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Investment Funds 2022

Netherlands: Law & Practice
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Law and Practice

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CONTENTS

1. Market Overview	p.3
1.1 State of the Market	p.3
2. Alternative Investment Funds	p.3
2.1 Fund Formation	p.3
2.2 Fund Investment	p.9
2.3 Regulatory Environment	p.10
2.4 Operational Requirements	p.12
2.5 Fund Finance	p.12
2.6 Tax Regime	p.13
3. Retail Funds	p.14
3.1 Fund Formation	p.14
3.2 Fund Investment	p.17
3.3 Regulatory Environment	p.17
3.4 Operational Requirements	p.19
3.5 Fund Finance	p.19
3.6 Tax Regime	p.19
4. Legal, Regulatory or Tax Changes	p.20
4.1 Recent Developments and Proposals for Reform	p.20

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1. MARKET OVERVIEW

1.1 State of the Market

The Netherlands is a commonly used jurisdiction for the formation of investment funds, and has a sophisticated, clear and flexible legal and governance system. In addition to its stable business and political environment, the Netherlands has various tax advantages that also make it an attractive fund jurisdiction. Capital is raised both internationally and from domestic investors (eg, Dutch pension funds).

As a location for private equity and venture capital funds, the Netherlands is typically used by fund managers who operate in and from the Netherlands. However, the Netherlands is also frequently used as a fund structuring jurisdiction by fund managers who have their head office outside the Netherlands, in which case they typically have some form of presence in the Netherlands, often for operational purposes.

Despite the pandemic, in 2021 there was much activity in the market, including new fundraises and an increasing number of general partner (GP)-led secondaries and continuation vehicles to address end-of-term issues. The trend towards more manager-friendly terms in fund documents seems to be unaffected by the pandemic. At the same time, the scrutiny on managers has increased due to new pan-European legislation such as the EU Sustainable Finance Disclosure Regulation (Regulation (EU) 2020/2088, or SFDR) and new legalisation regarding cross-border distribution of funds. Investors are increasingly aware of the changing landscape and are demanding higher standards, particularly in the field of ESG and reporting.

2. ALTERNATIVE INVESTMENT FUNDS

2.1 Fund Formation

2.1.1 Fund Structures

In the Netherlands, depending on the tax analyses performed in relation to them, alternative investment funds (AIFs) are generally structured in the form of a limited partnership (*commanditaire vennootschap*, or CV), a co-operative (*coöperatie*, or Coop), a contractual fund for joint account (*fonds voor gemene rekening*, or FGR) and/or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*, or BV), or a combination thereof.

Private Equity Funds

Private equity funds are generally structured in the form of a CV or a Coop.

CV

A CV is a limited partnership for the purpose of a durable co-operation between one or more managing (or general) partners (*beherend vennoten*), each with unlimited liability, and one or more limited partners (*commanditaire vennoten*), with limited liability (see **2.1.3 Limited Liability**). A CV has no legal personality and is not a separate legal entity distinct from its partners. In principle, assets cannot be held by a CV in its own name, but are held by a community of property of the partners (*gemeenschap*) or by one or more partners or a third party for the account of the community of property of the partners. Investors participate in the CV as limited partners and receive a limited partnership interest in the investment fund. Substantially all terms and conditions of an AIF can be laid down in the limited partnership agreement of the CV.

Coop

A Coop is a special form of association and is a separate entity from its members (ie, it has separate legal personality), with legal title and beneficial ownership of its assets. Investors participate in a Coop as members, with corresponding membership interests. The terms and conditions of the investment fund are typically laid down in a membership agreement (in addition to the articles of association of the Coop). A Coop does not have capital divided into shares or units.

BV

A BV is the Dutch equivalent of a private company with limited liability, and is generally the preferred legal form for privately held companies in the Netherlands. The BV is a legal entity with capital divided into one or more transferrable shares, and has legal personality. A BV is incorporated by the execution of a notarial deed of incorporation (including the articles of association of the BV) to that effect.

Hedge Funds, Debt Funds, Real Estate Funds

These types of funds are generally structured in the form of an FGR, which is not a legal entity. It is a contractual arrangement sui generis (often referred to as its terms and conditions) between a fund manager and each investor (ie, the participants), obliging the fund manager to invest and manage assets contributed by the participants for their joint account. Generally, the legal ownership of the FGR assets is held by a separate legal entity (ie, the title-holder). The FGR is not dealt with in Dutch corporate law. Parties are free to determine the financial and governance structure of an FGR.

The FGR is established by the execution of a notarial or private deed setting out its terms and conditions. The parties involved are the fund manager, the title-holder and the participants.

2.1.2 Common Process for Setting Up Investment Funds

Although the process for setting up an investment fund in the Netherlands shall mainly depend on the specific facts and circumstances, as a general rule, fund managers typically start discussing the structure and terms and conditions of the investment fund with their professional advisers. The fund manager will decide on the structure (thereby taking into account the outcome of discussions on the various tax aspects, the investor type it wishes to bind and the type of investments and investment purposes of the fund) and will prepare a term sheet setting forth the main terms and conditions of the investment fund.

In order to start (pre-)marketing activities, the fund manager will prepare the marketing material. Depending on the regulatory regime of the investment fund (please see below), (regulatory) approvals and/or registrations will first need to be obtained and/or made before the fund manager may approach potential investors. The fund manager typically makes available the main fund agreement, management agreement and subscription agreement for investors to review. Additional investors may be admitted at subsequent closings. During negotiations, investors may request side letters and/or legal and tax opinions.

Under Dutch law, the regulatory regime and supervision with respect to externally managed AIFs concern the alternative investment fund manager (AIFM) of an AIF, rather than the AIF itself (unless the latter is managed internally). The regulatory regimes that apply to Dutch AIFMs and non-Dutch AIFMs when setting up Dutch AIFs are discussed below.

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Dutch AIFM

The fully licensed regime

Pursuant to the Dutch Act on Financial Supervision (*Wet op het financieel toezicht*, or AFS), an AIFM is prohibited from managing an AIF or marketing interests in an AIF in the Netherlands without a licence thereto from the Netherlands Authority for the Financial Markets (*Stichting Autoriteit Financiële Markten*, or AFM), unless an exemption or exception applies.

The AFM will grant a licence to a Dutch AIFM upon application if the AIFM meets the requirements under Dutch law implementing the Alternative Investment Fund Managers Directive (2011/61/EC, or AIFMD). The licence requirements relate to, inter alia, the suitability and trustworthiness of the board members, the operational and control structure of the AIFM, the management of potential conflicts of interest, the appointment of a depositary, and solidity and minimum own funds requirements. The AFM has a review period of 26 weeks and may request additional documents or information during the application process (the review period will then be suspended). In practice, therefore, the process to obtain a licence takes more time.

If a Dutch AIFM holds a licence from the AFM pursuant to the AIFMD, it is, in principle, allowed to manage AIFs and to offer the interests in the AIF it manages to professional investors within the meaning of the AFS in the Netherlands, provided that it has obtained approval thereto from the AFM, as further discussed below. If the AIFM complies with the “retail top-up regime” (as further discussed under **3. Retail Funds**), the AIFM may also offer interests to non-professional investors in the Netherlands.

A licensed Dutch AIFM can manage a new AIF within the investment strategy covered by its licence and can market such AIF to professional investors if it has obtained approval thereto from

the AFM. In order to obtain such approval, a so-called investment institution notification form should be submitted to the AFM, with, inter alia, the following attached:

- a structure chart of the AIF and all connected entities;
- the fund agreement and other contractual arrangements between the vehicle and the investors;
- the prospectus in which the information required pursuant to Article 23 of the AIFMD is contained; and
- a notification form containing information on the depositary.

The AFM has one month to decide on the application, which can be extended by one month. If the AIF is managed or marketed to professional investors outside the Netherlands, a marketing passport needs to be obtained, pursuant to the Dutch implementation of Article 32 of the AIFMD.

A Dutch licensed AIFM can also pre-market an AIF in the Netherlands or another EU member state to professional investors, provided it made a notification to the AFM and the conditions set forth in Article 30a of the AIFMD, as implemented in the Netherlands, are met.

Registration regime for “Small Managers”

There is an exception from the above-mentioned licence obligation for Dutch AIFMs that can make use of the “small managers registration regime” (the “Small Managers Regime”) of Section 2:66a of the AFS. In order to be able to make use of this exemption, each of the following conditions has to be met by the AIFM.

- The AIFM manages directly – or through an undertaking with which it is linked through common management, common control or a qualified holding – portfolios of AIFs whose

assets under management (AuM) in total do not exceed (the “AuM Thresholds”):

- (a) EUR100 million; or
 - (b) EUR500 million if all the AIFs managed by the AIFM are unleveraged and there are no redemption or repayment rights exercisable with respect to interests in the AIFs for a period of five years following the date of the acquisition of the interests in the respective AIFs.
- Interests in each AIF managed by the AIFM may only be marketed (the “Placement Restrictions”):
 - (a) to professional investors within the meaning of Section 1:1 of the AFS;
 - (b) to fewer than 150 persons; or
 - (c) for a countervalue of at least EUR100,000 per investor.
 - The AFM clarified that the following conditions should be met, in order to make use of the third Placement Restriction mentioned above:
 - (a) the amount of the first capital commitment per investor is at least EUR100,000 (exclusive of costs);
 - (b) the first amount called under the commitment per investor should be at least EUR100,000; and
 - (c) the amount of committed capital may never fall below EUR100,000.

A Dutch AIFM that meets the AuM Thresholds and the Placement Restrictions and wants to make use of the Small Managers Regime needs to register itself and the AIF it manages/intends to market with the AFM, by submitting a registration form through a digital portal (including an overview of the AuM and a description of the investment strategy). The AFM charges EUR4,400 for a registration. After review and acceptance of the registration form, the AIFM and the AIFs managed by it will be included in the public register of the AFM kept on its website. If the AIFM meets the conditions of the

Small Managers Regime, it can start managing the AIF and marketing the AIF in the Netherlands after the registration is submitted to the AFM. There is no waiting period.

If the AIFM wishes to raise a new AIF after registering itself, it should register the AIF two weeks prior to the commencement of the marketing of the AIF. This term of two weeks is a request from the AFM and is not provided for in Dutch legislation, but it is advisable to take this period into account. If the AIFM exceeds the AuM Thresholds or no longer fulfils the Placement Restrictions, the AIFM must apply for a licence from the AFM within 30 calendar days thereafter.

Non-Dutch AIFM

A non-Dutch AIFM that intends to set up a Dutch AIF should comply with the following regulatory regimes, depending on whether the non-Dutch AIFM is an EU AIFM or a non-EU AIFM.

EU non-Dutch AIFM

An EU AIFM with an AIFMD licence in another EU member state can manage a Dutch AIF pursuant to a passport obtained in accordance with Article 33 of the AIFMD.

An EU sub-threshold AIFM is, pursuant to the Dutch implementation of the AIFMD, not allowed to manage a Dutch AIF. For the sake of completeness, the authors note that a legislative proposal is pending, pursuant to which, EU sub-threshold AIFMs are allowed to manage Dutch AIFs, provided that interests in the AIF are marketed to professional investors.

Non-EU AIFM

A non-EU AIFM that intends to manage a Dutch AIF needs to comply with the Dutch implementation of the national private placement regime of Article 42 of the AIFMD (NPPR). A number of conditions apply in order to make use of the Dutch NPPR, such as:

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- that interests in the AIF can only be marketed to professional investors;
- a memorandum of understanding is entered into between the competent supervisory authority of the non-EU AIFM and the AFM;
- the AFM is notified by the non-EU AIFM through a notification form including an attestation of the competent supervisory authority of the non-EU AIFM; and
- certain transparency rules of the AIFMD are complied with, as set out in Articles 22, 23, 24 and 26–30 of the AIFMD.

A non-EU AIFM can also pre-market an AIF in the Netherlands to professional investors, provided it made a notification to the AFM and the conditions set forth in Article 30a of the AIFMD, as implemented in the Netherlands, are met.

2.1.3 Limited Liability

The Dutch legal forms commonly used for investment fund formations are a CV, a Coop, an FGR and/or a BV. All these forms provide for the limited liability of investors. Typically, upon the request of investors, legal opinions are given in this respect, subject to the applicable assumptions and qualifications.

The Netherlands, furthermore, provides for two specific tax fund regimes that may be used for specific strategies:

- the exempted investment institution (*vrijgestelde beleggingsinstelling*, or VBI); and
- the fiscal investment institution (*fiscale beleggingsinstelling*, or FBI), which is a Dutch REIT regime.

CV

A CV is a limited partnership for the purpose of a durable co-operation between one or more managing (or general) partners, each with unlimited liability, and one or more limited partners (*commanditaire or stille vennoten*) who are not per-

sonally liable towards third parties for the obligations of the CV in excess of the amount they have contributed or have agreed to contribute to the CV, unless the names of the limited partners (or characteristic elements of their names) are used in the name of the CV or the limited partners engage in any act of management or control (*daden van beheer*) or are involved in any activities of the CV (even by virtue of a power of attorney – *volmacht*). However, a limited partner may be held liable for obligations of the CV if:

- such limited partner has committed a tort (*onrechtmatige daad*);
- such limited partner qualifies as a policy-maker (*beleidsbepaler*) or a co-policymaker (*medebeleidsbepaler*) of the GP and there is evidently improper management of the GP;
- such limited partner voluntarily assumes liability for the obligations of the CV; or
- in certain exceptional circumstances only, a limited partner is identified with a GP.

Coop

If the articles of association of the Coop do not provide otherwise, members and former members of a Coop are liable for deficits upon liquidation or bankruptcy. However, Dutch law allows the liability of the members to be limited or excluded in the articles of association. The letters W.A. (*wettelijke aansprakelijkheid* – unlimited liability), B.A. (*bepaalde aansprakelijkheid* – limited liability), or U.A. (*uitsluiting aansprakelijkheid* – exclusion of liability), respectively, have to be added to the name of the Coop to indicate the level of liability of the members. A member of a Coop U.A. is not personally liable for any deficit of the Coop. However, a member of a Coop U.A. may still be held liable for the obligations of the Coop if:

- such member has committed a tort;

- such member qualifies as a policymaker or a co-policymaker of the Coop and there is evidently improper management of the Coop; or
- such member voluntarily assumes liability for the obligations of the Coop.

BV

A BV is a legal entity with capital divided into one or more transferrable shares, which has legal personality (*rechtspersoonlijkheid*). A shareholder of a BV is, in principle, not personally liable for acts performed in the name of the company, and does not have to contribute to the losses of the company in excess of the amount to be paid up on its shares. However, the liability of a shareholder for the obligations of the BV may arise if:

- such shareholder committed a tort;
- such shareholder qualifies as a policymaker or a co-policymaker of the company and there is evidently improper management of the company;
- such shareholder voluntarily assumes liability for the obligations of the company;
- in exceptional circumstances, where “hiding” behind separate legal identities constitutes an abuse of law, such shareholder may be identified (*vereenzelvigd*) with the company; or
- a shareholder receives a distribution in excess of the company’s freely distributable reserves while being aware – or when it reasonably should have been aware – that such distribution was not permitted.

FGR

The liability of a participant of an FGR to make contributions is generally limited to the amount that each participant has paid or agreed to pay. However, although the FGR is not a legal entity (*rechtspersoon*) or a partnership (*personenvennootschap*), but a contractual arrangement sui generis, the possibility of an FGR being requalified as a partnership (*maatschap/vennootschap onder firma*) or a limited partnership

among the fund manager, the title-holder and the investors (ie, the participants) or among the participants cannot be ruled out if, as a factual matter, it meets the constitutive requirements of such a partnership. Upon such a requalification, the investors may become liable for equal amounts (*gelijke delen*) (if the FGR is requalified as a *maatschap*) or jointly and severally liable (*hoofdelijk aansprakelijk*) (if the FGR is requalified as a *vennootschap onder firma* or *commanditaire vennootschap*) for the liabilities of such partnership.

2.1.4 Disclosure Requirements Dutch AIFMs

Pursuant to the Dutch implementation of Article 23 of the AIFMD, a Dutch licensed AIFM should provide professional investors with a prospectus setting out the disclosures required pursuant to Article 23 of the AIFMD when marketing an AIF in the Netherlands. If the AIF is marketed under the retail top-up regime to non-professional investors that invest less than EUR100,000, additional disclosure requirements apply, as set out under **3. Retail Funds**. Also, if the AIF is marketed to non-professional investors, a key information document (KID) has to be prepared and made available to non-professional investors pursuant to Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), regardless of the amount invested.

With respect to marketing communications by Dutch AIFMs, as a general rule, marketing information provided by an AIFM has to be accurate, clear and not misleading. Also, all information provided by the AIFM may not be contrary to the information that is required to be disclosed pursuant to the AFS, and it should be made clear whether documents are of a commercial nature. As of 1 February 2022, marketing communica-

tions with respect to AIFs or UCITS marketed by licensed AIFMs and UCITs managers should comply with the requirements of the ESMA Marketing Communication Guidelines.

Dutch AIFMs that are registered under the Small Managers Regime should include a selling legend in the private placement memorandum and other marketing materials, in which the Placement Restrictions that will be used by the AIFM (as set out in **2.1.2 Common Process for Setting Up Investment Funds**) are explained. If the marketing is not limited to professional investors, the marketing materials and offering documentation must contain an exemption statement in the manner as provided for by the AFM, and a PRIIPs KID has to be prepared and made available to the non-professional investors.

In addition, if an AIF is closed ended with tradable units, the AIF should publish an approved prospectus pursuant to the Prospectus Regulation (EU 2017/1129), unless an exemption applies.

Furthermore, pursuant to the SFDR and Taxonomy Regulation (Regulation (EU) 2020/852, the “Taxonomy Regulation”) that have introduced additional disclosure requirements to the existing elements of relevant sectoral legislations (AIFMD, UCITS, etc) both at the legal entity as well as at the financial product-level, Dutch AIFMs shall be required to make certain disclosures in, amongst others, the prospectus or private placement memorandum and on the website.

Non-Dutch AIFMs

With respect to EU AIFMs, on the basis of their home country rules implementing the AIFMD, authorised AIFMs from other European Economic Area (EEA) member states will be required to provide a prospectus when marketing to Dutch investors, pursuant to Article 32 of the AIFMD. If

the AIF is marketed under the Dutch retail top-up regime to non-professional investors that invest less than EUR100,000, additional disclosure requirements apply, as set out under **3. Retail Funds**. Also, if the AIF is marketed to non-professional investors, a KID should be provided. In addition, if an AIF is closed ended with tradable units, the AIF should publish an approved prospectus pursuant to the Prospectus Regulation (EU 2017/1129), unless an exemption applies.

With respect to non-EU AIFMs, the non-EU AIFM that is marketing an AIF pursuant to the Dutch NPPR should provide a prospectus setting out the disclosures required pursuant to Article 23 of the AIFMD when marketing an AIF in the Netherlands to professional investors. In addition, the disclosure requirements pursuant to the SFDR and Taxonomy Regulation for Dutch AIFMs apply mutatis mutandis to non-EU AIFMs.

2.2 Fund Investment

2.2.1 Types of Investors in Alternative Funds

The main fund investors located in the Netherlands investing in investment funds are Dutch pension funds, commercial banks and insurance companies. There are also multiple Dutch family offices and multi-family offices/asset managers, high net worth individuals and regional public investment institutions that invest in investment funds. The Dutch government (via the European Investment Fund, or EIF) frequently invests in Dutch funds targeting SMEs.

2.2.2 Legal Structures Used by Fund Managers

Dutch fund managers often adopt the legal form of a BV to carry on their risk and portfolio management activities for the benefit of the investment funds under management.

2.2.3 Restrictions on Investors

AIFMs under the Small Managers Regime may only offer the interests in each AIF in accordance with the Placement Restrictions.

Dutch or EU-licensed AIFMs are restricted to offering the interests in the AIFs they manage to professional investors (within the meaning of Section 1:1 of the AFS), unless they have opted for the “retail top-up”. The AIFM is not required to comply with the requirements under the retail top-up regime if interests are offered for a countervalue of more than EUR100,000 per investor.

Non-EEA AIFMs making use of the Dutch NPPR may only offer interests to “qualified investors” within the meaning of the AFS.

2.3 Regulatory Environment

2.3.1 Regulatory Regime

Under Dutch law, the regulatory regime and supervision with respect to investment funds is the concern of the fund manager of an investment fund, rather than the investment fund itself (unless the latter is managed internally). In principle, fund managers of AIFs that are active in the Netherlands fall within the scope of the AIFMD and the Dutch implementation thereof in the AFS and the rules and regulation promulgated thereunder.

It is, in principle, prohibited in the Netherlands for an AIFM to manage an AIF or to market interests in an AIF without having obtained a licence from the AFM. This is only different if an exemption to the licence requirement is available, such as using a passport by a licensed EU AIFM, making use of the Small Managers Regime or registration under the NPPR. In principle, there are no investment limitations, other than those included in the authorisation (licence or registration).

2.3.2 Requirements for Non-local Service Providers

Pursuant to the Dutch Trust Offices Act 2018 (*Wet toezicht trustkantoren 2018*), it is prohibited to provide the following trust services (*trustdiensten*) in the Netherlands, unless a licence to do so has been obtained from the Dutch Central Bank (*De Nederlandsche Bank N.V.*, or DNB):

- being a director/partner of a legal entity/company;
- providing a (postal) address for an object company and performing “additional activities” such as record-keeping or preparing and filing tax returns (domicile plus);
- selling or intermediating in the sale of legal entities;
- acting as a trustee; and
- providing a conduit company.

Non-local service providers located in another EEA member state are prohibited from providing trust services in the Netherlands, unless a trust office licence has been obtained. Non-local service providers located outside the EEA cannot apply for such a licence, thus are prohibited from offering trust services in the Netherlands. With respect to custody services, a licence pursuant to the second Markets in Financial Instruments Directive (2014/65/EU, MiFID II) may be required.

2.3.3 Local Regulatory Requirements for Non-local Managers

An AIFM authorised in another EEA member state in accordance with Article 6 sub-paragraph 1 of the AIFMD may manage a Dutch AIF in the Netherlands on a cross-border basis with a passport, provided that the procedure of Article 33 of the AIFMD is followed, which, in summary, entails certain documentation and information being provided to the home member state regulator of the AIFM, and in so far as the AIFM has notified the AFM of its intentions to manage a Dutch AIF in the Netherlands.

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An AIFM within the EEA that is not authorised in another EEA member state is not allowed to manage Dutch AIFs on a cross-border basis. The Small Managers Regime as set out under **2.1.2 Common Process for Setting Up Investment Funds** is not available to “small” EU AIFMs outside the Netherlands. For the sake of completeness, the authors note that a legislative proposal is under consultation, pursuant to which, EU sub-threshold AIFMs are allowed to manage Dutch AIFs, provided that interests in the AIF are marketed to professional investors.

A non-EEA AIFM may manage a Dutch AIF on a cross-border basis if such AIFM complies with the conditions of the Dutch NPPR. These conditions entail, in summary, certain reporting, disclosure and transparency requirements relating to the annual report, disclosures to investors (both initially and on an ongoing basis), reporting obligations to regulatory authorities and, where relevant, transparency and asset-stripping requirements relating to investments in portfolio companies, and co-operation arrangements are in place between the supervisory authority of the non-EEA country where the AIFM is established and the AFM. In addition, a notification should be filed with the AFM, including an attestation of the home country supervisor of the non-EEA AIFM. Furthermore, the non-EEA country where the AIFM is established should not be listed as a non-co-operative country for the purposes of the Financial Action Task Force (FATF). Finally, pursuant to the Dutch NPPR, units in the relevant AIFs may only be offered to “qualified investors”, within the meaning of the AFS.

2.3.4 Regulatory Approval Process

With respect to the regulatory approval process, please see **2.1.2 Common Process for Setting Up Investment Funds**.

2.3.5 Rules Concerning Marketing of Alternative Funds

Reference is made to **2.1.2 Common Process for Setting Up Investment Funds**. The regulatory regimes set out therein also apply if an AIF is marketed in the Netherlands. As a result, a Dutch AIFM should make use of the Fully Licensed Regime or, if applicable, the Small Managers Regime when marketing interests in AIFs in the Netherlands. A licensed AIFM in another EEA member state may market interests in EU AIFs in the Netherlands pursuant to the passporting regime set out in Article 32 of the AIFMD. Presently, a legislative proposal is under consultation in which it is provided that sub-threshold AIFMs in other EEA member states may market interests in AIFs to professional investors in the Netherlands. Non-EEA AIFMs may only market interests in AIFs in the Netherlands while making use of the Dutch NPPR. If a licensed EEA AIFM intends to market a non-EEA AIF in the Netherlands, the Dutch NPPR should be complied with.

Regarding the information to be made available when marketing interests in AIFs in the Netherlands, reference is made to **2.1.2 Common Process for Setting Up Investment Funds**.

2.3.6 Marketing of Alternative Funds

Please see **2.2.3 Restrictions on Investors** regarding the applicable restrictions on investors.

2.3.7 Investor Protection Rules

For Dutch AIFMs that are registered under the Small Managers Regime, from a regulatory perspective, there are generally no investor protection rules that should be taken into account.

For the AIFMs (including Dutch-licensed AIFMs) authorised under the fully licensed regime, the investor protection rules pursuant to the AIFMD apply. Generally speaking, no gold plating of the AIFMD has taken place in the Netherlands,

which means that, inter alia, the following AIFMD investor protection rules on the following topics should be taken into account:

- operating conditions, including requirements regarding remuneration, conflict of interest and risk management;
- depositary;
- fair treatment of investors; and
- transparency requirements.

When interests are marketed to non-professional investors that invest less than EUR100,000, additional investor protection rules pursuant to the Dutch retail top-up regime need to be complied with.

2.3.8 Approach of the Regulator

The AFM may be described as a supervisor that duly considers the legal basis for its supervision and enforcement, while adopting a rather pragmatic approach if possible. This is no different when it comes to the supervision of AIFMs on the basis of the Dutch implementation of the AIFMD.

2.4 Operational Requirements

For Dutch licensed AIFMs, the operational requirements pursuant to the AIFMD apply. Generally speaking, provided that the offering is limited to professional investors, no gold plating of the AIFMD has taken place in the Netherlands. Generally, there are no restrictions on the types of activity or the types of investments for the AIF, provided that the envisaged activities/investments fall within the investment strategy covered by the AIFM's licence.

Licensed AIFMs have to appoint a depositary for the AIF. In principle, in the Netherlands, such depositary is subject to a licence requirement, unless a specific exemption to the licence requirement is available. If the AIF has no legal personality, the legal ownership of the assets

under management have to be held by a separate legal entity whose sole object stated in the articles of association is holding the legal ownership of the assets of investment funds.

Certain other operational requirements are also relevant, such as customer due diligence requirements on the basis of the Dutch implementation of the (revised) Fourth Anti-Money Laundering and Terrorist Financing Directive, which is applicable to AIFs.

Dutch AIFMs registered under the Small Managers Regime are, in principle, not subject to any specific operational requirements.

2.5 Fund Finance

All types of investment funds in the Netherlands generally have access to subscription financing and leverage financing. Traditional subscription financing remains the main type of financing selected by investment funds in the Netherlands, although there has been an overall increase in the use of financing by managers and investment funds, including fund-level leverage (such as hybrid credit lines and NAV financings). Traditionally, financings to Dutch investment funds are made available by (Dutch) banks; however, nowadays, foreign lenders (including alternative lenders) are also active on, or entering, the Dutch fund finance market.

An important consequence of incurring leverage at the level of a Dutch investment fund is that, depending on the structure of the fund and the details of the financing, the relevant fund manager may be required to obtain authorisation (by way of a licence) in the Netherlands. Other than that, for all practical purposes, there are no material restrictions on borrowing funds, provided that borrowed funds are attracted from professional market parties (eg, banks, pension funds and those persons that commit at least EUR100,000).

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Typically, subscription financing granted to a Dutch investment fund would be secured by providing security in the form of a right of pledge over (i) bank accounts, and (ii) the receivables or contractual rights that the investors owe to the investment fund arising out of the fund agreement, such as the contractual right of the investment fund to receive capital contributions.

Pursuant to Dutch law, security over receivables can be established by way of a disclosed right of pledge or by way of an undisclosed right of pledge. Typically, in relation to subscription financing granted to a Dutch fund, a disclosed right of pledges over those investor receivables or contractual rights is created. A disclosed right of pledge is created by way of a security agreement and notification of the right of pledge to the relevant debtors of the secured receivables. There is no prescribed form for notification, and no requirement to include a detailed description of the security agreement. Such notification can be made by uploading the notice to the relevant investor portal, making the process of serving notice a fairly effortless procedure. An undisclosed right of pledge is created by way of a notarial deed or by way of a security agreement that is registered with the Dutch tax authorities for date-stamping purposes.

In addition, depending on the type of financing and the structure of the investment fund, security could also be granted in respect of the assets in which an investment fund would (indirectly) invest.

There are generally no legal issues that commonly arise in relation to fund finance in the Netherlands.

2.6 Tax Regime

Currently, a CV (and its foreign law equivalents) can be organised as a tax-transparent entity (a “closed” CV) or as a tax-opaque entity (an

“open” CV). The closed character requires that any admission or substitution of a limited partner, as well as any change in relative interests among the existing limited partners, is subject to the prior unanimous consent of all partners, both general and limited partners. These restrictions also apply to transfers to affiliates. The fund documentation generally provides that such consent shall be deemed to have been given if an investor has not declined its approval within four weeks of the date on which the request for approval was sent. It is expected that the consent requirements and accordingly the distinction between the closed and open CV will be abolished in 2023. Accordingly, each CV (as well as foreign law limited partnerships) is expected to become tax transparent by default.

A Coop cannot be organised as a tax-transparent entity in the Netherlands. A Coop is subject to corporate income tax on worldwide income, provided that it is fully exempt from Dutch corporate income tax on dividends and capital gains derived from the qualifying equity stakes in portfolio companies (the participation exemption). Typically, the investments made by buyout funds and venture capital funds in their portfolio companies are eligible for the participation exemption. Profit distributions made by a Coop are subject to Dutch dividend tax if the Coop qualifies as a mere holding vehicle. A Coop that is used as a principal fund vehicle by fund managers that are (substantially) based in the Netherlands may, however, be eligible for an exemption.

Open and Closed FGRs

Similar to the CV, also with regard to the FGR, two types of entity exist: “closed” FGRs (“Closed FGR”) and “open” FGRs (“Open FGR”). A Closed FGR is a transparent entity for Dutch tax purposes. An FGR is considered a Closed FGR if either the participations in the FGR are not transferable other than to the FGR itself by

way of redemption, or if the participations are transferable only with the consent of all other participants. For example, debt funds may be structured as a Closed FGR. As a consequence of its tax transparency, any income and gains realised by investing through the Closed FGR are attributed to the participants as if the participants were investing directly in the investment portfolio of the FGR.

Open FGRs (ie, FGRs that do not meet the transferability criteria for the Closed FGR) are subject to Dutch corporate income tax on worldwide income, and profit distributions made by an Open FGR are, in principle, subject to Dutch dividend withholding tax. However, if certain conditions are met, the Open FGR can opt for the status of “exempt investment institution” (*vrijgestelde beleggingsinstelling*, or VBI) or “fiscal investment institution” (*fiscale beleggingsinstelling*, or FBI).

An FGR that elects to be treated as a VBI is fully tax exempt; ie, the VBI is not subject to Dutch corporate income tax and its profit distributions are not subject to Dutch dividend withholding tax. A VBI may only invest in financial instruments, including transferable securities.

The FBI is subject to Dutch corporate income tax at a rate of 0%. The FBI may only hold mere portfolio investments. However, unlike the VBI, the FBI may also invest in real estate. Consequently, in practice, the FBI may be referred to as the Dutch REIT regime. The FBI is required to meet statutory requirements as to its shareholders and leverage restrictions. Furthermore, the FBI must distribute its net income within eight months of the fiscal year-end. Profit distributions made by the FBI are, in principle, subject to 15% Dutch dividend withholding tax.

3. RETAIL FUNDS

3.1 Fund Formation

3.1.1 Fund Structures

Retail funds (eg, UCITS funds) are often structured in the form of an Open FGR or a public limited liability company (*naamloze vennootschap met beperkte aansprakelijkheid*, or NV) that adopts the legal status of an investment institution with variable capital (*beleggingsmaatschappij met variabel kapitaal*, or BMVK).

With respect to the description of the Open FGR, please see the description of the FGR under **2.1.1 Fund Structures**.

The NV has legal personality and capital divided into shares. Shareholders of an NV are required to hold at least one physical meeting each year. The NV is incorporated by the execution of a notarial deed of incorporation (including the articles of association of the NV) to that effect. The incorporation of an NV requires a bank account to be set up in the company’s name prior to incorporation, a bank statement providing evidence of the payment of the minimum paid-in share capital (if in cash) or a description of the contribution drawn up and signed by the incorporators, and an auditor’s certificate attesting to such payment (if in kind).

Both the Open FGR and the NV BMVK are suitable for the setting up of (semi) open-end and closed-end funds, as well as for umbrella funds. Both the participations in the FGR and the shares in the NV BMVK can be listed on a stock exchange.

3.1.2 Common Process for Setting Up Investment Funds

The (fund managers of) retail investment funds have to be authorised on the basis of either the Dutch implementation of the AIFMD and the

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AIFMD retail top-up regime, or the Dutch implementation of UCITS.

AIFMD

Please see **2.1.2 Common Process for Setting Up Investment Funds** regarding the registration and/or approval requirements for AIFMs and AIFs pursuant to the Dutch implementation of the AIFMD. As the authorisation pursuant to the AIFMD is, in principle, limited to professional investors, managers who intend to offer interest in the AIF they manage to non-professional investors (retail) in the Netherlands should comply with the so-called Dutch retail top-up regime. The licence for these authorised AIFMs should specifically include the retail top-up.

The authorised AIFM with a retail top-up will have to meet all requirements that apply for authorised AIFMs under the fully licensed regime. In addition, the retail top-up regime, inter alia, requires the manager to comply with detailed additional compliance, information and reporting requirements. However, the manager is not required to comply with the requirements under the retail top-up regime if interests are offered to non-professional investors for a countervalue of more than EUR100,000 per investor. AIFMs have to prepare a UCITS-like KID (in the Dutch language) for each new AIF they are marketing, and provide this to the investors prior to investing in the AIF. In this respect, please see **3.1.4 Disclosure Requirements**.

UCITS

Pursuant to Section 2:69b of the AFS, it is prohibited to manage and market UCITS funds in the Netherlands without a licence from the AFM. A licence can be obtained by the UCITS fund manager (ManCo) or by the (self-managed) UCITS. The AFM will grant a licence upon application if the ManCo meets the licence requirements under Dutch law. The licence requirements relate to, inter alia, the suitability and trustworthiness

of the board members, the operational and control structure, the appointment of a depositary, solidity and minimum own funds requirements. Holders of a qualifying holding (ie, >10% capital or voting rights) need to obtain a declaration of no objection from the DNB.

The AFM has a review period of 13 weeks for a licence application of a ManCo, and eight weeks for a licence application of a UCITS. The AFM may request additional documents or information during the application process. The review period is suspended while additional documents are being requested.

A licensed ManCo can manage a new UCITS within the investment strategy covered by its licence, and can market such UCITS to retail investors if it has submitted the notification form to the AFM at least two weeks prior to the marketing of the respective UCITS. The following should be attached to the notification form:

- a prospectus (pursuant to Section 4:49 of the AFS); and
- a so-called key investor information document (*Essentiele Beleggersinformatie*, or UCITS KID).

Until 31 December 2022, UCITS funds benefit from an exemption to the PRIIPs KID requirements under PRIIPs. As of 1 January 2023, a PRIIPs KID will have to be made available to retail investors.

3.1.3 Limited Liability Open FGR

Please see **2.1.3 Limited Liability** for a description of the Open FGR, and the limited liability of investors in an FGR.

NV

An NV is a legal entity with capital divided into one or more transferrable shares, which has

legal personality. A shareholder of an NV is, in principle, not personally liable for acts performed in the name of the company and does not have to contribute to the losses of the company in excess of the amount to be paid up on their shares. However, the liability of a shareholder for the obligations of the NV may arise if:

- such shareholder committed a tort;
- such shareholder qualifies as a policymaker or a co-policymaker of the company and there is evidently improper management of the company;
- such shareholder voluntarily assumes liability for the obligations of the company;
- in exceptional circumstances, where “hiding” behind separate legal identities constitutes an abuse of law, such shareholder may be identified with the company; or
- a shareholder receives a distribution in excess of the company’s freely distributable reserves while being aware – or when they should reasonably have been aware – that such distribution was not permitted.

When a shareholder supports or effects a dividend or other distribution whilst knowing that the NV would, as a consequence, not be able to continue paying its debts when these become due, it may qualify as acting in a tortious manner.

3.1.4 Disclosure Requirements

UCITS

The ManCo has to publish the following disclosures on its website:

- a prospectus including the information required pursuant to Article 4:49 of the AFS in conjunction with Article 118 of the Market Conduct Supervision Financial Institutions Decree (the “Decree”) and Annex I to the Decree (such as certain information about the fund, the (co-)policymakers, changes in conditions, the provision of information, the fund

activities and investment strategy, costs and remuneration, participation rights, risk profile of the fund and valuation of assets);

- the fund rules or the articles of associations of the UCITS; and
- if made public, the annual accounts of the UCITS of the two preceding years (on the basis of Article 4:50 of the AFS).

Furthermore, a UCITS KID should be available, in Dutch. As of 1 January 2023, a PRIIPs KID will have to be made available to retail investors.

In addition, as of 1 February 2022, marketing communications with respect to AIFs or UCITS marketed by licensed AIFMs and UCITS managers should comply with the requirements of the ESMA Marketing Communication Guidelines.

AIFM with Retail Top-Up

In principle, a licensed AIFM with a retail top-up will have to meet all the (disclosure) requirements that apply to licensed AIFMs under the fully licensed regime (as set out in **2.1.2 Common Process for Setting Up Investment Funds**).

With respect to an AIF that is closed ended and with tradable units, an approved prospectus should be published pursuant to the Prospectus Regulation (EU 2017/1129), unless an exemption applies.

With respect to an AIF whose units are not transferable and open-end AIFs, unless an exemption applies as a result of which there is no prospectus requirement, a prospectus including the information required pursuant to Article 23 of the AIFMD should be made available and published on the AIFM’s website, to be supplemented with particular information deemed important for retail investors as set out in the retail top-up regime (such as certain information about the AIF, the (co-)policymakers, the procedure regarding amendment of fund terms, reporting

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to investors, the fund activities and investment strategy, costs and remuneration, information with respect to the participation rights, risk profile of the fund and valuation of assets). Also, semi-annual accounts with respect to the AIFs will have to be published.

Furthermore, AIFMs have to prepare a key investor information document similar to the UCITS KID (a “UCITS-like KID”) (in the Dutch language) for each new AIF they are marketing and provide this to the investors prior to them investing in the AIF. AIFs that currently produce a UCITS-like KID under the national retail top-up regime can benefit from an exemption to the PRIIPs KID requirements under PRIIPs until 31 December 2023. As of 1 January 2023, a PRIIPs KID will have to be made available to retail investors.

In addition, as of 1 February 2022, marketing communications with respect to AIFs or UCITS marketed by licensed AIFMs or UCITS managers should comply with the requirements of the ESMA Marketing Communication Guidelines.

AIFM without Retail Top-Up

AIFMs registered under the Small Managers Regime and authorised AIFMs under the full licence that market interests to retail investors for a countervalue of more than EUR100,000 per investor have to prepare a PRIIPs KID and make this available to investors before they invest in the AIF.

3.2 Fund Investment

3.2.1 Types of Investors in Retail Funds

In general, private individuals invest in liquid funds, for the purpose of their personal wealth management.

3.2.2 Legal Structures Used by Fund Managers

Dutch fund managers often adopt the legal form of a BV to carry on their risk and portfolio management activities for the benefit of the investment funds under management.

3.2.3 Restrictions on Investors

There are no restrictions on the types of investors that can invest in a retail fund.

3.3 Regulatory Environment

3.3.1 Regulatory Regime

The (fund managers of) retail investment funds have to be authorised on the basis of either the Dutch implementation of the AIFMD and the Dutch retail top-up regime if investors are able to invest less than EUR100,000, or the Dutch implementation of UCITS.

With respect to authorised AIFMs with a retail top-up, in principle, no investment limitations apply. A Dutch UCITS, however, should take into account specific investment limitations as set out in the Dutch implementation of the UCITS Directive.

3.3.2 Requirements for Non-local Service Providers

Please see **2.3.2 Requirements for Non-local Service Providers**.

3.3.3 Local Regulatory Requirements for Non-local Managers AIFMD

EEA AIFMs with a licence and that obtained a passport pursuant to Article 32 of the AIFMD can market to retail investors in the Netherlands once they have filed a retail distribution notification form with the AFM. If retail investors can invest in the AIF marketed for less than EUR100,000, the retail top-up regime needs to be complied with.

EEA sub-threshold AIFMs cannot market AIFs to retail investors in the Netherlands.

Under certain circumstances, non-EEA AIFMs located in the USA, Guernsey, Hong Kong or Jersey may market AIFs to Dutch retail investors pursuant to the so-called designated state regime. Otherwise, non-EEA AIFMs are not allowed to market AIFs to Dutch retail investors.

UCITS

A non-local EEA-authorized ManCo may manage and market authorised UCITS funds in the Netherlands on a cross-border basis, provided that the passporting procedure (Article 91 and further of the UCITS Directive) is followed. The EEA ManCo will need to obtain separate approval from the AFM for the management of a Dutch UCITS fund in the Netherlands (pursuant to the Dutch implementation of Article 5(3) of the UCITS Directive). If a non-Dutch UCITS fund is marketed in the Netherlands, the UCITS KID will have to be provided in the Dutch language.

3.3.4 Regulatory Approval Process

AIFMD

With respect to the regulatory approval process for Dutch AIFMs under the Fully Licensed Regime and the Small Managers Regime, please see **2.1.2 Common Process for Setting Up Investment Funds**.

UCITS

If a ManCo applies for a licence from the AFM pursuant to the AFS, the AFM has a review period of 13 weeks. With respect to a licence application for a UCITS, the AFM has a review period of eight weeks. During the application process, the AFM may request additional documents or information; the review period is suspended when the AFM is requesting additional documents. A licensed ManCo can manage a new UCITS if it has submitted the notification

from UCITS to the AFM at least two weeks prior to the marketing of the respective UCITS.

3.3.5 Rules Concerning Marketing of Retail Funds

As a general rule, information provided by an AIFM or ManCo has to be accurate, clear and not misleading. Also, all information provided by the AIFM or ManCo may not be detrimental to the information to be supplied or made available pursuant to the AFS, and it should be made clear whether documents are commercial. Also, rules regarding marketing materials apply. Please also see **3.1.4 Disclosure Requirements**.

In addition, the Unfair Commercial Practice Act (*Wet oneerlijke handelspraktijken*, or UCPA) applies to all financial institutions that market, offer or sell products or services to consumers in the Netherlands, regardless of the authorisation, registration or exemptions that may be relied upon for Dutch financial regulatory purposes. If the AFM, as competent supervisory authority of the UCPA, deems that information provided to consumers is misleading or unfair, it may, for example, impose a fine on the (fund managers of the) fund in question.

3.3.6 Marketing of Retail Funds

There are no restrictions on the types of investors that can invest in a retail fund.

3.3.7 Investor Protection Rules

In principle, an authorised AIFM with a retail top-up will have to meet all the requirements that apply for authorised AIFMs under the fully licensed regime (see **2.3.7 Investor Protection Rules**).

Authorised AIFMs with a retail top-up and authorised ManCos have to comply with certain investor protection requirements pursuant to the AFS and the promulgated regulations thereunder, such as the requirement to have certain

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organisational and administrative procedures in place relating to, inter alia, conflicts of interest, complaints handling and product approval procedures. In addition, the requirement to be registered with the Dutch Financial Services Complaints Tribunal (*Klachteninstituut Financiële Dienstverlening*) applies.

3.3.8 Approach of the Regulator

The AFM may be described as a supervisor that duly considers the legal basis for its supervision and enforcement, while adopting a rather pragmatic approach if possible. Please see **2.3.8 Approach of the Regulator**.

3.4 Operational Requirements

In principle, the authorised AIFM with a retail top-up will have to meet all the requirements that apply for authorised AIFMs under the fully licensed regime and the rules set out in the retail top-up regime.

With respect to authorised Dutch UCITS funds, specific operational requirements apply, as set out in the Dutch implementation of UCITS. For instance, the legal ownership of the assets under management of the UCITS has to be held by a separate legal entity whose sole object as stated in the articles of association is holding the legal ownership of the assets of the UCITS fund.

Authorised Dutch UCITS funds have to appoint a depositary. In principle, in the Netherlands, such depositary is subject to a licence requirement, unless a specific exemption to the licence requirement is available.

Certain other operational requirements are relevant, such as customer due diligence requirements on the basis of the Dutch implementation of the (revised) Fourth Anti-Money Laundering and Terrorist Financing Directive, which is applicable to Dutch UCITS funds.

3.5 Fund Finance

Please see **2.5 Fund Finance**.

3.6 Tax Regime

Retail funds that are structured as an Open FGR or NV BMVK often elect to be treated as a VBI or an FBI.

An FBI is subject to Dutch corporate income tax at a 0% rate.

Profit distributions by an FBI are, in principle, subject to 15% Dutch dividend withholding tax, with two important exceptions.

- The FBI can apply a conditional rebate for the amount of directly suffered (foreign) withholding taxes against the FBI's own obligation to remit 15% Dutch dividend tax to the Dutch tax authorities, withheld in respect of its own profit distributions. Effectively, the (foreign) withholding tax levied in connection with the investments of the FBI will be converted into Dutch withholding tax, for which the retail investors may be eligible for a credit or (partial) refund. This is considered an apparent benefit of the FBI regime compared to other investment tax regimes (including the Dutch VBI regime), where (foreign) withholding taxes suffered in connection with the investment portfolio are often neither creditable nor refundable, as a consequence of which, such withholding taxes will be a fund cost, reducing the return on investment.
- The FBI can elect to apply a so-called reinvestment reserve (*herbeleggingsreserve*) by claiming such a reserve in its Dutch corporate income tax return. This reserve is equal to the net balance of (unrealised) gains and losses reduced with a proportionate part of the running costs of the FBI. By creating a reinvestment reserve, items of a capital nature will be excluded from the FBI's taxable profits and, therefore, will not fall under the annual

distribution obligation. Furthermore, subject to certain provisos, the FBI can make distributions at the expense of the reinvestment reserve free from Dutch dividend withholding tax, so that items of a capital nature realised by the FBI are effectively subject to neither Dutch corporate income tax nor Dutch dividend withholding tax.

4. LEGAL, REGULATORY OR TAX CHANGES

4.1 Recent Developments and Proposals for Reform

Focus on Impact Investing

The market is seeing an increasing focus on investors requesting managers to make an effort in terms of impact and reaching ESG goals, by way of linking the carried interest to certain impact or ESG targets. The authors expect that this will become a more important topic in future fundraisings.

Legislation on Partnerships

In February 2019, a draft legislative proposal was published by the Dutch government that aims to modernise the legislation on partnerships. One of the most remarkable amendments would be that a partnership would obtain legal personality. After a first public consultation, an updated draft legislative proposal is expected to be published this year.

Furthermore, in March 2021 the Dutch government published a consultation document that includes a proposal to abolish the unanimous consent requirement for admissions and substitutions of limited partners in a CV (see **2.6 Tax Regime**). A formal legislative proposal is expected for March 2022.

AIFMD2

On 25 November 2021, the European Commission made public the proposal to amend the existing AIFMD and also certain provisions under the UCITS Directive. Amongst others, the proposal contains enhanced requirements regarding AIFs with lending activities, liquidity management, delegation and the NPPR regime.

Proposal to Make the Small Managers Regime Also Available for Other EU Sub-threshold AIFMs

A proposal for a Dutch act has been published that adds the possibility for sub-threshold managers with a statutory seat in another member state to also offer units in the AIF they manage in the Netherlands. However, this may only be offered to professional investors within the meaning of the AFS.

NETHERLANDS LAW AND PRACTICE

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Loyens & Loeff N.V. has over 60 dedicated specialists in investment management, which is one of the firm's core practices. Loyens & Loeff offers clients a unique combination of tax, legal and regulatory advice on the structuring of funds and all other investment management work and is very skilled in combining the various detailed tax and regulatory regimes and rules in cross-border structures. The firm has a strong international capability in relevant jurisdictions. The Netherlands, Belgium, Luxembourg and

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