

**EXPLANATORY MEMORANDUM**

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No. 3  
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**General comments**

**1. Purpose and necessity**

The primary objective of the present draft of the National Ordinance on the Supervision of Investment Institutions and Administrators (hereafter referred to as NOSIIA) is to introduce a regime of supervision for investment institutions and administrators in the interest of an adequate operation of the financial markets and the position of the investors in those markets.

Investment institutions act as intermediaries between investors and investment objectives. The assets contributed by the participants are invested by the institution with the objective of distributing the revenues from the proceeds of the investment portfolio to the participants. By making use of the services of an investment institution the investor does not personally have to take the many decisions associated with finding and keeping investments, since the institution takes such decisions for them. In addition, the use of an investment institution allows investors to achieve a much better risk spread than they would be able to achieve in person.

Since a large number of investment institutions have administrators in the Netherlands Antilles, the undersigned thinks it is necessary to subject the administrators to supervision as well.

In the light of the above the NOSIIA has been drawn up with the objective of an adequate operation of the financial markets and the protection of (future) investors in such markets. The following considerations are the basis of this objective:

- the general public should be able to rely on the competence, integrity (integrity testing being a constituent of the supervision rules) and solidity of investment institutions and administrators offering their services in the financial markets and
- the solidity and transparency of the financial sector must be ensured as much as possible so that the instruments offered through the capital market will find their way to funding of companies and governments in an optimum manner.

The secondary objective of this draft, further to the primary objective, is to keep up the reputation of the Netherlands Antilles as a respectable international financial centre and to advance the further development of this centre.

Currently there are a number of Netherlands Antilles institutions that offer securities abroad. However, in recent times they have not been admitted to certain markets or banned from certain markets in which they were already active due to the lack of a statutory framework of supervision in the Netherlands Antilles. An international financial centre cannot afford to be in this position.

The undersigned is of the opinion that the protection of investors in investment institutions by the introduction of a regime of supervision for investment institutions and administrators is fully in keeping with the broader government policy to promote the confidence of investors and savers, both domestically and abroad, in the financial sector.

In this connection the undersigned would also like to refer to the National Ordinance on the supervision of banking and credit institutions 1994, the National Ordinance on the supervision of the insurance business, the National Ordinance on company pension funds and the National Ordinance on stock exchanges that provide for the economic supervision of credit institutions, insurance companies, company pension funds and stock exchanges by the Bank of the Netherlands Antilles.

This new supervisory legislation will voice the government's responsibility for a further proper operation of the financial sector.

By providing a regulation for investment institutions and administrators the NOSIIA intends to make a further contribution to maintaining this confidence, which is essential for investment institutions and administrators.

### *Investment institutions*

Illegal acts and adverse publicity may, under certain circumstances, lead to a drastic decrease in the value of the participating interests in the institution concerned: every participant will want to get out as soon as possible to minimise their loss. This sentiment will strongly affect the value of the participating interests of the remaining participants. If an investment institution of reasonable size is declared bankrupt or put into liquidation large sums of money entrusted to such institution will be withdrawn from the public. There will also be a serious risk that the loss of confidence will spread to other investment institutions and other parts of the financial sector.

The undersigned does not intend to offer absolute protection for investors against losses and the effects of bankruptcies or liquidation by means of this proposal. Even with extremely detailed legislation - which the undersigned does not advocate at all - this would be impossible. But it is not desirable either: there is always an element of risk associated with any form of investment. The investor willingly seeks and takes this risk. It is not the government's task to lay down rules on the economic supervision of investment institutions defining limits to the extent in which an investor should want to take such risk. A typical characteristic of the market for risk-bearing capital is that the parties in that market willingly accept risks, also when they participate in investment institutions. Therefore, any system of supervision should leave sufficient freedom for the parties in the market to develop initiatives and to make choices. Without this freedom the efficient allocation of financial resources would be threatened and the general economic well-being would be significantly affected. However, the government should set certain preconditions so that the public can form a picture of the investment possibilities offered (including the objectives of the institution and its investments) and the risks involved.

## **2. Scope of the regulation**

To achieve the objectives referred to above the legislative proposal attempts to create a framework of supervision by laying down requirements in respect of investment institutions

and administrators. These requirements, which have been divided into two categories for administrators and into four categories for investment institutions, shall be further specified in provisions based on the NOSIIA. The system, with the legislative proposal indicating the framework for the further rules to be laid down by the Bank's instructions and by national decrees containing general measures, is aimed at allowing any amendments to the framework of rules to be introduced in a flexible manner. This flexibility is indispensable in view of the speed at which new developments take place inside the financial markets. Effective and credible supervision requires the framework of regulation to be able to quickly react to such new developments.

#### *Investment institutions*

The following, partially overlapping, classifications of investment institutions may help clarify the scope of the NOSIIA:

a) investment company and investment fund:

Investment institutions can be divided into two legal forms: investment companies and investment funds. An investment company is an investment institution with legal personality. Often it will be incorporated as a public limited company or a private limited company, with the shares in such companies being the participating interests. An investment fund does not have legal personality: it is capital that is managed and kept safe by third parties for the participants. The proposed regulation applies to both forms.

b) open-end and closed-end investment institutions:

An 'open-end' investment institution issues or acquires participating interests at the request of the public. If the institution does not continuously issue or re-acquire participating interests, then it is defined as a 'closed-end' investment institution. Hybrid forms are possible as well. If an investment institution does not always have the obligation to re-acquire the participating interests on the participant's request, but does actually act as an 'open-end' institution, it will be considered an 'open-end' institution for the purposes of this proposal.

c) division into investment activities:

There are many kinds of investment objects, securities and real estate being the most common ones, but other property, such as gold and raw materials, can also be investment objects. The kinds of object invested in do not play a role when deciding whether the proposed regulation applies to a specific investment institution.

### **3. Outlines of the regulation**

A licensing system for investment institutions and administrators has been opted for. Such a system should make it possible to check -at the moment of receiving an application for a licence- that the investment institution or administrator offers sufficient guarantees for raising moneys from outside a closed circle or, respectively, for performing administrative services.

#### *Investment institutions*

For the purposes of granting a licence, the NOSIIA distinguishes between:

- a) investment institutions with their registered office in the Netherlands Antilles and
- b) investment institutions with their registered office outside the Netherlands Antilles.

The investment institutions listed under a) and b) must apply for a licence. Without a licence they will not be allowed to obtain moneys for collective investment.

To obtain a licence the applicant must demonstrate that the investment institution and any custodian employed by it satisfy a number of requirements. Under certain conditions it will be possible to authorise an investment institution if it can be demonstrated that it cannot be reasonably expected to satisfy all requirements. A precondition in this respect will be that such an investment institution should offer sufficient other guarantees to satisfy the objectives of the NOSIIA.

The present proposal also provides for the power to exempt investment institutions from the prohibition laid down in Article 3 of the NOSIIA (also see article 10 of the NOSIIA). This power will be used to exempt investment institutions from the NOSIIA if they only do business with professional parties. Examples would be institutions that offer their services only to pension funds, insurance companies etcetera. Contrary to the situation in respect of most individual investors it speaks for itself that the parties, acting in their professional capacities, with whom these specialised investment institutions deal have sufficient competence and information to be able to form a reasonable opinion of what the investment institution has to offer and of the investment institution itself. They will have less need of the investors' protection offered by the NOSIIA. However, should it be proved that malpractices or abuse frequently occur in this professional circle, this proposal will make it possible to revoke the exemption, thus offering an instrument to take measures in the short term. Also investment institutions that do not seek funding from the public but that raise or obtain moneys in a closed circle shall be eligible for exemption.

In addition, the legislative proposal distinguishes between requirements that apply to being eligible for a licence and rules which the investment institution must observe for as long as it is authorised. The result of this is that permanent supervision is possible instead of only when admitting parties to the market. At the time of the application for a licence only the intended behaviour by investment institutions can be examined. Especially where newly established investment institutions are concerned, their future behaviour is still unclear. In addition, certain standards do not become relevant until after granting a licence, such as requirements in respect of reports that cannot be drawn up without a prior history.

#### *Administrators*

For the purposes of granting a licence the NOSIIA distinguishes between:

- a) administrators with their registered office in the Netherlands Antilles and
- b) administrators with their registered office outside the Netherlands Antilles.

The administrators listed under a) and b) must apply for a licence. Without a licence they will not be allowed to carry out administrative services.

To obtain a licence the person seeking a licence must demonstrate that the administrator satisfies a number of requirements. Under certain conditions it will be possible to authorise an administrator if it is demonstrated that it cannot be reasonably expected to satisfy all requirements. A precondition in this respect will be that such an administrator must offer sufficient other guarantees to satisfy the objectives of the NOSIIA.

The present proposal also provides for the power to exempt administrators from the prohibition laid down in Article 17 of the NOSIIA (also see article 24 of the NOSIIA). E.g. foreign administrators who are subject to adequate supervision elsewhere are eligible for exemption.

In addition, the legislative proposal distinguishes between requirements that apply to being eligible for a licence and rules which the administrator must observe for as long as it is authorised. The result of this is that permanent supervision is possible instead of only when admitting parties to the market.

#### **4. Contents of the regulation**

The NOSIIA starts from the principle that certain minimum requirements must be set for investment institutions and administrators in the interest of an adequate operation of the financial markets and the position of the investors in such markets.

Due to the different natures of the activities of the investment institutions and of the administrators it has been decided to include separate chapters on their licensing regimes in this draft.

##### *Investment institutions*

To be granted a licence and to be admitted to the market the investment institutions and any custodian employed by the institution will have to satisfy certain requirements, divided into four categories. The first category concerns the competence and integrity (of which probity testing is a constituent) that the investment institution and the custodian are expected to have. These requirements are specifically intended to avoid participants being affected by incompetent acts or bad faith. The second category is made up of provisions concerning financial guarantees such as a minimum equity capital amount. The third category concerns business operation. This concerns requirements set to the organisational and legal structure as expressed in the articles of association of the investment company or the fund rules and in other documents outlining the conditions of management and safe-keeping of the capital. The fourth category contains requirements regarding the information provided to allow investors to form a reasonable opinion of the contents of the investment instruments offered. In addition information on such matters as the articles of association, rules and other conditions of management and safe-keeping must be available. The above requirements will be further detailed in instructions to be issued by the Bank.

The legislative proposal requires the investment fund's management company to have legal personality. The reason for this is that the capital of the fund's daily management and of the fund itself have to be separated and have to remain separated. If the management company is a legal person, this separation is obvious. In addition, a legal person has one or more bodies that supervise its daily management or control its financial status as a rule.

In addition, the investment fund's assets must be entrusted for safe-keeping with an independent custodian. This is also aimed at capital separation. With investment funds the custodian occupies a prominent role. It is the custodian's responsibility to act in the participants' interest and to see to it that the management company acts in accordance with the articles of association and/or the rules. Since the capital rests with the custodian, the management company requires the custodian's cooperation to dispose of the capital. This is

why it is so important that the custodian is independent of the management company, i.e. that there are no personal or financial ties between them that might threaten the proper performance of the custodian's function. The custodian must be a legal person too. Most investment companies do not have independent custodians, but keep their assets safe themselves. This is possible because the investment company is subject to company law, allowing sufficient capital separation. As a result, and since company law provides for consultation by shareholders, there is no need to make further provisions regarding the acts of investment companies by a custodian, contrary to funds where this is necessary.

The rules to be observed by an investment institution and its custodian, if employed by the investment institution, after a licence has been granted, have been subdivided into these four categories as well and are intended to ensure that the competence and integrity, financial securities, business conduct and information provision do not fall to below the levels that existed at the time when the licence was granted. E.g. it will have to be demonstrated that new executive officers meet the same requirements of competence and integrity. As regards the financial guarantees both the management company and the custodian must have a minimum amount of equity capital. In the field of business conduct, amendments to the articles of association, fund rules or conditions of management and safe-keeping will be subject to the Bank's approval. Where the provision of information is concerned the prospectus requirements that apply when granting a licence will remain fully applicable to new or amended prospectuses. In addition, the investment institutions will have to publish annual accounts and half-yearly figures that satisfy a number of requirements. In addition, the investment institution will always have to have current information available with which participants can get an insight into the value of their investment interests, cost, the investment policy etc.

The undersigned is of the opinion that thanks to the combination of licensing requirements and the rules that apply once a licence has been granted the NOSIIA will form a good basis to ensure that the public, making investments will have sufficient confidence in the qualities of the investment institutions' organisations and in their information provision.

For clarity's sake it is noted that the supervision of investment institutions to be carried out by the Bank will differ from the Bank's supervision of credit institutions. Both forms of supervision share common characteristics such as the admission system and the assessment of the organisation of the investment institutions concerned and the executive officers involved. A significant difference between these forms of supervision is the fact that the supervision of the (quality of the) placement by banks plays a considerable role under the National Ordinance on the supervision of banking and credit institutions 1994, whereas under the NOSIIA the supervision does not concern the investment policy. These different approaches can also be explained by looking at what moves a funder to entrust moneys to a credit institution or to an investment institution respectively. The first case concerns the entrusting of moneys which the funder wants to be able to dispose of again in full (at their nominal value) immediately or in due course. The funder wants to retain its moneys in the risk-avoiding environment. In this respect the supervision must be aimed at reducing the risks where possible. The second case concerns the investment of moneys in a risk-bearing environment. The funder willingly takes the risk that it will not receive its money back or will only receive part of the money back, since the value of investments can be subject to fluctuations and it is considered quite normal that losses can occur in this respect. On the other hand, profits may be gained as well. In this case the supervision must not aim to protect the funder as much as possible against the risks it has sought out itself. The supervision will

have to be aimed at ensuring that the funder can (continue to) make a good assessment of the risk to be run by it on the basis of correct and sufficient information. In addition, by examining the investment institution as well as its major officers on the basis of the NOSIIA criteria the supervisory body will try to ensure that an adequate business organisation exists.

### *Administrators*

To be granted a licence and to be admitted to the market the administrators will have to satisfy certain requirements, divided into two categories. The first category concerns the competence and integrity (of which probity testing is a constituent) that the administrator is expected to have. These requirements are specifically intended to avoid interested parties being affected by incompetent acts or bad faith. The second category concerns business operation. This concerns requirements set to the organisational and legal structure as expressed in the administrator's articles of association. The above requirements will be further detailed in instructions to be issued by the Bank.

The legislative proposal requires the administrator to have legal personality.

The rules to be observed by an administrator after a licence has been granted have been subdivided into these two categories as well and are intended to ensure that the competence, integrity and business conduct do not fall to below the levels that existed when the licence was granted. E.g. it will have to be demonstrated that new executive officers meet the same requirements of competence and integrity. In the field of business conduct, amendments to the articles of association will be subject to the Bank's approval.

The undersigned is of the opinion that thanks to the combination of licensing requirements and the rules that apply once a licence has been granted the NOSIIA will form a good basis to ensure that the interested parties will have sufficient confidence in the qualities of the administrator's organisation and in the qualities of the executive officers of such administrators.

## **5. Implementation of supervision**

The Bank will carry out the supervisory tasks pursuant to the NOSIIA. It has the disposal of a competent organisation that is considered an authority in financial markets. As a result, there are sufficient guarantees for a good implementation of the NOSIIA. The objection to a new body would be that the financial markets would have to deal with a new supervisory body in addition to the Bank. This would not improve the transparency of the markets. In this connection the undersigned would like to refer to the fact that the demarcations between financial institutions become increasingly less distinct. This development and the international trend reported by the IMF underlines the desirability of concentrating and coordinating the supervision of financial institutions where possible. Another reason why the Bank should be made responsible for supervision is associated with the fact that many investment institutions are closely affiliated with banks (the 'in-house managed funds'). The implementation of supervision of the banks and their in-house managed funds by one supervisory body would mean a reduction of the burden that multiple supervision would bring.

In this context it should be noted that the fact that investment institutions and administrators are supervised does not offer any guarantees whatsoever that no debasement will take place

with such investment institutions or administrators or that no developments can occur affecting such investment institutions or administrators as a result of which the institution will have to be declared bankrupt and/or put into liquidation. As to the supervision of credit institutions there is already a rule that neither the government nor the supervisory body can be held responsible for the policy of the institutions under their supervision. This should also apply, to a greater extent, to the supervision of investment institutions and administrators.

A final note is that the implementation cost pursuant to the NOSIIA can be passed on to the sector concerned with the objective of structural cost recovery. This is not new: such a regime also applies pursuant to the National Ordinance on the supervision of the insurance business and the National Ordinance on the supervision of stock exchanges. The importance of a good regulation and a framework for supervision of investment institutions and administrators justifies that they should bear the costs of implementation. A responsible and easy-to-use system will be designed to pass on the costs to investment institutions and administrators. In this context a system might be drawn up where a fixed amount per application for a licence is charged as well as a certain annual contribution to be paid by every authorised investment institution and administrator for as long as their licence is valid, taking into consideration the balance sheet totals. In keeping with the principle that no severe form of supervision will be implemented, the cost will be laid down at a minimum justifiable level. A budget will be drawn up on annual basis in accordance with provisions drawn up by national decree containing general rules. The supervision of the investment institutions and administrators is expected to result in the creation of new jobs with the Bank, good for approximately ten FTEs.



## EXPLANATION OF THE INDIVIDUAL ARTICLES

### Article 1

a) - c) The definitions of investment companies and investment funds ensure that (observing the further distinction outlined in the proposal) the NOSIIA applies to all investment institutions, irrespective of their legal form. Investment institutions come in many shapes, also because foreign institutions operate on the Netherlands Antilles market as well. In the general comments the distinction between investment companies and funds has already been discussed. Further to this it should be noted that the definition of investment fund does not specify that it has legally separated capital. This element was not included in the definition to avoid circumvention of the law by means of ingenious structures where, for example, a non-separated fund could be formed after which it could be alleged that the NOSIIA would not apply to this due to this very definition. In addition, it may also be noted that off-shore investment institutions with a registered office in the Netherlands Antilles will be considered investment companies or funds depending on their legal forms. As a result, it will not be possible to create investment institutions *sui generis* which would not be subject to the proposed regulation for that reason. The expression 'pecuniary means or other property' in the definitions should be taken in the widest sense of this expression: all property and capital interests that an investment institution receives from its investors and that can be broken down into financial units are included by it. The word 'revenues' does not only refer to the direct returns, but also to the growth of the intrinsic value of a participating interest.

Enterprises such as holding companies are not subject to the operation of the NOSIIA: their activities do not tend to be referred to as investment, but as managing and providing capital to their subsidiaries and participations. The accumulation of moneys by supervised credit institutions and insurance companies is not subject to the NOSIIA either since the moneys that they raise are not intended for collective investment. The NOSIIA will not apply to securities investment intermediaries either. Securities investment intermediaries are:

1. anyone actively involved in the negotiation of securities transactions as an intermediary in the framework of the exercise of their business or profession;
2. anyone who in the framework of the exercise of their business or profession offers the possibility of opening an account, obtaining claims expressed in securities, where such securities transactions can be effected using the account concerned; and
3. anyone effecting stock exchange transactions as a stock broker for its own account in order to maintain a securities market or to gain a benefit from any difference between the demand and supply prices of securities.

The NOSIIA does apply to independent investment subsidiaries of such companies and for example the in-house managed funds of banks to the extent that they raise or obtain pecuniary means or property for collective investment outside a closed circle.

d) In principle a 'participant' will be a unit-holder in an investment company or a participant in an investment fund. However this definition has been formulated in a non-restrictive manner since other forms of participation are possible as well, such as the membership of an association.

e) An investment fund may have more than one management company. In addition an investment company may hand over (parts of) the actual capital management to third parties.

In such an event the investment company itself, being the authorised institution, will keep full responsibility for the observance of the regulations set out in the NOSIA.

g) and h) Since the work of the administrators is not restricted to organising and supervising the activities of investment institutions, a broader definition of administrative services has been provided to ensure that all services and activities of an administrator as regards the administration, business conduct, representation or establishment of investment institutions will be subjected to the Bank's supervision.

This means that the NOSIA also applies to trust companies that carry out administrative services for investment institutions.

It should be noted that the auditing work carried out by an external auditor for investment institutions is not covered by the definition of administrative services.

## **Article 2**

An investment fund is not a legal person, and as such it cannot independently hold any rights or duties. Therefore, this article states that the obligations resulting from the regulation are aimed at the fund's management company. Where a provision is aimed at the custodian, this is always stipulated explicitly.

## **Article 3**

Further to paragraphs 2 and 3 of the general section of this explanatory memorandum where the licensing obligation is discussed, it should be noted that the expression 'in or from the Netherlands Antilles' extends the scope of the national ordinance to investment institutions with their (registered) office in the Netherlands Antilles, irrespective of the country where the participating interests are traded, or that have their office outside the Netherlands Antilles, but are active on the Netherlands Antilles market. This prohibition has been drawn up to avoid participating interests being offered if the issuing investment institution has not been granted a licence. As a result, the prohibition applies to investment institutions, and to any other parties offering participating interests. In principle, this will lead to the situation where only the participating interests in authorised investment institutions can be issued and traded in the Netherlands Antillean market. The second paragraph exempts the incidental offering of participating interests by private persons from this prohibition.

## ARTICLE 4

### **First paragraph**

The requirements to be detailed in the Bank's instructions will apply to all investment institutions affected by this national ordinance:

a) competence and integrity:

A licence can only be granted if, in the opinion of the supervisory body, there is sufficient competence within the investment institutions or the custodian. In addition, there must not be any doubts as to their personal integrity. As a result the Bank will examine the history of the persons who decide on the daily policy and if applicable, the members of the Board of Directors, and of the 'investment manager/adviser' of the investment institutions subject to the supervision. The Bank may also examine the history of the shareholders if it deems this necessary. If there is any cause for doubt in this respect, the actual manner of offering participating interests will be taken into consideration when carrying out an evaluation and examination of the competence and integrity. This will specifically concern cases where aggressive or misleading door-to-door sales is involved. Any improper behaviour will result in a refusal to grant a licence, or in the provision of a specific instruction or even in the revocation of the licence. In that event the Bank may also demand the resignation of the persons involved. (See article 37 paragraph two)

b) financial securities:

Both the management company and the custodian will have to have a certain minimum amount of equity capital. Custodians will also have to be insured against the dangers of fire, transport, fraud and robbery.

c) conduct of business:

This mainly concerns requirements set to the contents of the articles of association, rules and other conditions of management and safe-keeping of the investment institution. These documents will have to include rules for the acquisition and sale of the investment institution's own participating interests, the valuation of the assets, the substitution of persons and the manner of distributing the proceeds. In addition, the articles of association must specify that the daily policy of the investment institution is determined by no fewer than two persons and that if there is a Supervisory Board, such Board must comprise of at least three members.

d) providing information:

The investment institution will be obliged to publish a prospectus satisfying the requirements to be laid down in the national decree containing general measures and satisfying the Bank's minimum requirements as to the provision of information. The main requirement in this respect will be that the prospectus must include the data that investors need in order to form a sound picture of what the institution has to offer. In addition, the investment institution will always have to have sufficient information available with which anyone can get an insight into the conditions employed and the investment activities.

### **Second paragraph**

For the requirements set to the management company and the custodian of an investment fund, refer to paragraph 4 of the general section of this explanatory memorandum. The notion of an 'independent custodian' makes it impossible for the investment institution to employ the

managers, directors or administrators of the custodian body and vice versa. It also makes it impossible for the management company and the custodian to directly or indirectly acquire participating interests in each other's capital. This prevents functions being merged and financial cross-links being made between the management company and the custodian.

The NOSIIA does not exclude that the management company and the custodian may both be subsidiaries of the same institution provided that their mutual independence is sufficiently guaranteed. For the in-house managed funds of credit institutions this would mean an effective and acceptable separation of functions. Item c imposes the obligation that an investment fund must really be a separated capital (also see the above explanation concerning Article 1, a - c).

#### **Fourth paragraph**

This paragraph makes it possible to grant a licence to an investment institution, even if it does not satisfy all relevant requirements. Thus it can be avoided that an institution whose information provision and management structure, among other things, are more than acceptable in the light of the statutory objectives is affected by the prohibition set out in Article 3. So actually this paragraph embodies a possibility of exemption and is a guarantee that the supervisory body can act in a flexible manner to avoid the regulation being implemented unfairly.

#### **Article 5**

With individual applications for a licence it may show that for the case in question it will only be justified to grant a licence if further restrictions or provisions are laid down. Think of a new fund whose direction and staff, as described above for Article 4, are only experienced with stock investments. In such event it would speak for itself that the scope of a licence would, for the time being, be restricted to stock investment, since the required competence for investing in real estate is very different from the competence required for investing in stock. Of course the application for a licence may be granted unconditionally if the investment fund in the above example recruits staff, as described for Article 4 above, that have experience and competence in the field of investing in real estate. Conditions would specifically concern the manner in which the investment institution conducts its business. They might be conditions concerning the manner in which the public is approached or the administrative system to be employed by the institution.

Sometimes a change of circumstances makes it necessary for the Bank to attach further conditions to a licence after it has been granted. This provision makes this possible.

#### **Article 6**

In principle companies that have legal personality, have made the safe-keeping of and provision of administrative services for investment objects to a significant part of their business and otherwise satisfy the requirements laid down by and pursuant to Article 4 will qualify to work as custodians. This would specifically concern certain trust companies and (subsidiaries of) credit institutions.

## **Article 7**

The power to require clarification of the name to be adopted by the investment institution serves to prevent that the public making investments is misled as to, for example, the legal form of the investment institution or its association with other institutions.

## **Article 8**

### **Second and third paragraphs**

The investment institution has to submit periodical statements within the times laid down by the Bank. The Bank will confer with the representative associations as to the form and frequency of the statements to be submitted.

### **Fifth paragraph**

Once a licence has been granted, it must be possible to check that the authorised investment institution continues to act in accordance with the objectives of the NOSIIA. For this reason, amendments to the articles of association must be submitted to the Bank for its approval.

### **Article 9, fourth paragraph**

This article obliges the investment institution's auditor to notify the Bank of any circumstances that might affect the institution's solidity and that have been observed during the performance of the work.

## **Article 10**

The so-called 'closed-end' institutions are eligible for exemption. A closed-end institution has been established by a limited number of (legal) persons, where the objective is not to attract new participants from the investing public. Examples of such closed-end investment institutions are funds established by heirs and certain investment subsidiaries of credit institutions and insurance companies. Although individual aspects play a role, the following considerations are important to answer the question whether the institution is directed at a closed circle:

- the group of persons addressed is of limited size and carefully specified;
- such persons have a certain relationship with the party making the offer or inviting them to participate; which implies that in addition to the financial relationship between the parties involved there must be other relationships as well;
- when presenting the offer or the possibility to participate it is clearly stipulated that acceptance of the offer or participation is restricted to the group of persons to whom the first and second considerations apply.

The closed circle criterion proves to be fairly easy to apply in practice and has not led to any problems with the industry itself. An example of a closed circle is a fund formed by a group of persons in the context of a small-scale association where admission to the fund is limited to the members of the association. If admission to the association itself is not or hardly subject to restrictions it might be decided that the activities are not restricted to a closed circle since participation in the fund would become fairly easy. Another example of a closed circle is when a company offers its own shares to its own employees. Here it is important that the

persons to whom the offer is directed have been clearly specified, whereas the labour agreement clearly constitutes another relationship than only the financial relationship. In addition it is important that this offer cannot be made use of by just anybody: to accept the offer one has to be an employee of the company. However, a fund specifically managed by the employer with the objective of investing for the benefit of the employees would, in principle, be subject to the NOSIIA and would not be exempted. A decisive factor here is that participation in the fund is offered by the fund itself so that the employee/employer no longer plays a role. These examples only give a very general indication of how the criteria can be applied, as every case must be assessed on the basis of its own merits and specific characteristics.

It must be noted that in the National Ordinance on the supervision of banking and credit institutions 1994 the term 'public' is defined such that all persons and bodies are covered by this term with the exception of the registered institutions. In view of the intended objectives of this national ordinance, the Bank has developed a further practical interpretation for this.

## **Articles 11 and 12**

If any of the circumstances listed in article 11 occurs, the Bank may revoke a licence. A certain freedom to decide is integrated here since immediate revocation will not always be desired or necessary, e.g. when it is certain that the authorised investment institution will rectify the existing situation within the near future. In addition, this freedom to decide is necessary from the point of view of protecting the participants' interests. These interests will always be taken into consideration when deciding whether or not to revoke a licence, since in certain cases revocation might result in serious losses for the participants. If the a licence is revoked, the investment institution will have to cease its activities and will have to wind up all current matters. Article 12 provides for this. In certain events it would be an unnecessary burden to require the former authorised administrator being wound up.

This might be the case if an open-end investment institution would want to convert itself into a closed-end investment institution in a careful manner. For this reason the third paragraph of Article 12 has been included for investment funds. With respect to an investment institution this may be avoided by not submitting a winding-up request referred to above.

### **Article 13**

This article contains a number of provisions to allow the supervisory body to carry out the necessary activities to ensure that the statutory regulation is observed. In this context it is assumed that the institutions that are being supervised will authorise their external auditor in advance to furnish all information to the supervisory body that is necessary to allow it to perform its tasks.

Although this may be needless to say, it should be noted here that these powers to request information and perform an examination have the character of administrative law and can only be applied in the context of implementing the NOSIIA. If examination leads to the suspicion of an offence having been committed, the supervisory body will be allowed to notify the relevant institutions.

### **Article 14**

This power to issue instructions has been included in the NOSIIA to provide an instrument that can be used to promote the observance of provisions resulting from the National Ordinance without immediately having to consider revoking the licence.

### **Article 15**

This article provides for the possibility of 'undisclosed custody' in case special circumstances make it necessary to strengthen the management since the infrastructure is at risk. This could be in the form of a temporary appointment to management positions if a managing director is suspected of illegal acts, or if no arrangements have been made for succession in the event of the death or ill-health of a managing director, etc.

### **Article 16**

The purpose of this article is that the Bank is informed of any delays concerning the acquisition or redemption of participating interests by the investment institution.

### **Article 17**

Further to paragraphs 2 and 3 of the general section of this explanatory memorandum where the licensing obligation is discussed, it should be noted that the expression 'in or from the Netherlands Antilles' extends the scope of the national ordinance to administrators that have their (registered) office in the Netherlands Antilles, irrespective of the country where the participating interests are traded, or that have their office outside the Netherlands Antilles but are active on the Netherlands Antilles market. The prohibition applies to administrators, and to any other providers of administrative services to investment institutions.

## **Article 18**

### **First paragraph**

The requirements to be outlined in the Bank's instructions will apply to all administrators to whom this national ordinance applies:

a. competence and integrity:

A licence can only be granted if, in the opinion of the supervisory body, the administrator has sufficient competence. In addition, there must not be any doubts as to their personal integrity. As a result the Bank will examine the history of the persons who decide on the daily policy and, if applicable, the members of the Board of Directors of the administrators subject to the supervision. The Bank may also examine the history of the shareholders if it deems this necessary. Any improper behaviour will result in a refusal to grant a licence, or in the provision of a specific instruction, or even in the revocation of the licence. In that event the Bank may also demand the resignation of the persons involved. (See article 37 paragraph two)

b. conduct of business:

This mainly concerns requirements set to the contents of the articles of association, rules and other conditions concerning the administrator's activities. These documents will have to include the following rules: the acquisition of the investment institutions for whom administrative services will be carried out; the drawing up of administrative and managerial agreements; the sub-contracting of administrative and managerial services to third parties; and the intended administrative organisation including an adequate financial accounting and control organisation. In addition, the articles of association must specify that the daily policy is determined by no fewer than two persons and that if there is a Supervisory Board, such Board must comprise of at least three members.

### **Third paragraph**

This paragraph makes it possible to grant a licence to an administrator, even if it does not satisfy all relevant requirements. Thus it can be avoided that an administrator who does not fully meet the provisions concerning business conduct is affected by the prohibition set out in Article 17. So actually this paragraph embodies a possibility of exemption and is a guarantee that the supervising body can act in a flexible manner to avoid the regulation being implemented unfairly.

## **Article 19**

With individual applications for a licence it may show that for the case in question it will only be justified to grant a licence if the observance of further restrictions or provisions is required. Such conditions would specifically concern the manner in which the administrator conducts its business. They might be conditions concerning the manner in which interested parties are approached, or the administrative system to be employed by the administrator. Sometimes a change of circumstances makes it necessary for the Bank to attach further conditions to an a licence after it has been granted. This provision makes this possible.

## **Article 20**

### **Second and third paragraphs**



The administrator has to submit periodical compliance reports within the times laid down by the Bank. The form and frequency will be laid down in consultation with the representative associations.

#### **Fifth paragraph**

Once a licence has been granted, it must be possible to check that the authorised administrator continues to act in accordance with the objectives of the NOSIIA. For this reason, amendments to the articles of association must be submitted to the Bank for its approval.

#### **Article 21, fourth paragraph**

This article obliges the administrator's auditor to notify the Bank of any circumstances that might affect the institution's solidity and that have been observed during the performance of the work.

#### **Article 22**

This article obliges the administrator to immediately inform the Bank of any developments concerning certain matters, such as the observance of laws and regulations by and the business conduct of the investment institutions for whom they perform administrative services and that will or may negatively affect the investment institution and their participants. If deemed necessary by the Bank, the administrator will also be obliged to inform the Bank of the integrity and competence of the persons that determine the daily policy and, of the members of the Supervisory Board if there is such a board, the shareholders and 'the investment manager/adviser' of the investment institutions for which administrative services are provided.

#### **Article 24**

As specified in the general section of this Explanatory Memorandum foreign administrators that are adequately supervised elsewhere could be eligible for exemption.

#### **Articles 25 and 26**

If any of the circumstances listed in article 25 occurs, the Bank may revoke a licence. A certain freedom to decide is integrated here since immediate revocation will not always be desired or necessary, e.g. when it is certain that the authorised administrator will rectify the existing situation within the near future. If the a licence is revoked, the administrator will have to cease its activities and will have to wind up all current affairs. Article 26 provides for this. In certain events it would be an unnecessary burden to demand the former authorised administrator being wound up. This may be avoided by not submitting a winding-up request.

#### **Article 27**

This article contains a number of provisions to allow the supervisory body to carry out the necessary activities to ensure that the statutory regulation is observed. In this context it is assumed that the administrators that are being supervised will authorise their external auditor in advance to furnish all information to the supervisory body that is necessary to allow it to perform its tasks.

Although this may be needless to say, it should be noted here that these powers to request information and perform an examination have the characteristics of administrative law and can only be applied in the context of implementing the NOSIIA. If examination leads to the suspicion of an offence having been committed, the supervisory body will be allowed to notify the relevant institutions.

### **Article 28**

This power to issue instructions has been included to provide an instrument that can be used to promote the observance of provisions resulting from the National Ordinance without immediately having to consider revoking the licence.

### **Article 29**

This article provides for the possibility of 'undisclosed custody' in case special circumstances make it necessary to strengthen the management since the infrastructure is at risk. This could be in the form of a temporary appointment to management positions if a managing director is suspected of illegal acts, or if no arrangements have been made for succession in the event of the death or ill-health of a managing director, etc.

### **Article 30**

Investment institutions, investors and other interested parties may use the register as an easy means of ascertaining whether a certain investment institution or administrator is authorised.

### **Article 31**

This non-disclosure provision is almost identical to the provision of Article 40 of the National Ordinance on the supervision of banking and credit institutions 1994.

Again the Bank has been granted the right to refuse to give evidence in civil matters. Of course, the Bank still has the power to act as a witness or an expert, e.g. in hearings to decide on petitions for bankruptcy or liquidation.

### **Article 32**

This article may help achieve that (future) investors can be warned by the supervisory body against participation in an investment institution that raises moneys for participation outside a closed circle without satisfying the statutory licensing requirement. Investment institutions may be warned as well against entrusting their administration to an administrator that fails to satisfy the statutory licensing requirement. The undersigned would like to stress that this

concerns a discretionary power, i.e. no obligation, of the supervisory body, since imposing an obligation on the supervisory body would not be in keeping with the nature of the intended supervision. This National Ordinance concerns a sector where risks are willingly accepted by investors and investment institutions, as a result of which the supervision of this sector is more limited by nature than that employed in other sectors. Therefore the public must not automatically assume that a public warning will be issued. It speaks for itself that any use of this power will be made with the highest possible care. For order's sake it is noted that third parties cannot derive any rights from the fact that in any given case the supervisory body has failed to issue a public notification.

### **Article 33**

This article provides for the publication of data resulting from the information, such as six-monthly figures and annual accounts, which investment institutions and administrators will be obliged to provide periodically. The data will be presented in aggregate.

### **Article 34**

This article extends the possibility to disclose information to other parties within the financial sector and outside it. The items a - f define the grounds on which the disclosure of information must be refused.

### **Article 35**

This article introduces the possibility of (officers of) foreign institutions that act as "home supervisory authorities" and carry out consolidated supervision of a Netherlands Antilles investment institution or a Netherlands Antilles administrator participating in an on-site examination in the Netherlands Antilles.

### **Article 36**

This article was drawn up in the interest of promoting an equal treatment of financial institutions. Under certain conditions it may be important to have the power to take action in respect of a country that sets unreasonable restrictions to financial institutions from the Netherlands Antilles.

### **Article 37**

This article intends to give the Bank the power to impose fines on investment institutions and administrators that do not satisfy the obligations resulting from this National Ordinance or that fail to satisfy such obligations in time.

### **Article 38**

This article provides the possibility to appoint a representative association of investment institutions or custodians or administrators that could act as an interlocutor concerning NOSIIA affairs. At this time there are no associations that are eligible for such appointment.

### **Article 39**

The Bank may charge all costs of supervision resulting from the execution of this National Ordinance to the investment institutions and administrators that are subject to its supervision. By a national decree containing general measures further rules will be laid down concerning the passing on of such cost by the Bank.

### **Article 41**

This article will form the basis for penal support of the supervision pursuant to the NOSIIA.

### **Article 43**

In order to allow existing investment institutions and administrators to meet the provisions contained in the proposal, the prohibition set out in Articles 3 and 17 will not be applied until three months after the day of on which the NOSIIA takes effect.