

# Investment Management Group Newsletter

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## Recent developments

26 January 2009

This newsletter highlights the following recent developments:

- **EP approves UCITS IV Directive**
- **Transparency Directive implemented in The Netherlands – ASFs may in many cases apply local GAAP**
- **Template for Fiduciary Management Agreements**

### **EP approves UCITS IV Directive**

On 13 January 2009, the European Parliament approved a proposed reform of the UCITS directives. This new directive, commonly referred to as UCITS IV, is designed to make the UCITS market in the European Economic Area (“EEA”) less fragmented and to improve efficiency, especially in cross-border operations.

UCITS (undertakings for collective investment in transferable securities) are investment institutions formed under and governed by a harmonised set of European rules dealing with investor protection, (cost) transparency and which meet basic requirements on organisation, management and oversight of funds. If the UCITS is authorised by the competent authority of its home state,

participations in the UCITS may be offered to the public in the EEA. Even states outside the EEA have accepted UCITS as relatively safe and comprehensible retail investment products.

Since their inception in 1985, a large number of UCITS has been set up and successfully marketed to retail investors, and UCITS have become a key product in providing retail investment and savings solutions. In addition, UCITS have also become an important instrument for institutional investment structuring.

Nevertheless, there are still different national interpretations of the current UCITS rules. This lack of a level playing field has resulted in a more burdensome and costly distribution of UCITS than was the original aim of UCITS harmonisation and has impeded cross-border sales of UCITS products.

### ***Significant changes***

UCITS IV seeks to reduce the obstacles previously encountered when offering in other EEA states, by bringing about the following changes:

- the administrative barriers to cross-border distribution of UCITS will be removed;
- mergers between UCITS will be facilitated;

- the use of "master-feeder" structures will be permitted, which will make the UCITS framework more attractive for creating funds for institutional investors, e.g. in the case of asset pooling;
- the "Simplified Prospectus", which currently approaches the size and level of detail of the fund's full prospectus, will be replaced by a "Key Investor Information" document. This new document will be a very concise, probably one page document tailored to the needs of typical retail investors. Due to its compactness, translations into the various required languages will cost significantly less than translating the present, sometimes very sizeable, Simplified Prospectuses;
- national supervisory authorities will be stimulated to cooperate more closely to more effectively administer the supervision of UCITS and their distribution in the various EEA states.

#### *Management Company Passport*

Following consultation and further research prompted by CESR, UCITS IV also introduces a "management company passport", allowing UCITS authorised in one EEA state to be managed remotely by a management company established in another EEA state and authorised by that state's competent authority.

#### *Implementation*

Although formally UCITS IV has yet to be approved by the European Council, informal agreement has already been reached and UCITS IV will have to be implemented in the legislation of the member states by 1 July 2011.

#### **Transparency Directive implemented in The Netherlands<sup>1</sup> – ASFs may in many cases apply local GAAP**

On 1 January 2009, the Dutch act implementing the EU Transparency Directive (2004/109/EC) (the "**Dutch Act**") came into force. The Dutch Act amends the Financial Markets Supervision Act (*Wet op het financieel toezicht*, the "**FMSA**").

<sup>1</sup> For a complete overview of the Dutch Act, please read De Brauw's recent [Legal Alert](#) on this subject.

Open-end investment institutions do not fall within the scope of the Dutch Act and must (already), pursuant to the FMSA, publish their annual accounts and report within 4 months of the end of the financial year, where this term is now newly introduced for all listed companies.

Since 2004, a number of foreign closed-end investment institutions which are considered adequately supervised in their country of origin<sup>2</sup> (notably permanent capital vehicles of private equity or hedge funds groups) have been listed on NYSE Euronext Amsterdam. Of these adequately supervised funds ("**ASFs**") a significant number are based in Guernsey, where they are allowed to report in US GAAP.

Until the introduction of the Dutch Act, in principle such closed-end investment institutions had to apply IFRS in their financial reports. This requirement has often been problematic, to the extent that IFRS is not the reporting standard in the relevant country of origin.

The Dutch Act now provides a wider basis for applying equivalent local GAAP instead of IFRS by certain closed-end non-Dutch investment institutions

Non-EEA issuers with the Netherlands as home member state, such as these NYSE Euronext Amsterdam listed Guernsey ASFs, are allowed to apply their local Generally Accepted Accounting Principles (GAAP) instead of IFRS, if the European Committee has approved the application thereof. In such case, the local GAAP is considered to be equivalent to IFRS.

On 12 December 2008, the European Committee decided that as of 1 January 2009 non-EEA issuers may report in:

- IFRS adopted for use in the EU pursuant to Regulation (EC) No 1606/2002;
- IFRS (as published by the International Accounting Standards Board);

<sup>2</sup> The list of countries designated by the Dutch Ministry of Finance as having adequate supervision has recently been extended and presently includes: France, Guernsey, Ireland, Jersey, Luxembourg, Malta, the United Kingdom, and the United States of America (to the extent such US investment institutions are under SEC supervision).

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- US GAAP or Japanese GAAP; or
- Canadian, Chinese, Indian or South Korean GAAP.

### *Transitory provisions for financial reporting*

The new financial reporting rules take effect for financial years starting on or after 1 January 2008 and will not apply to the whole or part of any annual financial period which commenced before 1 January 2008.

### **Template for Fiduciary Management Agreements**

At the request of DUFAS (the Dutch Fund and Asset Management Association) and OPF (the Dutch Association for Company Pension Funds) De Brauw has drafted a template Fiduciary Management Agreement, which is based on [The DUFAS Principles of Fiduciary Management](#), which were published on 13 November 2008.

The [Fiduciary Management Agreement](#) is a template for Dutch pension funds to use when outsourcing fiduciary management to investment firms. It has been designed to assist pension funds and fiduciary managers to structure their fiduciary management relationship and properly allocate the different tasks and duties to both parties, taking into account their different roles and legal obligations.

The [Explanatory Notes](#) clarify certain specific provisions of the Fiduciary Management Agreement.

### *Fiduciary Management*

Fiduciary management is fundamentally different from operational asset management. Transferring the management of assets to a fiduciary manager, gives a pension fund access to professional expertise with regard to:

- pension fund asset management;
- management of the pension fund's entire balance sheet; and
- increasingly stricter regulatory supervision.

Fiduciary management has become increasingly important in the institutional fund management industry.

### *Fiduciary management activities*

The template Fiduciary Management Agreement encompasses arrangements for a wide variety of both core and additional activities, including advising the pension fund on:

- the ALM study;
- the Strategic Investment Policy (*Strategisch Beleggingsbeleid*);
- the Investment Plan (*Beleggingsplan*);
- the continuity analysis;
- if necessary: recovery plans; and
- the actuarial and technical business report (*actuariële en bedrijfstechnische nota*).

The fiduciary manager will typically:

- select operational asset managers and investment institutions;
- conclude and terminating operational asset management mandates;
- supervise the operational asset managers and investment institutions;
- execute overlay-strategies regarding all of the pension fund assets, including by derivatives transactions to hedge currency and interest risks;
- measure and analyse the management performance and management of operational asset managers and investment institutions; and
- report to the pension fund on all investment activities carried out in respect of the pension fund assets under the Fiduciary Management Agreement.

Other services to be rendered by the fiduciary manager to the pension fund may include:

- selecting custodians, prime brokers, clearing brokers and executing brokers;
- maintaining contact with and cooperating with the custodian;
- advising on and drafting the reports of the pension fund to the supervising authorities; and
- advising on issues of corporate social responsibility.

Both the pension fund and the fiduciary manager must carefully consider which of these activities are to be included as well as the scope of these

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activities prior to entering into the agreement and subsequently transferring the fiduciary management to the fiduciary manager.

### *Other aspects of the agreement*

In addition to selecting various activities to be carried out by the fiduciary manager and making the corresponding choices, parties need to realise that other aspects of a fiduciary management agreement are equally important when setting up a framework for rendering fiduciary management services, including:

- a clear conflicts of interest policy must deal with potential conflicts of interest between the pension fund and the fiduciary manager;
- transparency about all costs and fees in connection with the fiduciary management; and
- transparency about costs associated with the investment of assets with operational asset managers or investment institutions.

## Contact

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