



# Explanatory Notes to the Fiduciary Management Agreement Template

**These explanatory notes have been prepared by De Brauw Blackstone Westbroek N.V. in consultation with DUFAS. It provides an explanation of the Fiduciary Management Agreement Template, which is based on the DUFAS Principles of Fiduciary Management. The explanatory notes do not constitute legal advice. If you have any questions or comments, please contact Francine Schlingmann ([francine.schlingmann@debrauw.com](mailto:francine.schlingmann@debrauw.com)), Kees Groffen ([kees.groffen@debrauw.com](mailto:kees.groffen@debrauw.com)) or Jan Willem van der Velden ([janwillem.vandervelden@debrauw.com](mailto:janwillem.vandervelden@debrauw.com)).**



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## Explanatory Notes to the Fiduciary Management Agreement template

### 1 GENERAL NOTES

#### 1.1 The template – connection to The DUFAS Principles of Fiduciary Management

The purpose of the Fiduciary Management Agreement template is to set out the arrangements between a pension fund and fiduciary managers with regard to fiduciary management. The template is based on the rules of conduct and allocation of duties and responsibilities contained in The DUFAS Principles of Fiduciary Management (the “**DUFAS Principles**”). It provides an example of how the DUFAS Principles can be implemented, but is by no means compulsory. Fiduciary management agreements can be drawn up in a different form while following the DUFAS Principles. Parties may select provisions from the template as required. In some instances, the template offers different options for a contractual provision.

#### 1.2 Fiduciary management services

Fiduciary management concerns the provision of integral advice to a pension fund with regard to the management of all of its assets, in accordance with all of its obligations. The template sets out the services provided by a fiduciary manager to a pension fund. Services listed in the template which have been specified in the DUFAS Principles as optional additional activities may be left out at the discretion of the parties. If instructions do not include the “core activities” specified in the DUFAS Principles, the question arises whether the service can still be defined as fiduciary management. If no instruction is given to carry out a “core activity”, no integral advice can be provided to the pension fund.

#### 1.3 Service agreement

The template specifies the duties to be carried out by the fiduciary manager for each type of service. More detailed arrangements with regard to the services are set out in a service agreement, which is attached as an annex. The service agreement may include provisions on the time limits for carrying out specific duties and contain specific requirements with regard to such duties, e.g. the form in which reports are to be submitted or the specific procedures to be followed in carrying out the duties in question.

#### 1.4 Operational asset management

The template identifies three ways in which the actual asset management, *i.e.*, the “operational” asset management, can take place:

- (a) by giving instructions to carry out individual asset management;
- (b) by the pension fund’s participation in investment institutions;



- (c) by carrying out overlay strategies with regard to the entire portfolio or a part thereof, e.g. by derivatives transactions.

The services mentioned in (b) and (c) can be regarded as investment services. The provision of these services is likely to include advice on specific financial instruments, which also constitutes an investment service. In the Netherlands, investment services may be provided if a relevant licence has been granted by the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten – AFM*) (or if a licence granted in another EEA member state has been recognised, following a notification procedure pursuant to the Financial Markets Supervision Act (*Wet op het financieel toezicht, “FMSA”*)). As the fiduciary manager can provide the services mentioned in (b) or (c), the template incorporates the relevant requirements under the FMSA and the Decree on the Supervision of the Conduct of Financial Enterprises (*Besluit Gedragstoezicht financiële ondernemingen Wft*, the “Decree”).

## 2 NOTES TO SPECIFIC CLAUSES

### 2.1 Recitals

The DUFAS Principles do not form part of the agreement. However, by entering into the agreement the parties express their wish to adhere to the DUFAS Principles, as follows from recital (C).

### 2.2 Definition of “Fiduciary Management” (clause 1)

Fiduciary management relates in principle to all of the pension fund’s assets. This is expressed in the definition of “Fiduciary Management”. It is possible to exclude assets from certain services provided by the fiduciary manager. This could, for example, apply to the management of real estate, in which case the definition of “Fiduciary Management” will have to be adjusted. To ensure that the fiduciary manager is able to carry out its services, the agreement must provide for the manner of providing information to the fiduciary manager on the assets excluded from the fiduciary management.

### 2.3 Services included in fiduciary management (clause 2)

Subparagraph (f) of clause 2.2 contains one of the typical components of fiduciary management: the coordination of various services. The fiduciary manager does not have to provide all of the services mentioned in clause 2.2. The distinction between core activities and optional additional activities is set out in clause 1.2. above. Clause 2.5 refers to services which the fiduciary manager will not provide.

### 2.4 Separate components of the fiduciary management (clauses 3 to 6)

Clauses 3 to 6 specify in more detail the main components of the fiduciary management, *i.e.* providing advice as described in subparagraph (a) of clause 2.2, selecting (and supervising) operational asset managers, selecting (and supervising) investment institutions, as well as analyzing results and reporting.



## **2.5 Other services (clause 7)**

The other services provided by the fiduciary manager will vary as will the manner in which they are provided. For example, the role of the custodian may differ. If the custodian provides services in the field of securities lending, a proper exchange of information between the fiduciary manager and the custodian will be crucial. The custodian may also supervise certain elements of the fiduciary management for the pension fund. Specific arrangements for this can be set out in the service agreement.

## **2.6 Manner of fiduciary management (clause 9)**

Investment institutions which provide investment services or additional services are under the obligation to act in the client's interest in an honest, fair and professional manner (section 4:90 FMSA). The template (clause 9.1) extends this duty of care to fiduciary services which do not qualify as investment services or additional services.

Under clause 9.3, the parties have the choice to enter into agreements with operational asset managers in the name of the pension fund or in the name of the fiduciary manager. Entering into agreements in the name of the fiduciary manager may sometimes result in a discount on the management fee. If agreements are entered in the name of the fiduciary manager, attention should be given to the continuation of the agreements in the event that the fiduciary management ends.

If the fiduciary manager (or a group company of the fiduciary manager) also acts as an operational asset manager, the management agreement relating to those activities can be attached as an annex (clause 9.6).

## **2.7 Order execution policy, order allocation policy and selection policy (clause 10)**

For the sake of clarity, the first paragraph of this clause sets out the scope of the provision. It applies where orders in financial instruments are executed by the fiduciary manager or where orders are placed with or passed on to third parties. These services are relevant where pension funds participate in investment institutions. Execution of transactions in financial instruments may also be relevant where overlay strategies are performed, in particular where it concerns hedging currency exchange rate and interest risks. Section 4:90a FMSA places an obligation on investment companies which provide these investment services to take all reasonable measures to ensure that the best possible result is achieved for their clients. [The investment firm must thereby take into account various factors listed in the FMSA and, in determining the relative importance of such factors, also take into account various aspects listed in the FMSA]?. For that purpose the investment firm must have an order execution policy or, in the case of placing orders with or passing orders on to third parties, a selection policy (section 4:90b and 4:90c FMSA). Although the FMSA does not require this, the agreement is an appropriate means of focussing the parties' attention on this obligation of the investment firm and to provide for certain rights of the client in this connection.

## **2.8 Remuneration (clause 11)**



With respect to how remuneration is calculated and the specific arrangements thereto, the template refers to an annex [which can be agreed in each individual case]. If investments are to be made in investment institutions managed by the fiduciary manager or a group company of the fiduciary manager, the parties often agree on arrangements with regard to fee reductions. Fee reductions are often given on the fiduciary management fee rather than the fee of the manager of the investment institution. The fiduciary management fee is (in principle) subject to turnover tax, whereas the fee of the manager of the investment institution is not.

### **2.9 Client classification (clause 13)**

The investment firm has an obligation to classify its client (section 4:18a FMSA). The agreement is the appropriate document to record such classification. The statement by the client that it is a qualified investor is connected with its potential participation in investment institutions. By providing this statement, the fiduciary manager will be better able to select which investment institutions are suitable for participation by the pension fund/the client, for example those whose participation rights are offered exclusively to qualified investors. Clause 13.2 follows current practice by choosing to classify the client as professional investor in connection with the provision of services for which it (being a pension fund) could also have been classified as a counterparty. The types of services in question are limited to receiving and passing on, or executing, orders in financial instruments. Clause 13.3 incorporates the obligation on the investment firm, under section 4:18a subsection 2 FMSA, to inform the client on paper or on another durable medium about the client's options for requesting a different qualification, unless the investment firm has adopted a policy which does not allow such requests to be granted.

### **2.10 Agreements with operational asset managers (clause 14)**

This clause incorporates the requirements for outsourcing by investment companies. Although one could argue that when the fiduciary manager instructs operational asset managers there is no outsourcing in this sense, compliance with the FMSA and the Decree on this point will be in line with the DUFAS Principles.

### **2.11 Regulations concerning outsourcing (clause 15)**

This clause incorporates the applicable provisions on outsourcing in the Pension Act, the Decree implementing the Pension Act, and the Occupational Pension Scheme Act.

### **2.12 Potential conflicts of interest (clause 20)**

This clause takes into account the obligations of the fiduciary manager under the FMSA with regard to conflicts of interest. It encompasses all services provided by the Fiduciary Manager regardless of whether investment services within the meaning of the FMSA are being provided.

### **2.13 Liability (clause 23)**

The template gives the parties the option to agree on a limitation of the fiduciary manager's liability, and sets out two variations.



#### **2.14 Disputes (clause 26)**

The template has been drawn up in accordance with Dutch law and will therefore be governed by Dutch law (clause 26.1). A different governing law can be chosen. In that case, the user of the template should check if any provisions need to be amended. The template gives the choice between resolution by the courts and arbitration. Arbitration may be preferable as arbitrators with specific expertise can be appointed and confidentiality can be agreed, whereas court proceedings are public. However, arbitration is generally more expensive than court proceedings.