

# New Dutch regulation may discourage cross-border securities offerings into the Netherlands

## Introduction

The mandatory use of a new Dutch standardised exemption warning on offering materials could prove to have a considerable impact on exempt offerings of securities in the Netherlands. Despite widespread market concerns, the Dutch Financial Markets Amendment Act (*Wijzigingswet financiële markten*, the "**Amendment Act**") introduces the requirement to include a 'health warning' dubbed 'Wild West Sign' (*wildwestbordje*) in marketing material and prospectuses for offerings of securities which are exempt from prospectus requirements under the EU Prospectus Directive ("**PD**"). If the prospectus used for such offering is approved by the Dutch securities markets regulatory authority ("**AFM**") or another EU competent authority and passported into the Netherlands, this requirement does not apply. In addition, the Amendment Act will raise the minimum denomination threshold for certain non-regulated investment products from EUR 50,000 to EUR 100,000. The above changes take effect on 1 January 2012.

## Wild West Sign

According to the Amendment Act, offerings of securities in the Netherlands on the basis of a PD exemption will be subject to a standardised warning notice obligation. This so-called Wild West Sign must be included on a prominent place in all marketing and offering materials used for the exempt offerings to Dutch investors. An example of this sign is shown below. The warning notice will consist of a graphical element and a text warning which must cover at least 10% of the front cover of a prospectus, stating that it has not been approved by the AFM. The Wild West Sign will need to be used for all qualifying offers after 31 December 2011. Offers targeted exclusively at qualified investors (within the meaning of the PD) are the only exception to this obligation. Non-compliance is subject to administrative sanctions (including administrative fines and 'naming and shaming').

While aimed at protecting Dutch retail investors, the cross-border wholesale market for institutional investors will also be affected. The Amendment Act does not make a distinction between international cross-border offerings and domestic offerings. It also ignores the fundamental principles of maximum harmonisation and of home member state control in the PD.

Consequently, the Amendment Act would also cover an exempt offering in the Netherlands by a UK or US issuer of debt securities with denominations of EUR 100,000 listed on the Luxembourg Stock Exchange on the back of a PD compliant listing (base) prospectus approved by the CSSF. Such an issuer or its underwriters may not think of including a Wild West Sign at the time the (base) prospectus is approved or, if they do, it is questionable whether the competent authority of the relevant home member state would accept such inclusion.

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Reliance on the standard ICMA EEA selling restrictions is not an option either, because these contain a list of the various exempt offering methods. To avoid the obligation to include a Wild West Sign the issuer and its underwriters should either:

- apply a specific selling restriction on the offering into the Netherlands to qualified investors; or
- passport the (base) prospectus into the Netherlands (if possible at all); or
- prepare a separate set of marketing materials (including a separate prospectus) for the Dutch investor base; or
- prohibit any offer into the Netherlands.

The new rules will therefore probably set the stage for unintended and inadvertent breaches in multi-jurisdictional offerings on a massive scale leading to numerous fines and increased reputational risk (as a result of 'naming and shaming') for both issuers and their underwriters.

The impact will also be felt by non-Dutch repackaging and asset-backed SPVs that normally offer their notes on the basis of the high denomination exemption under the PD. If they offer such notes to Dutch institutional investors without using the new warning sign, they will risk being fined as from 1 January 2012. Their cashflow models will not contemplate such fines and so their viability may become jeopardized.

## Minimum denomination threshold for non-regulated investment products

Ahead of the further implementation in the Netherlands of the amendments to the PD, the Amendment Act already increases the minimum denomination threshold from EUR 50,000 to EUR 100,000 for exempt offerings of all types of securities, effective from 1 January 2012.

The Netherlands also applies a wholesale exemption regime based on the current EUR 50,000 threshold for other investment products, including rights of participation in investment funds, deposits and so-called investment objects (*beleggingsobjecten*).

With the increase of the threshold to EUR 100,000 for securities falling under the scope of the PD, the legislator wanted to maintain a level playing field by lifting the thresholds for these other investment products as well. The Amendment Act includes the increase of the threshold to EUR 100,000 for offerings of participations in investment funds and investment objects. Draft legislation is under consideration to increase the threshold for exempt deposits to EUR 100,000 as per the same date.

It is remarkable that the legislator uses the argument of a level playing field to increase the thresholds for all these investment products where it ignores the importance of an international level playing field for the offerings of debt securities. ■

**Attention! This investment falls outside AFM supervision. No prospectus required for this activity.**



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