



BANK VAN DE NEDERLANDSE ANTILLEN
(CENTRAL BANK)

*POLICY GUIDELINES
ON EXEMPTION REGULATION FOR INVESTMENT
INSTITUTIONS*

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INTRODUCTION

The *National Ordinance on the Supervision of Investment Institutions and Administrators* (N.G. 2002, no. 137), hereafter referred to as "the NOMA", creates the necessary conditions for the public to form a well-considered opinion about the offers made by investment institutions and about the inherent risks associated with these offers.

Article 3, paragraph 1 of the NOS11A prohibits raising or obtaining pecuniary means or other property for purposes of participating in an investment institution that has not been granted a license by the* Bank or offering participating interests in such an 'investment institution in or from the Netherlands Antilles.

However, pursuant to article 10, paragraph 1 of the NOSIIA, the Bank may grant an institution an exemption from the above-mentioned prohibition if certain criteria are met. Particular attention has been devoted in the Explanatory Notes to the NOSHA to the criteria regarding the offering of participating 'interests within a 'restricted circle' and to 'professional parties'. These policy guidelines elaborate further on these criteria and in addition discuss other criteria, which if met can qualify an investment institution for an exemption as stipulated in article 10, paragraph 1 of the NOSIIA. The five categories addressed *in these policy guidelines are:

- *Restricted circle*: money or other pecuniary means raised and obtained in a restricted circle;
- *Investment (research) clubs*- small investment institutions that in practice do not meet the restricted circle criterion;
- *Investment as secondary activity*: institutions that have investments as a secondary activity;
- *Professional parties*- participating interests solicited or obtained from exclusively professional or comparable parties; and
- *Venture Capital companies*

RESTRICTED CIRCLE

Investment institutions operating within a restricted circle are assumed to have sufficient information available for participants to form a balanced opinion about the activities of the investment institutions. Hence, under the NOSIIA no protections are deemed necessary for these participants.

The Explanatory Notes state that investment institutions that do not seek funding from the public but raise or obtain money 'in a restricted circle are eligible for exemption. A number of criteria are mentioned in the Explanatory Notes that can be used to assess whether an investment institution is operating within a restricted circle. If the following criteria are met, an investment institution is exempted from the prohibition contained in article 3 of the NOSIIA:

- the group of persons to whom participating interests are offered is limited in size and described in detail;
- these persons have a certain relationship with the offeror, which implies that besides the financial relationship, other relationship(s) exist between the parties involved;
- when participating interests are offered, it is clearly explained that accepting the offer or participation is the exclusive privilege of the group of persons to which the first and second considerations apply.

The "limited size" element

In principle, the size of the group to which the offer is made is the overriding criterion for the Bank, not the number of persons actually acquiring participating interests. For example, a placed advertisement will in principle be regarded as an offer to an unlimited number of participants, even if there are only five actual buyers.

The Bank believes that the "limited size" element cannot be quantified. In other words, no numerical limit can be imposed for the group to which the participating interests are offered. However, as the group of persons becomes larger, the Bank attaches extra weight to the relationship required to exist between the participants and the offeror. If legal entities are among the participants, the Bank will assess which natural persons participate *in the investment institution indirectly to determine to how many persons the participating interests are actually offered.

The 'described in detail' element

Combined with the first criterion, the Bank 'interprets this as follows: the persons who will (can) join the group must be clearly defined. In addition, the fact that only those persons are eligible to acquire participating interests should be presented in writing in advance.

The "certain relationship) " element

According to the Bank, a "certain relationship" between the offeror and the participants exists when this relationship is such that it alone would make participants familiar with the investment institution's particularities and the offered moneys or goods. This relationship must demonstrably exist before an offer is made to acquire participating interests of the investment institution. The rationale for this requirement of an already existing relationship

is that it has a certain protective effect. The relationship should be such that those to whom the offer is made should reasonably have sufficient knowledge about the facts and circumstances important to decide whether to accept the offer. In this case, the facts and circumstances at least 'include the information supply and familiarity with the person who controls the value of the investment institution. Investment *institutions for which the aforementioned relationship may be evident are, for example, funds offered exclusively to family members or employees of a firm.

The Bank considers offers made to employees of the offering investment institution and to employees of group companies and subsidiaries as offers made within a restricted circle.

Acquaintance, friend, neighbour or colleague relationships do not meet the "certain relationship" criterion. A business relationship, such as "being a customer of a certain office" or "participant in another investment institution of the offeror", is regarded by die Bank as exclusively a financial relationship and not as a "certain relationship".

Another example where a restricted circle is evident is *in a fund established by a group of persons in a small-scale association where access is limited to the members of that association. The legislation thus *indicates the possibility for certain already existing associations, which establish an investment fund in addition to their core working activities, to be regarded as operating within a restricted circle.

A statutory relationship between an association and its members does not sufficiently constitute a "certain relationship". Therefore, the first requirement the Bank attaches to this type of 'investment institution is that the founding or initiating association performs for its members both a statutory (or under its rules) function and a *de facto* other function, not related to investment objectives. An association which, in the Bank's judgement, has been established as an investment institution or *defacto* functions as such will not be regarded as operating within a 'restricted circle'. Second, the association must set qualitative entry requirements for its members. Freely or easily accessible associations are, *in principle, considered by the Bank as operating in contravention to the 'certain relationship' element. In individual cases, the Bank may attach less importance to the strictness of the entry requirements if the investment institution's main objective is to achieve the primary objective of the association. A good example of this may be an association with a low-entry threshold for membership such as a sport association that establishes an investment institution to acquire properties such as a clubhouse.

The prospectus of an investment institution exempted based on the criterion addressed 'in this section, should contain a special clause formulated as follows:

In accordance with the Policy Guidelines on Exemption Regulation for Investment Institutions issued by the Bank van de Nederlandse Antillen, '(name of the investment institution)' is exempted from the prohibition contained in article 3, paragraph 1 of the National Ordinance on the Supervision of Investment Institutions and Administrators (N.G. 2002, no. 137). Consequently, '(name of the investment institution)' is not subject to the supervision exercised by the Bank van de Nederlandse Antillen. Further information concerning this exemption may be obtained at '(name of the investment institution)'

INVESTMENT (RESEARCH) CLUBS

A few small investment institutions in practice do not meet the restricted circle criterion and are therefore, required to obtain a licence. A case in point is small private initiatives that do not meet the above-mentioned "certain relationship" criterion, but where the number of participants and the amounts to be invested are limited, which enables the (potential) participants to be fairly able to assess the offer being made and the inherent risk associated with the offer. Among these small schemes are investment (research) clubs.

The Bank believes that supervision of small investment institutions is not necessary because the limited size of these investment institutions guarantees that the participants have insight into (the execution of investment policies, can monitor the functioning of the managers, and also have sufficient information available. Supervision in such cases is not deemed practical, as these investment institutions would not be viable if they had to comply with the requirements of the NOS11A. The investment institutions concerned would not be able to meet a number of licensing requirements, such as the minimum capital requirement or a number of reporting requirements, such as quarterly and annual reporting.

Investment institutions are therefore exempted by the Bank from the prohibition contained in article 3 of the NOS11A if the following conditions are met:

- a) a maximum of 25 natural persons can participate in the investment institution;
- b) a maximum of NAf. 20,000.00 is invested per participant;
- c) the moneys and/or other goods are not solicited or obtained, or the participating interests are not offered, by natural persons who or legal entities which, in the course of their occupation or business, deal or invest in securities; and
- d) the investment institution does not enter into obligations that may result in additional payment obligations on the part of participants.

The stipulated number of 25 participants stated under subsection *a* is considered the maximum number of persons with whom it is feasible to adequately conduct mutual consultations about the investment policy to be executed and to monitor the managers.

The maximum amount of NAf. 20,000.00 invested per participant, stated in subsection *b* is considered by the Bank to be relatively limited, which in the Bank's opinion justifies the lack of supervision; the smooth operation of the financial markets is consequently not at issue. The net amount referred to above is the total amount individual participants are allowed to invest in the investment institution. This means that any repayment by the investment institution to the participants as a result of capital growth can be offset against the investment.

The criterion referred to under subsection *c* excludes the offering of participating interests by professional market parties. As a result, investment clubs offered by professional market parties, such as banks, securities brokers, and institutional investors are not eligible for exemption. More than one offer by the same offeror also could be an indication of commercial activities by a professional market party.

Subsection *d* provides that the investment institution may not enter into obligations that may cause additional payment obligations for the participants. This restriction prevents the risk per participant from becoming larger than the invested amount. This limiting condition must be stated when the offer is made.

The prospectus of an 'investment 'institution exempted based on the criterion addressed in this section, should contain a special clause formulated as follows:

In accordance with the policy Guidelines on Exemption Regulation for Investment Institutions issued by the Bank van de Nederlandse Antillen, '*name of the investment institution*' is exempted from the prohibition contained in article 3, paragraph 1 of the National Ordinance on the Supervision of Investment Institutions and Administrators (N.G. 2002, no. 137). Consequently, '*name of the investment institution*' is not subject to the supervision exercised by the Bank van de Nederlandse Antillen. Further information concerning this exemption may be obtained at '*name of the investment institution*'

INVESTMENT AS SECONDARY ACTIVITY

Institutions are exempted from the prohibition contained in article 3 of the NOSIIA if the following conditions are met:

- moneys or other goods are solicited or obtained in exchange for participating interests of an investment institution whose balance sheet total consists of less than 50% investments, or if the participating interests of such an investment institution are so offered, and
- less than 50% of total realized income is generated from investment.

Both conditions are applied cumulatively. The exemption also applies to the offering of participating *interests of such institutions. The reason for this exemption is that in addition to investment, other business activities also may be carried out within a single institution. The NOSIIA does not explicitly stipulate the measure in which an 'institution has to engage in investments to be recognized as an investment institution within the meaning of the NOSIIA. Any demarcation problems that may arise as a result hereof will be removed by the stipulation that institutions which, strictly speaking, could fall under the definition of investment institution, are exempted from the obligation to obtain a license under the NOSIIA if investment does not constitute their principal activity.

Investment is deemed an institution's principal activity if 50% or more of its balance sheet total consists of investments and/or 50% or more of its realized income is generated from investments. The 'investment objects should be determined irrespective of their presentation in the annual accounts, i.e. irrespective of how they are named, and shall, in principle, be determined as of the balance-sheet date at the close of the financial year.

Investments that arise from an institution's business process are not included in the determination of the limit of the balance sheet total. Under certain circumstances, for instance, an industrial enterprise may have high liquidity, which subsequently is invested.

The aforementioned demarcation problems occur mainly 'in the real estate sector. This sector includes institutions that, in addition to investment, also engage in construction and project development. To help determine which part of the balance sheet of these institutions to include under 'investments, a clear distinction should be made between *investment and business activities in the real estate sector.

The prospectus of an investment 'institution exempted based on the criterion addressed in this section, should contain a special clause formulated as follows:

In accordance with the Policy Guidelines on Exemption Regulation for Investment Institutions issued by the Bank van de Nederlandse Antillen, '*(name of the investment institution)*' is exempted from the prohibition contained in article 3, paragraph 1 of the National Ordinance on the Supervision of Investment Institutions and Administrators (N.G. 2002, no. 137). Consequently, '*(name of the investment institution)*' is not subject to the supervision exercised by the Bank van de Nederlandse Antillen. Further information concerning this exemption may be obtained at '*(name of the investment institution)*'

PROFESSIONAL PARTIES

Investment institutions can be exempted from the prohibition contained in article 3 of the NOSITA if the moneys or goods 'in exchange for units of an investment institution are solicited or obtained solely from natural persons who or legal entities which, in pursuit of their occupation or business, deal or invest in investment objects or if the participating interests of an 'investment institution as referred to above are offered solely to this category of natural persons and legal entities.

The reason for the exemption is that professional market operators are sufficiently capable and competent to form their own balanced opinion about an offer being made and are, therefore, in less need of legal investors' protection. The skills and competency of professional market operators have to do with internal expertise on the subject, easy accessibility to market 'information, and capability to interpret this information.

Investment institutions that engage *in (investment) transactions with professional operators that deal or invest in investment objects other than securities, such as real estate investment institutions that solicit funds solely from real estate brokers, also are eligible for an exemption from the prohibition contained in article 3 of the NOSIIA.

Furthermore, investment institutions that offer their participating interests only or also to natural persons and/or legal entities considered by the Bank to have comparable skills and competency as the professional (market) operators to form their own balanced opinion about the offer being made, also may in individual cases be exempted from the prohibition contained in article 3, paragraph 1 of the NOSIIA. In determining whether an institution qualifies for this exemption, the Bank particularly considers the target group to whom the institution's participating 'interests are offered. It should be noted that investment institutions with a minimum initial subscription amount of less than USD 50.000 (or its equivalent in another currency) per investor, are under no circumstance considered eligible for this exemption possibility.

Contrary to the investment institutions that meet the exemption criteria addressed in the previous sections, the investment institutions described in this section need to explicitly apply for an exemption. Considering the nature of the activities of die latter category of investment institutions and the growing concern among international supervisory authorities that the general public can (ultimately) participate in such investment institutions through the secondary market, the Bank deems it necessary to evaluate each individual request for the exemption addressed in this section.

If malpractice or abuse occurs in the specialized investment *institutions described in this section, the Bank has the authority to revoke the exemption.

The prospectus of an investment institution exempted based on the criterion addressed in this section, should contain a special clause formulated as follows:

The Bank van de Nederlandse Antillen, in line with its Policy Guidelines on Exemption Regulation for Investment Institutions, has granted '*(name of the investment institution)*'an exemption from the prohibition contained in article 3, paragraph 1 of the National

Ordinance on the Supervision of Investment Institutions and Administrators (N.G. 2002, no. 137). Consequently, *'(name of the investment institution)'* is not subject to the supervision exercised by the Bank van de Nederlandse Antillen. Further information concerning this exemption may be obtained at *'(name of the investment institution)'*

VENTURE CAPITAL COMPANIES

Enterprises and institutions regarded as venture capital companies do not fall under the definition of investment institutions, as formulated in article 1 of the NOS11A, and are consequently not subject to the provisions of the NOS11A.

Because the distinction between a venture capital company and an investment institution is not always clear, the Bank deems it necessary to clearly describe in these policy guidelines the circumstances under which an enterprise or institution would be classified as a venture capital company (not required to comply with the licensing requirements of the NOS11A) versus an investment institution (required to comply with the licensing requirements of the NOS11A).

Both venture capital companies and investment institutions are engaged in providing capital and offering their shareholders the opportunity to share in the returns. However, a distinction exists between venture capital companies and investment institutions, since venture capital companies tend to emphasize the former activity while investment companies emphasize the latter activity.

The following criteria have to be met in order for an institution to qualify as a venture capital company:

1. The shares of the enterprises in which the company holds an equity interest can be issued to the public only with difficulty, or not at all;
2. Termination of the participation may occur only in consultation with the enterprise concerned;
3. The venture capital company exercises influence on the management of the enterprise in which it holds an equity interest, and is actively involved in this enterprise (in particular through the appointment of one or more (co-) policymakers or internal supervisors); and
4. Criteria 2 and 3 are set down in a venture capital agreement.

It should be noted that although the investment horizon does not constitute an independent criterion, the proposed term of investment may well serve as an indicator that the institution is a venture capital company. A characteristic of venture capital companies is that they, in general, participate for a relatively longer term (e.g. five to ten years) in the equity interests of enterprises.

The Bank will, upon request, assess on an individual basis, whether an enterprise or institution qualifies as a venture capital company and is consequently not subject to the provisions of the NOS11A.

The regulation related to venture capital companies described above, can strictly speaking not be regarded as an exemption regulation. Nonetheless, the Bank, in its continued effort to promote adequate provision of information, has deemed it prudent to include this regulation in these policy guidelines on exemption regulation for investment institutions.

CONCLUSION

If an investment institution meets one or more of the first three criteria addressed *in this exemption regulation, it is exempted from the prohibition contained in article 3, paragraph 1 of the NOSIIA. However, if an investment institution considers itself eligible for an exemption based on the "Professional parties"-criterion, it should submit its request, along with the necessary supporting information (for example: a Prospectus, the Extract of the Chamber of Commerce and the Articles of Association), to the *Investment Institutions Supervision Department* of the Bank at the following address:

*Simon Bolivar Plein 1
Willemstad
Curacao, Netherlands Antilles*

The Bank reserves the right to revoke an exemption in individual cases, if such a revocation serves the objective of ensuring the adequate supervision exerted by the Bank by virtue of the NOSIIA or of guaranteeing the integrity and adequate functioning of the financial markets.

Furthermore, the Bank may at any time conduct quick-scan reviews at *investment institutions to monitor compliance with the general exemption provision addressed in the first three criteria.