correct new diplomas.

➢ **Exit qualifications and test targets financial services Wft exams**

At the end of last year the Dutch Ministry of Finance has published a change to the Regulation on exit qualifications and test targets financial services Wft exams for consultation purposes. One of the changes concerns the inclusion in this regulation of the test targets for the Permanent Education (PE) exams, which PE exams can be taken as of 1 April 2017. Within the context of permanent education each adviser is required during every PE period, not being the PE period in which the diploma or certificate was acquired, to successfully pass a PE exam in order to continue providing advisory services after the PE period. The amended Regulation should enter into force on 1 April 2017.

➢ **Consumer credit: Customer's interest paramount in decision-making environment**

In October 2016 the AFM published its report 'Consumer behaviour on the market for consumer credit – Impact of the decision-making environment on the decision-making behaviour of consumers' (*Consumentengedrag op de markt voor consumptief krediet - Impact van de keuzeomgeving op het beslisgedrag van consumenten*). The report shows by using concrete examples how within an (online) decision-making environment of consumer credit, content can be given to putting the customer's interest centre stage and to enhancing responsible borrowing behaviour. In the report, the AFM describes a number of basic principles for designing the decision-making environment, which could have an impact on the decision-making behaviour of consumers when entering into a credit agreement. The decision-making behaviour of consumers can, for example, be influenced by the number of alternatives that are offered, the standard option that is proposed or the preferred settings that are already completed. According to the AFM, market parties can use these basic principles to design the decision-making environment for credit agreements in such a manner that it serves the customer's interests. The AFM expects consumer credit providers to also perform own research into the effect of their decision-making environment on the borrowing behaviour of consumers and to use these insights to prevent undesired negative steering. The AFM has expressed its critical view on the manner financial services providers have designed their

decision-making environment for consumer credit and whether such is in line with the actual behaviour of consumers.

In October 2016 the AFM also published its survey 'AFM & Consumer Behaviour' (*AFM & Consumentengedrag*). With this survey, the AFM for the first time has provided information to the sector about the manner it applies insights on consumer behaviour to its supervision. The AFM makes use of knowledge drawn from the behavioural sciences in its supervision more often. That knowledge shows that consumers are limited in their rational (intuitive) decision-making process and that they require more than just information to take good financial decisions. For example, the way choices are presented to the customer in an (online) environment, unconsciously influences the decision-making process of customers. In the future the AFM will increase its supervision on the manner in which financial undertakings provide information and the decision-making environments they provide. The AFM wishes to encourage parties to use insights obtained from the behavioural sciences in such a way that it benefits consumers as a result of which it becomes easier for them to make appropriate financial decisions.

We expect that consumer behaviour will be an important topic for the AFM in 2017. We advise consumer credit providers to take notice of the survey and of its further elaboration within the context of consumer credit in the report 'Consumer behaviour on the market for consumer credit'. Consumer credit providers are advised to test their (online) decision-making environment against these publications and make changes where necessary.

- **Consumer credit: Credit warning has no immediate effect on consumers**

Since 2009 consumer credit providers are obliged to include in all advertising a warning about the consequences of the credit offered, consisting of the warning sentence "Be careful! Borrowing money costs money" (*Let op! Geld lenen kost geld*) and the warning symbol. The warning is compulsory for all credit advertisements on television, radio, internet and in printed media.

At the beginning of 2015 the AFM announced its study into the effectiveness of the credit warning. In December 2016 the AFM published the conclusions of its study in the report 'Be careful! Borrowing money costs money; a study into the effectiveness of a warning in credit advertisements' (*Let op! Geld lenen kost geld; een onderzoek naar de effectiviteit van een waarschuwing in kredietreclames*). This report describes the effect of the credit warning on the behaviour of consumers, in other words whether it helps consumers in practice to take better well-considered and more rational decisions. The AFM concludes that the credit warning has no short-term effect on the behaviour of consumers in practice. For example, it did not influence the frequency with which consumers click on banners, how consumers obtain information on the website and the choices that they make when requesting a credit proposal. The warning also has little to no short-term impact on the attitude of consumers towards credit, the intended actions and how consumers experience credit advertisements.

In light of the conclusions of the study, the AFM advises the Dutch Minister of Finance to determine whether, besides raising awareness (the current purpose of the credit warning), he has other concrete behavioural objectives in terms of influencing the borrowing decisions of consumers and the AFM proposes to join forces in studying to what degree the credit warning contributes towards the set objectives and whether alternative measures may be required.

The minister has informed the Dutch House of Representatives in a letter of the results of the AFM study and stated that he will follow the advice of the AFM and soon reflect again critically upon the policy objectives of the credit warning. If necessary, he will consider whether alternative measures may be required in order to achieve the set objectives. The minister will inform the Dutch House of Representatives of any further action in the spring of 2017.

- **Mortgage loans: Borrowing standards 2017**

  On 1 January 2017 the Amending Regulations Mortgage Credit 2017 (*Wijzigingsregeling hypothecair krediet 2017*) entered into force. The regulations have introduced a number of changes to the Provisional Scheme for Mortgage Loans (*Tijdelijke regeling hypothecair krediet*). Objective of the Provisional Scheme was to determine the income criteria for the provision of mortgage loans and the maximum amount of the loan in relation to the value of the house (loan to value (LTV) ratio).

  Mortgage loan providers determine the permitted financing burden on the basis of the consumer's qualifying income and the applicable financing burden rate. The financing burden rate indicates what part of the consumer's gross income can be spent on mortgage costs, without this leading to irresponsible financial burdens for the consumer. With the Amending Regulations the financing burden rates for 2017 are adjusted. Additionally the borrowing capacity for dual-income borrowers has been expanded as of 1 January 2017. Mortgage loan providers take into account the combined qualifying income when calculating a mortgage loan for dual-income borrowers. As of 1 January 2017 the mortgage loan provider applies the financing burden rate of the highest qualifying income plus 60% of the lower qualifying income. In 2016 this figure was 50%.

  Additionally, as of 1 January 2017, a mortgage loan provider can deviate from the LTV ratio if provisions are made for necessary home improvement that lead to a drop in the ratio between the amount of the total mortgage loan and the value of the house. This deviation option applies exclusively to mortgage loans up to the amount required to finance the necessary provisions.

  With the introduction of the Mortgage Credit Directive in the summer of 2016, a change was made to the moment at which it is assessed whether the mortgage loan is appropriate. Where this was formerly at the moment of the preliminary proposal (*voorlopige offerte*), the assessment must now be carried out when making a mortgage loan offer that is binding for the mortgage loan provider (after which the consumer has a period of reflection of 14 days). The binding offer must comply with the applicable loan-to-income (LTI) and LTV standards. However, it appears in practice that mortgage loan providers perform the assessment on the basis of the current standards at the time that the mortgage loan is *applied* for, rather than when the mortgage loan provider *makes the binding offer*. This may potentially lead to financial problems for consumers who applied for a maximum mortgage loan in 2016, while the binding offer is made in 2017, when the loan standards have become stricter. In order to prevent problems the AFM observes a transition period. With respect to mortgage loan applications made before 1 January 2017 whereby the assessment against the loan standards for the binding offer takes place ultimately 1 February 2017, the standards of 2016 may be applied in calculating the maximum mortgage loan. This is subject to the condition that the mortgage loan provider, when making the binding offer, verifies that the applicant and the address of the house are the same as in the initial application.

  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 AFM publishes the reference rate on its website. The reference rate is 5% for the first quarter of 2017.

In the first quarter of 2017 mortgage loan providers must apply the reference rate of 5% and are advised to consult the AFM website for the following quarters.

- **Mortgage loans: Intended evaluation inducement ban**

Since 1 January 2013 an inducement ban applies to intermediary and advisory services regarding (inter alia) mortgage credit. As regards the intermediary and/or advisory services regarding mortgage credit, the intermediary and/or adviser must be remunerated directly by the customer. It was stated on the introduction of the inducement ban that it will be evaluated in 2017. Last summer, the Dutch Minister of Finance sent the Dutch House of Representatives a letter informing them of the contours of the intended evaluation. The evaluation has been prepared in 2016, whereby the following themes were identified:

- Evaluate to what extent the desired culture change in the financial services sector (from product-driven sales to customer-oriented advice) has taken place, whereby attention will be given in particular to the development of the quality of the advisory services and to what extent there still is a risk of undesired steering towards the provider of the product / the product. The scope of the inducement ban will also be evaluated.
- Evaluating the accessibility of advice for consumers, whereby attention will also be devoted to the development of the price of advice since the introduction of the inducement ban.
- Evaluating the effectiveness of the information provision document.

The minister expects that the results of the evaluation of the inducement ban can be presented to the Dutch House of Representatives in 2017.

- **Rules for robot advice**

It is expected that as of 1 July 2017 new rules will enter into force for financial services providers that provide automated advice (robot advice, defined as 'a form of advisory services where the advice is provided without intervention of natural persons') to consumers. This will probably follow the entering into force of the Financial Markets Amendment Decree 2017, of which to the present date only a consultation version has been available. On the basis of the new rules sufficient information must be gathered, the automated advice must be based on that information and the advice must be explained. Additionally, at least one employee must be designated per financial product as being responsible for the robot advice and periodic control thereof. This person must have the Wft diplomas required for advising on that specific product.

The consultation period has ended. Consumer credit providers that provide robot advice are advised to closely monitor in 2017 what the legislator will do with the received consultation reactions. It is expected that the new rules will enter into force on 1 July 2017 and immediately become applicable to the providers of robot advice.

- **Legislative wishes AFM**

In July 2016 the Dutch Minister of Finance sent the annual legislative letter on financial markets to the Dutch House of Representatives, in which the minister informs the House about the most important intentions regarding laws and regulations. With this letter, the minister responds to the legislative wishes of the AFM and the Dutch Central Bank (*De Nederlandsche Bank*, DNB). Two of the wishes of the AFM specifically relate to credit.

Mortgage loans: legal safeguards for mortgage loans financed by investors

One of the wishes of the AFM concerns legal safeguards for mortgage loans financed by investors. Possible future developments, such as shrinking margins on investments in mortgage loans or higher returns on other investments, could cause investors to lose their interest in investing in mortgage loans. As a result, the mortgage loan provider could decide at the end of a fixed-rate period to raise the mortgage interest rate in order to discourage customers from staying with that mortgage loan provider. In that case customers could be confronted with unnecessary high interest rates. The AFM has established that there are at present no legal safeguards that adequately address the risk of unnecessary high interest rates for existing customers. With that in mind and owing to the possible serious consequences for homeowners, the AFM wishes together to study together with the Dutch Ministry of Finance any possibilities for reducing, in a general sense, the risk of unnecessary high interest rates for existing customers. The minister has stated its willingness to consult with the AFM in order to determine the need for additional measures.

Consumer credit: maximum interest rate

Another legislative wish of the AFM concerns the maximum interest rate. The maximum annual interest rate is currently set at 14% (12% plus the statutory interest of 2%). The AFM ascertains the existence of loans with a fee that approaches the maximum. This high fee in combination with a low repayment component, has led to financial problems among consumers in case of revolving credit, especially those burdened by high credit amount. As one of the possible solutions for this 'locked-up' problem, the AFM advises a change of the maximum interest rate. The AFM has indicated its wish to consult on this matter with the Dutch Ministry of Finance and, if necessary, to include concrete proposals in the next AFM legislative letter, which is expected to appear in July.

Consumer credit providers are advised to take notice of the annual legislative letters of the AFM and to monitor any possible next steps of the Ministry of Finance.

- **Evaluation general duty of care Wft**

The Dutch Minister of Finance has sent, by letter to Parliament on 30 December 2016, the evaluation of the general duty of care that was adopted into the Dutch Financial Supervision Act as of 1 January 2014 to the Dutch House of Representatives. Financial services providers, amongst which are consumer credit providers, must, according to the general duty of care, carefully take into account the legitimate interests of the consumer or beneficiary and, if they advise, must act in the interest of the consumer or beneficiary. With the introduction of the general duty of care it was also determined that within 3 years after entry into force the effectiveness and impact of the general duty of care in practice would be evaluated.

The evaluation did not give rise to adjustments in laws and regulations by the Minister of Finance . The administrative-law basis of the general duty of care has been introduced as a supplement to the system of consumer protection (normative effect) and as a safety net provision on the basis of which the AFM can take measures if specific rules in the Dutch Financial Supervision Act are absent (punitive effect). According to the Minister the general duty of care functions well in these respects.

Hard empirical data on the general duty of care in the Dutch Financial Supervision Act are not available, because to the present date there has been no formal enforcement on the basis of the general duty of care and therefore administrative case law is lacking. The Minister therefore is of the opinion that it is too early to draw any farther reaching conclusions regarding the effectiveness and impact of the general duty of care and sees cause for a new evaluation. The Dutch States General will receive a report with the findings of this evaluation no later than 1 January 2022.

- **Inventory expansion of Wft consumer provisions to independent contractors and SMEs**

In the autumn of 2016 the Dutch Ministry of Finance has held a consultation on the effectiveness and desired level of Wft protection for independent contractors and SMEs as regards financial services. At present, the protection of independent contractors and SMEs differs per financial product and type of customer, while the Wft protection of consumers applies to all financial products and services. While small business customers currently enjoy protection in case of insurance and investment products, only consumers are protected when it comes to payment services, savings products and credit services. Problems in the provision of services to small business customers in the past have raised the question whether the Wft offers sufficient adequate protection to this group or whether an expansion in scope is necessary. In the consultation document a number of options for expanding the protection of small business customers are presented, such as:

- expanding the general duty of care included in Section 4:24a Wft towards consumers to small business parties, giving the AFM enforcement powers in case of evident misconduct;
- expanding the scope of information and advisory obligations as applicable to consumers to include small business customers;
- expanding the inducement ban included in Article 86c Bgfo to products for small business customers;
- opening the Financial Services Complaints Tribunal (*Klachteninstituut Financiële Dienstverlening*, KiFiD) to small business customers as a low threshold alternative to court proceedings.

It should be noted, however, that these options are only suggestions and it has not been established that Wft protection for independent contractors and SMEs will be amended or expanded. It may be concluded on the basis of the consultation that the existing protection is adequate. The Minister of Finance has indicated that the Dutch House of Representatives will be informed about the findings of the consultation in the beginning of 2017. Consumer credit providers are advised to monitor developments in this area.

➢ **DNB: Emergence of new loan providers in credit markets**

At the end of 2016 DNB published its report 'Credit markets in a state of flux – Larger role pension funds and insurance companies enhances financial stability' (*Kredietmarkten in beweging - Grotere rol pensioenfondsen en verzekeraars bevordert financiële stabiliteit*). The report pertains to the emergence of pension funds and insurance companies on the market for mortgage loans and business credit. According to DNB this development contributes to a better balanced financing of long-term credit and improves the diversity and competition of the credit on offer. DNB announced its intention to closely watch shifts on the credit markets and to intensify its supervisory role wherever necessary:

- DNB closely monitors risk management and the consequences for the risk profile of institutions.
- Banks must take into account the potential impact of these shifts on the mortgage market on their earnings model, partly because of increased competition the margins on new mortgage loans are under pressure.
- Long-term customer's interest must be safeguarded: when renewing the fixed-rate period customers must not be disadvantaged by investors with short-term goals.

In order to promptly address the outlined development, DNB will take follow-up actions in 2017, as stated in the DNB Supervisory Outlook.

➢ **Mortgage loans: EBA Guidelines on product oversight & governance arrangements**

The EBA published Guidelines that are applicable to retail banks, payment service providers, e-money institutions and mortgage loan providers (EBA/GL/2015/18). The guidelines relate to product oversight and product governance with respect to, inter alia, mortgage loans to be offered to consumers. The guidelines are applicable to all products that are introduced into the market after the execution date of

these guidelines (3 January 2017) and to all existing market products that are significantly adjusted after that date. The guidelines provide for specific recommendations which mortgage loan providers must meet when developing products and marketing them. The recommendations are similar to the obligation for mortgage loan providers to follow a Product Approval and Review Process (PARP) when developing products and the guidance given by the AFM on that subject.
Supervisory authorities and relevant financial companies are required to make efforts as to ensure the guidelines are met.

We advise mortgage loan providers to take notice of these guidelines and to assess whether their PARP needs adjustment.

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Outlook 2017

FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR TRUST OFFICES IN 2017

TOPICS

➢ Draft legislative proposal Trust Offices Regulation Act 2018

Consultation on the draft legislative proposal Trust Offices Regulation Act 2018 ('legislative proposal Wtt 2018') took place in May 2016. The legislative proposal Wtt 2018 includes a thorough review of the regulation of trust companies. The proposal partly reflects the statutory embedding of standards that were earlier laid down in the Operational integrity rules Trust Offices Regulation Act 2014 ('Rib 2014'). Additionally, a number of new standards are introduced while existing standards are made more stringent:

- ***Legal form:*** the requirement is that a trust office with an establishment in the Netherlands must have the legal form of a NV (public limited company), BV (private limited company) or an SE (Societas Europaea). Consequently, natural persons no longer qualify for a trust office licence.
- ***Four-eyes principle*****:** the four-eyes principle is introduced for trust offices. This means that a minimum of two daily policymakers are required.
- ***Ban on services*****:** the draft legislative proposal Wtt 2018 provides a statutory basis for the use of an order in council to ban services to or on behalf of specific structures.
- ***Publication options*****:** the proposal advises revising the published regime to the effect that the supervisory authority is obliged to publicly disclose an administrative sanction as soon as it becomes irrevocable. In case of a serious infringement, the supervisory authority is obliged to promptly publicly disclose its decision to impose a fine, irrespective of whether the fine has become irrevocable.
- ***Raising the maximum fine*****:** the legislative proposal raises the maximum fine, whereby it is proposed to raise the maximum amount for the third fine category from EUR 4 million to EUR 5 million. Also proposed is a turnover-linked fine maximum of 10% of the net turnover.
- ***More stringent integrity standard*****:** further clarification is provided in the draft legislative proposal Wtt 2018 of the best-efforts obligation as regards the customer review. The best-efforts obligation entails that the trust office must establish the information with a 'probability bordering on certainty'.
- ***UBO*****:** alignment has been sought with the Fourth Anti-Money Laundering Directive for the new definition of UBO and higher management personnel.

Finnius has submitted a reaction during the consultation round. It is, at present still unclear what next steps will be taken by the legislator following the consultation.

➢ DNB studies 2017

In its trust offices newsletter of November 2016, the Dutch Central Bank (*De Nederlandsche Bank*, DNB) announced the following studies in 2017:

- ***Compliance Sanctions Act 1977*:** DNB will at a small number of offices with a high exposure on countries that fall under a sanctions regime verify compliance with the Sanctions Act 1977.
- ***Aggressive tax planning or customer anonymity:*** DNB will investigate the facilitating of aggressive tax planning and customer anonymity by trust offices and determine whether they adequately recognise and control the accompanying integrity risk.
- ***Transaction monitoring and audit function*:** DNB will follow up on studies performed in 2016 into transaction monitoring and the audit function.

➢ **Status *good practices* transaction monitoring**

DNB has decided to publish *good practices* in order to provide trust offices with guidelines for the structuring and implementation of transaction monitoring. DNB expects that trust offices will, wherever possible, learn from these *good practices* and process these at operational level. The published *good practices* were still a draft version. DNB is currently processing the feedback from the consultation meetings and will publish the definitive version in January 2017.

➢ **Risk appetite and systematic integrity risk analysis (SIRA)**

The *integrity risk appetite* indicates what integrity risks an institution can run in the realisation of its goals or mission. DNB will examine the extent to which the integrity risks identified in the SIRA have ultimately resulted in policy and procedures to adequately manage these risks. While earlier studies by DNB also centred on SIRA, they primarily looked at the structure of the SIRA. The focus will now be placed on whether the correct risks are actually included in the SIRA and whether the measures that have been taken are sufficiently tailored to the risks identified in the SIRA. Aspects that DNB will look at include the use of scenarios in establishing important risks, substantiating the risk weighting process, testing against the *risk appetite* and the involvement and role of staff/departments in determining the *risk appetite*. The first pilot studies have already started and will continue into 2017.

➢ **Change to ISI reporting period**

A change to the ISI reporting period was made in 2016. DNB will during the first quarter of 2017 make a single request for the ISI report over the July-December 2016 period, after which it will annually in January request the ISI report over the entire calendar year (January-December).

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Outlook 2017

FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR ISSUERS IN 2017

TOPICS

➢ Completion implementation of market abuse rules

The new Market Abuse Directive and the Market Abuse Regulation have been in force since 3 July 2016. A number of provisions required further detailing in national legislation. In light thereof on 17 November 2016 the Decree on implementation of the market abuse regulation has been submitted to the market for consultation. This decree includes a member state option and provides further detailing of the regulation. The most important matters are:

- The Market Abuse Decree (*Besluit marktmisbruik Wft*) will largely lapse. The Market Abuse Regulation applies directly.

- Reporting postponement of disclosure of inside information: explanation only required at the request of the AFM. Under the regulation, an issuer may under conditions postpone the disclosure of inside information. Upon disclosure the issuer must immediately report the postponement to the regulatory authority. Immediate explanations regarding the disclosure are compulsory, unless a member state decides that explanations only need to be provided at the request of the regulatory authority. The Netherlands has chosen this member state option.

➢ Draft legislative proposal investment objects and investment bonds

The Ministry of Finance has on 2 August 2016 submitted the Draft legislative proposal on investment objects and investment bonds to the market for consultation. Investment bonds are bonds, the proceeds of which are used for collective investments, whereby the returns of the investment are used for interest and redemption payments on the bonds. On its website, the AFM mentions examples of investments in agricultural land, solar panels, real estate, wine, shares or SME companies. Under current laws and regulations, the supervision of institutions that issue investment bonds is limited to the obligation to publish a prospectus as provided in Section 5 of the Wft and the AFM at present claims to have too little regulatory authority over the issuers of investment bonds.

In drawing up the legislative proposal, the legislator has taken as point of departure the rules applicable to investment funds. One of the objectives of the legislative proposal is, through the implementation of a license requirement, to place the manager of investment bonds under ongoing supervision. Additionally, the legislative proposal contains provisions that in certain cases make it compulsory to appoint a custodian, which must meet specified conditions.

Finnius has submitted a consultation reaction to the proposal. The consultation period has since ended. It is not known at present what the legislator will do with the received consultation reactions. We expect further clarity on this in the first half of 2017 and advise the issuers of investment bonds to closely monitor developments in this area.

- **Revision of prospectus rules**

The European Commission has on 30 November 2015 published a proposal for revision of the Prospectus Directive as part of a package of measures aimed at the creation of a European capital market union. The directive will be replaced by a regulation, thereby giving member states less room for additional requirements. It is the opinion of the Commission that the current framework serves as a barrier to (potential) issuers and is not effective enough to enable access to the capital market. The Commission views the time-consuming, complex and expensive process of drawing up a prospectus and having it approved by the regulatory authority as the main obstacle. SME companies in particular can be discouraged from entering the capital market because of excessive administrative charges and the costs of drawing up the prospective. The aim of the proposal is to make it easier to raise funds on the capital market, whereby at the same time the prospectus must continue to provide the investor sufficient information to enable a responsible investment decision.

The most important provisions of the proposal 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 issuers that issue on a frequent basis.

The new Prospectus Regulation is expected to come into force in 2017. Issuers will have to comply with the rules in the Prospectus Regulation 12 months after the date of entry into force. The exact date on which the new prospective rules will come into force is not yet known.

- **Intention to raise exemption limit prospectus requirement**

At present, an exemption applies to the obligation to publish a prospectus when offering securities with a total value below € 2.5 million (over a period of 12 months). The Dutch legislator has stated its intention, as soon as the new Prospectus Regulation applies, to raise this exemption limit to € 5 million in combination with the additional safeguards (recent answering of parliamentary questions). The legislator is of the opinion that the limit of € 5 million represents the highest amount whereby the advantages of lower costs for the issuer outweigh the absence of a full prospectus for investors. However, the legislator is only prepared to raise the exemption limit on condition that this is accompanied by additional safeguards, which it regards essential in order to prevent abuse of the exemption limit. This is backed by the introduction of minimum disclosure requirements and a duty of notification for parties making use of the (proposed) exemption.

- **ESMA priorities financial reporting 2016**

ESMA annually publishes a statement setting out the topics on which it and the national supervisory authorities will focus explicitly in the assessment of the financial reports of issuers. As regards the financial reports for 2016, the main points are:

- The disclosure of financial performances.
- The classification of financial instruments as equity or debt.

- Disclosure of the impact that new IFRS standards have on financial reporting.

We advise issuers to take note of the points stated by the ESMA in its statement and to take these into account in drawing up the financial reports for 2016.

➢ **The revised Corporate Governance Code**

The revised Corporate Governance Code was published on 8 December 2016. The Code applies to listed companies. Important points of the new Code are:

- **Internal control and risk management.** Companies should have a sound independent internal control function. The board of directors shall in its report state that the internal control function has adequately addressed the encountered shortcomings.
- **Stricter compliance.** Also under the new Code, companies must explain how the Code is applied and not limit themselves to highlighting the deviations. Additionally, any deviation from the Code must be explained in more detail.
- **Remunerations.** Remunerations of members of the board of directors must be clearly and understandably defined and stimulate long-term value creation. The remuneration of members of the supervisory board must be based on the amount of time that they devote to their function and not on the number of shares that they own.
- **Reporting of misconduct.** The board of directors is required to immediately inform the chairman of the supervisory board in case of material misconduct. If a member of the board of directors is involved in the alleged misconduct, employees can report directly to the chairman of the supervisory board. If the external accountant ascertains any misconduct during the performance of his duties, he is required to report this immediately to the chairman of the audit committee.

The new Code comes into force on 1 January 2017. We advise issuers to familiarise themselves with the new Code and to take into account that description of compliance with the new Code is a compulsory item in the directors' reports over 2017. We also advise issuers to review their internal procedures and to make any necessary changes to bring these in line with the new Code. The revision of the Code may for example lead to revision of regulations applicable to the supervisory board and the board of directors.

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Outlook 2017

FINANCIAL MARKETS LEGISLATION
IMPORTANT INFORMATION FOR INSURANCE COMPANIES IN 2017

TOPICS

➢ DNB Regulatory Priorities 2017

In November 2016, the Dutch Central Bank (*De Nederlandsche Bank*, DNB) published its regulatory priorities for the coming year. The general regulatory priorities will be discussed in the General part of this Outlook. Specifically as regards insurance companies, DNB reports that that it will focus on the following subjects in 2017:

- **DNB study: impact of FinTech**
  In 2017, DNB will further study the impact of FinTech on the strategic and sustainability of earnings models in the insurance sector. DNB will (i) gain insight into the degree in which insurance companies use FinTech in the design, distribution and pricing of insurance products and the related prudential risks, (ii) ascertain to what degree insurance companies use FinTech strategy in cost-savings programmes, (iii) chart the possible consequences of FinTech for the structure of the sector and (iv) identify prudential risks and study how FinTech can impact on the nature of regulatory activities.

- **Stress test non-life insurers**
  In 2017 DNB will perform a stress test among non-life insurers in order to inventory their resilience under certain adverse scenarios. Purpose of the study is to acquire better insight into the risks facing the non-life sector, and specifically the risks in terms of reinsurance, including the risk transfer, the level of intention and cover. DNB wishes to consult with the sector in drawing up the scenarios. Following completion of the stress test, DNB wishes to share the findings with the participating institutions, followed by a sector-wide publication in the form of good practices. If the stress test gives reason for such, DNB has indicated its intention to intervene among individual non-life insurers. In any event, we advise non-life insurers with an active reinsurance policy to respond to the scenarios that DNB is inviting consultation on.

- **More attention to non-life insurers**
  While DNB has in recent years devoted most attention to the life market, it signals increasing risks on the non-life market: profit is under pressure and margins are low. DNB will therefore devote more attention to the non-life sector in 2017.

- **DNB study: focus on profitability and Product Approval and Review Process (PARP)**
  DNB wishes to study how insurance companies pursue the profitability of individual products in 2017. DNB will do so among selected insurance companies based on requested documentation and an on-site study, whereby the PARP required by insurance companies will form an important starting point. With this study DNB intends to gain better insight into the degree in which insurance companies are selling loss-making products. Key questions are whether insurance companies have a strategic reason for selling those products, how these loss-making products are monitored, whether the loss is compensated by other profitable segments and whether the solvency position permits such loss-making products. If insurance companies score inadequate on these aspects, DNB has announced its intention to intervene or – if the problem has a broader scope – to provide further instructions to the sector in the form *of good practices*.

- **Organisation of internal risk management function**
  Further to earlier studies into the organisation of the audit and actuarial functions, DNB will in 2017 study whether the embedding of the risk management function among insurance companies meets the requirements for key positions under Solvency II. DNB has announced its intention to intervene in case of deviations, or when companies take inadequate action. DNB will share its findings and good practices with the sector.

- **Quality of strategic decision-making**
  In 2017 DNB will perform a study among a selection of insurance companies into the quality of the strategic decision-making process. Attention will thereby be given to:

  - the structure of the followed process;
  - the quality of the used information;
  - the instruments used for scenario analysis; and
  - the interaction between the members of the board of directors and the supervisory board, as well as other parts of the organisation.

  DNB intends to draw up *good practices* on the basis of the findings. DNB will not only publish a document on this topic, but also hold a seminar to offer the sector guidelines for organising a sound strategic decision-making process.

➢ **Legislative proposal recovery and resolution insurance companies**

The consultation version of the legislative proposal for the recovery and resolution of insurance companies appeared in the summer of 2016. The draft legislative proposal provides DNB with the instruments and powers required, if necessary, for the orderly resolution of insurance company with a view to maximising the interests of policyholders. The draft legislative proposal is inspired on the existing set of instruments for the recovery and resolution of banks. Elements of the proposal include preparatory crisis plans, resolution plans, bail-in, transfer instruments and advances on payments from the estate of an insurance company. The intention is for these new instruments to come into effect in 2018.

We expect the publication and further detailing of the legislative proposal on the recovery and resolution of insurance companies in 2017. The coming into force of this act will impact directly on Dutch insurance companies. It is important that insurance companies, in anticipation of the act coming into force in 2018, use 2017 to take appropriate preparatory measures, such as drawing up a preparatory crisis plan, in which

the insurance company must provide insight into the recovery options if the solvency requirements (SCR/MCR) are (threatened to be) breached. This crisis plan precedes the recovery plan and the financial short-term plan, prescribed in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft), which both only have to be prepared in the event the insurance company no longer complies with the solvency requirements. The purpose of the preparatory crisis plan is to offer the insurance company solutions, in advance, to possible crisis situations.

- **Amendment Decree solvency of insurance companies with limited risk profile**

The Amendment Decree solvency of insurance companies with limited risk profile will come into effect on 1 January 2017. Subsequently, as of that date, the rules for calculating the solvency position of insurance companies with limited risk profile – which include funeral in-kind insurers and smaller non-life and life insurance companies that fall outside the scope of Solvency II - and the applicable transition periods will be adjusted. It has appeared that the application of the standard solvency rules to funeral in-kind insurers and life insurers that (practically) exclusively insure payment on death, would lead to disproportionately stringent solvency requirements for these parties. This is explained by the fact that the business model of such insurance companies is based on exceptionally long-term commitments, for which Solvency II is inappropriate. Therefore, per 1 January 2017 the Prudential Rules Decree Wft provides for revised solvency rules that take into account the special characteristics of this group of insurance companies. For example, the 6% risk margin - the remuneration for the provision of risk-bearing capital, which must be added to the best estimate of the future commitments in order to determine the value of the technical provisions – will be lowered to 4% for funeral in-kind insurers and comparable life insurers with limited risk profile.

- **DNB report Vision of the future of the Dutch insurance sector**

On 13 December 2016, DNB published its report 'Vision of the future of the Dutch insurance sector'. In this report, DNB analyses the impact of various developments in the insurance sector in the coming 5 to 10 years. Attention is given to (i) technological, social and economic developments, (ii) changing customer behaviour and (iii) changes in laws and legislation.

DNB uses the report to make a number of concrete policy recommendations to insurance companies, including with a view to the expected further shrinkage of the total individual life insurance portfolio in the coming years, and the expected substantial drop in the total premium volume on the non-life market as a result of technological innovation.

Examples of such recommendations to life insurance companies include:

- the study of possible consolidation options, potential run-off of portfolios and the possibility to transfer closed portfolios to specialised parties; and
- the recommendation to include, in the capital and dividend policy, the impact of economic market parameters on the development of the financial position. DNB will assess the capital and policy dividend on this point.

Examples of such recommendations to non-life insurance companies include:

- the strengthening of strategic decision-making and change capacity so that: a. the cost basis and capacity are adjusted to the declining premium volumes; and b. investments in innovation are used to provide a flexible response to social needs;
- the study of options for the (partial) winding down of activities or linking up with other parties.

According to DNB, the stress test performed by EIOPA among European insurance companies, the results of which appeared on 15 December 2016, underlines the need for insurance companies to take further

measures to futureproof their business models and prepare their capital and dividend policy for a sustained period of low interest rates.

The report also includes an action point for DNB in 2017, namely that DNB will in 2017 perform a further exploratory study into the impact of climate change on the insurance sector and the possible consequences on its regulatory role. Climate change impacts both on the insurable risks and the investments of insurance companies. We also expect that DNB will use the report in the performance of its regulatory tasks.

- **DNB approval of 403-statement**

Based on the consultation version of the legislative proposal for the Financial Markets Amendment Act 2018, prior approval by DNB will be required for a guarantee given by (inter alia) insurance companies for debts resulting from (nearly) all actions by a third party. This approval requirement also applies to guarantees given by the holding companies of insurance companies or their group entities that provide critical services. Additionally, DNB has the authority to prohibit the assumption of liability for the settlement of a debt or to attach conditions thereto. The approval requirement only applies to liability guarantees given after this legislation has come into force, which is expected in mid-2018. We therefore advise closely monitoring the exact legislative proposals on this point in 2017 and to test the guarantee policy of your company accordingly, e.g., as regards 403-statements and other guarantees within your group.

- **June 2017: the complete Solvency II group year report for 2016 financial year**

The complete Solvency II group report for the 2016 financial year must be submitted in June 2017. Significant intra-group transactions and significant risk concentrations must be stated in this report. Also, insurance groups must at all times notify DNB as soon as possible of highly significant intra-group transactions. The definition of a significant intra-group position or risk concentration is yet to be provided by the group regulatory authority. DNB has for each insurance group for which it is the group regulatory authority set quantitative reporting thresholds to determine whether transactions and concentrations are (highly) significant and should therefore be reported. DNB will inform the insurance groups accordingly.

- **DNB study of integrity risk appetite**

The integrity risk appetite indicates what integrity risks an institution can run in the realisation of its goals or mission. In its study, DNB will include insurance companies, and focus in particular on the question to what extent the correct risks have actually been included in the SIRA (systematic integrity risk analysis). In addition, DNB will study to what extent the risks that are identified in the SIRA have led to policies and procedures for adequately managing these risks. The first studies have already started and will continue into 2017. DNB will, in particular, look at:

- the use of scenarios in the determination of the most important risks;
- the substantiation of the weighing up of the risks;
- the testing against the risk appetite; and
- the involvement and role of employees/departments in the establishing of the risk appetite.

- **Expectations of DNB regarding capital management policies**

In the first half of 2016, DNB has carried out an investigation throughout the sector relating to the capital management policy of insurers. This investigation revealed many points of improvement. For instance, the substantiation of the size of the safety margin which insurers keep above the statutory capital requirement, and the description and elaboration of the recovery measures which insurers may take in case of a deteriorating solvency position.

The investigation was reason for DNB to publish a document on capital management on 30 November 2016. In this document, DNB explains its principles and expectations with respect to the capital management policy of insurers. DNB's document distinguishes 7 principles:

- Principle 1: Insurers establish policy which is aimed at preventing frequent deficits of the statutory solvency requirements;
- Principle 2: Insurers establish policy for the composition of its own funds and the planning of own funds and debt;
- Principle 3: In the capital management policy, insurers ensure that they are able to take immediate and adequate measures in case their solvency ratio decreases quickly or falls below a critical boundary;
- Principle 4: Insurers evaluate the capital management policy periodically and adapt it where necessary. Insurers monitor the solvency ratio frequently, in order to be able to signal actual and expected developments in the solvency ratio in time.
- Principle 5 (for insurers with long-term liabilities): in their capital management policy, insurers with long-term liabilities (term longer than 20 years) must explicitly take into account the economic reality, and in any event the impact on the solvency position of the extrapolation of the interest rate term structure and possible LTG-measures;
- Principle 6 (for health insurers): health insurers integrate the premium policy and the capital management policy;
- Principe 7 (for insurance groups): the policy of different insurers within a group and the policy of the group itself are consistent.

DNB expects that insurers adapt their capital management policies in accordance with these principles, and that insurers report about this in the 2016 supervisory reporting. In 2017, DNB shall review the chapter on capital management in this supervisory report, in order to assess to which extent the capital management policies of insurers meet the DNB-principles. Therefore, insurers will have to (i) review their capital management policies in order to assess whether these need adaptation and (ii) pay extra attention to the chapter capital management in the supervisory reporting.

- **DNB study compliance Sanctions Act by branch offices of foreign insurance companies**

As in preceding years, DNB intends also in 2017 to give attention to compliance with the Sanctions Act by insurance companies. However, DNB will in 2017 focus in particular on compliance with the sanction regulations (including the Wwft) by branch offices of life and non-life insurance companies that operate on the Dutch market on the basis of a European passport. This group fell outside the scope of earlier compliance studies performed by DNB. The study started in November 2016 and we expect the results and possible enforcement action in 2017.

- **EIOPA Single Programming Document 2017 - 2019 and Annual Work Programme 2017**

EIOPA will once again be productive in 2017. In October 2016, it published its "Single Programming Document 2017 – 2019", which document also comprises the "Work Programme 2017". This shows that EIOPA will maintain the same strategic objectives for 2017 as in preceding years: (i) enhancing supervisory convergence, (ii) reinforcing preventive consumer protection and (iii) preserving financial stability. EIOPA will, moreover, in 2017 devote a great deal of activity to a general evaluation of Solvency II, which will come into force in 2018. This general evaluation was in fact started by the consultation initiated by EIOPA in December 2016 with respect to several specific points of the Solvency II Delegated Regulation (in particular the SCR, the *Solvency Capital Requirement*) (deadline: 3 March 2017).

- **Implementation of Fourth Anti-Money Laundering Directive and industry-specific risk factors in the framework of the customer review**

The implementation of the Fourth Anti-Money Laundering Directive will enter into force in the Netherlands in 2017. For an overview of the consequences thereof, we refer to the General section of this Outlook. Specifically relevant to life insurance companies is that the ESAs on 21 October 2015 started a consultation on the guidelines for simplified and more stringent customer reviews and the risk factors that should be taken into account. These guidelines contain a number of risks factors per sector which are in particular relevant for that specific sector. An example of a risk factor for a life insurance company is a customer who regularly transfers his insurance contract to another insurance company.

The guidelines are currently not yet definite, but we expect that the definite version will be published in the first half of 2017. We advise life insurance companies to consult the guidelines as soon as they are definite and to process the risk factors mentioned therein in their internal policy and to modify their customer review accordingly.

- **Preparation for PRIIPs Regulation**

The PRIIPs Regulation contains regulations for developing and offering on the retail market of Packaged Retail and Insurance-based Investment Products (PRIIPs). 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 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 PRIIPs Regulation was initially to enter into force on 31 December 2016. However, the European Commission decided in mid-November 2016 to postpone the entry into force of the PRIIPs Regulation by one year, after the European Parliament had in mid-September 2016 rejected the Regulatory Technical Standards belonging with the PRIIPs Regulation. This gave market parties an extra year to draw up an EBI for the PRIIPs developed by them and to present that to their sales channels. Market parties that offer PRIIPs will have to ensure that they comply with the obligations of the PRIIPs Regulation by end 2017 latest.

- **Preparations for implementation Insurance Distribution Directive**

The Insurance Distribution Directive ("IDD") must be implemented by 23 February 2018 at the latest. That means that the most preparations to ensure compliancy with the directive will have to be carried out in 2017.

The IDD will replace the Insurance Mediation Directive ("IMD") from 2002. Where the scope of the IMD was limited to insurance intermediaries, the IDD also applies to insurance companies that sell products directly/online. Purpose of the IDD is (i) to provide consumers with the same level of protection, irrespective of the sales channel through which they purchased the insurance product (directly from an insurance company or through an intermediary), and (ii) to enable intermediaries and insurance companies to compete under the same conditions. Changes introduced by the IDD include:

- more stringent pre-contractual transparency and information obligations for the various links in the insurance chain;
- generic duty of care for insurance distributors (which include both insurance intermediaries and insurance companies);
- new product oversight and governance obligations for product developers and distributors.

The IDD will impact directly on insurance intermediaries, insurance companies and financial service providers that advise on insurance products. The directive will also impact on the relationship between the insurance company and intermediaries. To have legal effect in the Netherlands, the IDD must first be

implemented in Dutch law. We expect consultation versions of the Dutch implementation act, to which market parties can respond, to appear in the first half of 2017. We advise insurance intermediaries and insurance companies to monitor this process closely.

- **Further clarity on setting of the ultimate forward rate (UFR)**

The year 2016 was marked by a great deal of commotion regarding the revision of the ultimate forward rate (UFR) for insurance companies, the actuarial interest rate for the capitalisation of long term commitments (i.e., commitments with a term longer than 20 years). This has currently been set for the EURO (and for many other European currencies, as well as, e.g., the USD) at 4.2%. In April 2016, EIOPA held a consultation on the UFR. In this consultation, EIOPA proposed to significantly adjust the UFR for insurance companies to 3.7%. DNB issued a critical opinion during this consultation by advocating an even lower UFR, namely 3.2%. By doing so, DNB wishes to bring the UFR to the level that must be applied by Dutch pension funds. For insurance companies, this would lead to a significant drop in their solvency. EIOPA had the intention, following the consultation, to take a decision in September 2016, but has postponed this process due to the numerous critical comments by market parties. A decision is now expected early in 2017. We advise insurance companies to monitor this process closely.

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➢ **Timeline Insurance Companies**