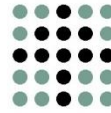


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Ref 15_095



Voorwoord

Den Haag, november 2015

Voor u ligt een handreiking van de Dutch Fund and Asset Management Association (DUFAS) met *best practices* voor de overeenkomst tussen de beheerder en bewaarder van alternatieve beleggingsinstellingen, dat wil zeggen beleggingsinstellingen die vallen onder de reikwijdte van de Europese 'Alternative Investment Fund Managers' richtlijn.

De handreiking is ontstaan vanuit de behoefte van marktpartijen (fondsbeheerders, maar ook bewaarinstellingen) om meer guidance te krijgen bij het opstellen dan wel actualiseren van deze overeenkomst. Modelbepalingen over artikelen die anders in de praktijk nogal eens leiden tot discussie met de AFM, kunnen het onderhandelingsproces en het traject van vergunningverlening bespoedigen. Zeker voor nieuwe fondsintroductions van fondsbeheerders die van rechtswege een AIFMD vergunning hebben gekregen, kan dit belangrijke tijdswinst ('time to market') opleveren!

Het is bij het opstellen van deze handreiking uitdrukkelijk **niet** de bedoeling geweest om een volledig en uitputtende overeenkomst op te stellen. Alleen controversiële bepalingen zijn opgenomen. De in dit document genoemde artikelen kunnen los van elkaar daar waar gewenst in een overeenkomst tussen beheerder en bewaarder worden verwerkt.

DUFAS heeft als voertaal voor de *best practices* Engels gekozen. Dit heeft louter een praktische reden: de meeste overeenkomsten die wij hebben gezien zijn in het Engels gesteld. In veel gevallen is er een buitenlandse partij betrokken bij de overeenkomst.

De inhoud is met zorg samengesteld door DUFAS in samenwerking met een representatieve selectie van marktpartijen en externe adviseurs. Met name willen we daarbij het advocatenkantoor De Brauw en de Dutch Association of Depositaries speciaal noemen.

Bij de samenstelling van deze handreiking heeft DUFAS tevens dankbaar gebruik gemaakt van de bereidheid tot overleg over deze materie die de AFM heeft geboden.

Wij hopen met deze handreiking een waardevolle bijdrage te leveren aan de mogelijkheid om nieuwe fondsen snel te introduceren op de Nederlandse markt.

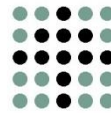
Zoals altijd vernemen wij graag eventuele opmerkingen van de gebruikers van deze handreiking, zodat wij daar bij actualisering gebruik van kunnen maken.

Wij vertrouwen erop u hiermee van dienst te zijn.

Dutch Fund and Asset Management Association (DUFAS)

Mr. J.H.M. Janssen Daalen

Algemeen Directeur



DEPOSITARY AGREEMENT - BEST PRACTICES IN THE NETHERLANDS November 2015

A depositary agreement must meet certain requirements as set out in the Dutch Financial Markets Supervision Act ("**Wft**")¹, the regulations promulgated pursuant thereto, the AIFMD Regulation and guidance and recommendations by ESMA.² In respect of a number of these requirements best practices have been developed, which have been set out below.

The best practices have been drafted assuming that the Wft has been amended in accordance with the draft legislative proposal transposing the UCITS V Directive as published on 27 March 2015³ that is expected to enter into force on 18 March 2016. Until that date depositary agreements must comply with all existing rules including rules on liability (see hereinafter "Liability").

The best practices have been drafted in a manner that these can be included in a depositary agreement.

We have assumed that a depositary agreement will be entered into with respect to multiple investment institutions (*beleggingsinstellingen*) ("**Funds**").

This document is a joint initiative of DUFAS and the Dutch association of depositaries.

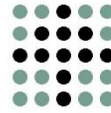
The Funds as a party to the agreement

Each of the Funds is a party to the agreement. If a Fund is not a legal entity (*beleggingsmaatschappij*) as referred to in section 1:1 Wft, but a contractual arrangement, i.e. an investment fund (*beleggingsfonds*) as referred to in section 1:1 Wft such as a fund for joint account (*fonds voor gemene rekening*) or limited partnership (*commanditaire vennootschap*), all rights and obligations of the Fund under the agreement will be rights and obligations of the titleholder as referred to in section 4:37j Wft in respect of the Fund (the "**Titleholder**"). A schedule to the agreement sets out the Titleholder in respect of each of the Funds.

¹ Transposing Directive 2011/61/EU on Alternative Investment Fund Managers ("AIFMD").

² Commission Delegated Regulation (EU) No 231/2013 supplementing the AIFMD.

³ See: <https://www.internetconsultatie.nl/icbe>.



The agreement constitutes a single agreement per Fund and does not create rights and liabilities between Funds and accordingly there will not be any joint liability (*hoofdelijke aansprakelijkheid*) of the Funds.

Appointment

The Manager appoints the Depositary to act as the depositary of the Funds, within the meaning of the Wft and to provide the AIFMD Depositary Services in respect of the Funds. The Depositary accepts the appointment. Notwithstanding any other provision in the agreement, the AIFMD Depositary Services comprise all functions and services to be provided by a depositary pursuant to:

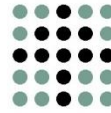
- (a) the Wft and the regulations promulgated pursuant to the Wft
- (b) the AIFMD Regulation
- (c) ESMA's guidance and recommendations within the meaning of article 16 of EU Regulation 1095/2010
- (d) any further regulations supplementing the AIFMD, as amended and supplemented from time to time (the "**AIFMD Requirements**").

This document only deals with the AIFMD Depositary Services and not with ancillary services to be provided by the Depositary. If parties wish to add ancillary services to the agreement with respect to the AIFMD Depositary Services, parties should consider their position on the topics mentioned in this document as the AIFMD Requirements do not apply to the ancillary services.

The Depositary shall provide the AIFMD Depositary Services in accordance with the AIFMD Requirements. This clause will prevail over the agreement at all times, including any provision that is contradictory to this clause, either in whole or in part.

Depositary operating through a branch

The Depositary has and will continue to have customer services staff working out of its offices in the Netherlands in sufficient numbers and with sufficient expertise in order to provide, when requested, promptly adequate



information to the Manager and the competent authorities, including without limitation Autoriteit Financiële Markten ("**AFM**") in connection with the performance of the AIFMD Depositary Services pursuant to the agreement.

If the Depositary operates through a branch in the Netherlands, the AFM requires that the agreement provides that the Dutch offices are sufficiently staffed.

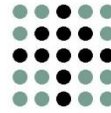
Delegation

The Depositary shall only delegate and allow sub-delegation of any of the AIFMD Depositary Services to the extent that such AIFMD Depositary Services may be delegated in accordance with the AIFMD Requirements and after notification in writing thereof to the Manager. Any delegation and sub-delegation will at all times be subject to the AIFMD Requirements.

The AIFMD Requirements allow the Depositary to delegate safe-keeping functions subject to certain conditions. The Manager should always be notified in advance of any (sub-)delegation. If the Fund assets consist of financial instruments that can be held in custody and the Depositary relies on an extensive network of sub-custodians prior approval of the Manager for a change of a sub-custodian will not be practicable. However in case of non-custody assets or in specific situations parties may wish to agree that delegation requires the Manager's prior written approval. If prior approval for (sub)delegation is not appropriate, parties could agree that the Manager may terminate the agreement on short notice following a notice of (sub-)delegation or a change in (sub)delegate(s).

Amendment Fund terms or investment policy

The Manager will notify the Depositary in writing prior to any amendment of the Fund terms or investment policy becoming effective.



An amendment that materially affects the AIFMD Depositary Services or the Depositary's liability under the agreement will only become effective after the Depositary's approval in writing.

E.g. if the Fund changes from closed-ended to open-ended or wishes to invest in other asset classes or countries.

A change of investment policy or an amendment of the Fund terms may require the approval of the AFM.

Escalation procedures

If the Depositary in the performance of the AIFMD Depositary Services becomes aware of any matter in respect of which it determines, in its sole discretion, remedial action or a further explanation from the Manager is required, it will notify the Manager hereof in writing as further set out in more detail in a schedule to the agreement.

The schedule sets out the contact details of the individuals with the Manager to be contacted in case the Depositary deems remedial action or a further explanation from the Manager is required and may allow for an escalation within the Manager. In addition, the agreement may provide that if the Depositary in its sole discretion considers the Manager's explanation unsatisfactory or the remedial action insufficient, it will notify the supervisory board, advisory board or any other Fund body vested with supervisory powers.

If the Depositary in its sole discretion considers this to be required in the best interests of the investors in the Fund, it will at the appropriate time notify the competent authorities, including without limitation Autoriteit Financiële Markten ("**AFM**"), hereof.



This clause allows the Depositary to notify the AFM prior to notification to the Manager, if this is required in the best interests of the investors in the Fund, e.g. in case of fraud by the Manager.

A confidentiality provision, if agreed, should be without prejudice to the escalation procedures and should allow for disclosure if required in accordance with the AIFMD Requirements.

Liability

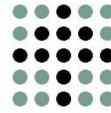
The Depositary shall be liable to the Fund in respect of the AIFMD Depositary Services as set out in the AIFMD Requirements.

Managers and depositaries may wish to amend existing depositary agreements as of 18 March 2016 as there will no longer be a legal requirement to include in the depositary agreement a third party stipulation pursuant to which investors may have a direct claim on the depositary.

An indemnification given to the Depositary against third party claims, if agreed, should not affect the liability of the Depositary under the AIFMD Requirements.

Termination

As soon as practicable after notice of termination has been given, the Manager will select a successor depositary for each of the Funds and will notify the Depositary of the successor depositary's name. If the Manager so



requests, the Depositary will provide the Manager with information that is reasonably required to prepare an action plan to select and appoint a successor depositary. The Manager will appoint the successor depositary as the depositary of the Funds as per the date that the agreement with the Depositary ends.

The termination of the agreement will not be effective with respect to the AIFMD Depositary Services provided to the relevant Fund – and the Depositary will continue to provide the AIFMD Depositary Services in respect of such Fund - until the appointment of a successor depositary for the Fund has become effective.

If the termination of the agreement has not become effective with respect to the AIFMD Depositary Services provided to a Fund because a successor depositary has not been appointed, the Manager and the Depositary will act as follows:

- (a) the Manager will inform the Depositary of the reasons for not having been able to appoint a successor depositary and the Manager will inform the AFM hereof;
- (b) the Manager will provide regular updates to the Depositary and the AFM on the progress made in selecting and appointing a successor depositary;
- (c) if a successor depositary has not been appointed within a term agreed upon between the Manager and the Depositary, or if no agreement is reached on such term, the Manager and the Depositary will notify the AFM hereof and the Manager will convene a meeting of investors of the relevant Fund(s) or will procure that such meeting is convened as soon as practicable, at which meeting possible scenarios will be discussed taking into consideration that the Fund cannot continue to be managed without a depositary.

Unless the circumstances dictate otherwise, a Manager usually will not terminate the agreement until it has identified a successor depositary.



Entire agreement

The agreement contains the entire agreement of the parties thereto in relation to its subject matter. All previous agreements and arrangements made by the parties thereto in relation to that subject matter are hereby terminated.

If ancillary agreements are entered into that could interfere with the agreement, we recommend including that the agreement will prevail.

If general (banking) conditions of the Depositary have been applied in the past or could be declared applicable in the future, we recommend excluding applicability of these general conditions.

Governing law and enforcement

The agreement is governed exclusively by Dutch law.

All disputes arising out of or in connection with the agreement, including disputes concerning its existence and validity, will be resolved by the courts in [Amsterdam], the Netherlands.

In order to facilitate the enforcement of the agreement in the interest of the investors in the Funds, the AFM takes the position that the agreement should be governed by Dutch law and a court in the Netherlands should have jurisdiction.
