

European Commission  
Attn. Mr. McCreevy  
Commissioner for Internal Market and Services  
Rue de la Loi 200  
1040 - Brussels  
Belgium

The Netherlands, 27 August 2009

Dear Commissioner,

Reference is made to the proposed Directive on Alternative Investment Fund Managers (the "Proposal"). We are asset managers of pension funds and jointly represent approximately EUR 450 billion of invested pension capital, which is the large majority of invested pension capital in the Netherlands. Over 20% of that capital (EUR 90 billion) has been invested in Alternative Investment Funds ("AIF") and together we provide services to the benefit of more than 7 million pension beneficiaries.

We welcome the fact that the European Commission is taking the initiative to address concerns that have arisen as a result of the recent financial crisis. However, we are concerned that elements included in the current Proposal may reduce investment opportunities and risk diversification, lead to higher costs and lower returns, and may, in fact, not reach its intended objective to reduce the systemic risk as experienced under the current financial crisis.

#### **1. Introduction**

The institutions we represent have many years of experience in the area of pension fund investments. Our investment strategy very much depends on the ability to iron out market inefficiencies and benefit from diversification in our investment portfolio. AIF play a vital role in achieving that goal and can have a significant positive impact on the functioning of capital markets. The extent to which AIF have contributed to the financial crisis is perhaps less clear than the Proposal claims it is. We do support the objective to capture to address systemic risk involving financial institutions that potentially have a significant impact on macro-economic financial stability in an appropriate set of regulation and to subject them to adequate financial supervision. However we wonder to what extent this cannot be done within the existing regulatory framework. In general, the undersigned support disclosure (be it bilateral or public) as the most optimal means for protecting investors; imposing restrictions tends to be arbitrary and can be unduly disruptive.

Our response is drafted from the perspective of the pension funds we service. We need to invest pension capital for the ultimate benefit of individual members and pension beneficiaries. The Proposal may significantly reduce the opportunities to put that pension capital to work efficiently, be highly burdensome to comply with and therefore lead to substantially higher costs for end-investors such as our clients. The inefficiencies that would sprout from the Proposal will ultimately need to be borne by current and future pensioners and could be reflected in higher pension premiums and lower net payout. This will delay our efforts to improve the financial robustness of the pension system.

In addition our response is also drafted from the perspective that many of us facilitate fund structures for our clients in order to efficiently maximize returns against the lowest possible costs. Some of these fund structures will be impacted by the Proposal and might even lead to some of us being regulated as Alternative Investment Funds Managers ("AIFM").

Please find below a high-level summary of more particular concerns from these two perspectives regarding the Proposal.

## **2. Do not limit the choice of investments**

The proposed restrictions and requirements imposed on AIFM marketing non-EU AIF and non-EU AIFM marketing AIF in the EU will have a negative impact on the investment universe available to pension funds. This particular investment market is a global playing field whereby a relatively large part of our assets under management are invested via non-UCITS non-EU investment funds. AIF managed by non-EU AIFM who cannot, or are not willing to, meet the requirements (for example no information treaty available), will no longer be available to the pension funds we represent. Preliminary signals already indicate that many non-EU AIFM will simply stop marketing their funds to EU investors. For other AIFM offering services from a third country, it will not be possible to market their funds given the fact that the countries in which they are domiciled will not meet the requirement of adequate supervision.

At present, roughly 22% of the approximately EUR 450 billion assets under management of the undersigned are managed by non-EU non-UCITS counterparties. This percentage could even be higher as the potential impact of non-EU AIFM are not evenly distributed over different asset classes. Of the assets under management of the alternative investment departments of Dutch pension funds, in some cases up to 65% is managed by non-EU AIFM. The Proposal could seriously restrain access to AIF and thereby hamper optimal portfolio construction.

Besides the fact that a large quantity of AIF will no longer be permitted or accessible (either directly or via the in-house asset pooling vehicles the undersigned typically use), we also foresee a decrease in the quality of our clients' portfolios. The top percentile non-EU AIFM will be most inclined to stop marketing their funds to EU investors as they can tap many other investors worldwide. Worst case, the restrictions regarding non-EU AIFM/AIF could even make entire asset classes inaccessible.

The proposed restrictions and requirements imposed on non-EU AIFM and the limited availability of AIFM of high quality in the EU, in combination with restrictions regarding leverage, short selling and securitized instruments, could severely reduce the investment opportunities of the pension funds we represent (quantity, quality and asset wise), thereby limiting portfolio optimization and risk diversification. In the end, this could reduce the overall return on portfolios and increase volatility.

## **3. The scope of the Proposal should be more fit-for-purpose**

According to the Explanatory Memorandum, the Proposal *inter alia* aims to reduce the systemic risk as experienced under the current financial crisis. However, it seems to us that the scope and aim of many of the proposals included in the Proposal are not so much the reduction of systemic risk but rather the protection of professional investors in AIF. We are not convinced that professional investors actually insisted on, or will benefit from, such protection. Currently, when investments in AIF are made by any of the undersigned, an extensive due diligence is performed to ensure that the risks involved remain within the margins of the investment plan. In any event, to equally impose restrictions on all AIF and their managers under the Proposal does not seem to be a proportionate response to the challenges we face. If it is determined that certain types of market participants pose systemic risk, those institutions should be addressed specifically. Such a determination would require a careful analysis of the types of AIF that are of systemic importance. If the Proposal intends to (also) achieve protection of professional investors than this is preferably not achieved by restricting AIFM (*e.g.* through leverage requirements) but by ensuring more transparency *vis-à-vis* those investors.

We have noticed that – in line with other European directives – pension funds themselves do not fall under the scope of the Proposal. We support that. It would then, in our view, be consistent to also exclude dedicated asset managers or service administration companies of pension funds from the scope of the Proposal. This is particularly acute since pension funds pool their assets in vehicles, which under the Proposal qualify as AIF and the undersigned could qualify as AIFM. Such asset pooling vehicles are created primarily for efficiency and economies of scale purposes. Why would the Proposal exclude assets of pension funds, but regulate those as soon as the assets of two or more pension funds are invested collectively by a dedicated pension fund service provider? We are of the opinion that an exemption in situations where a related dedicated asset manager or service administration company is used is appropriate and also in line with other European directives.

Moreover, we are of the opinion that the Proposal should not impose requirements which are more burdensome than those which already exist under existing regimes, such as UCITS or MiFID. Good examples are the provisions on delegation. These are highly onerous. For instance, external managers are frequently sought for their specific expertise in non-EU jurisdictions. We doubt if such external non-EU managers (who often hold office in the US or Asia) would still offer their services to us, if they need to be authorized as AIFM or approved by the local European regulator, as currently provided under the Proposal. At the very minimum the organizational requirements between the Proposal, MiFID and UCITS should be aligned, with the present UCITS framework – which has proven itself for many years – serving as an example (with an exception for more retail type provisions and the investment restrictions).

#### **4. Remove the one-size-fits-all approach and differentiate between funds**

Although the Explanatory Memorandum explicitly states that the Proposal does not follow a one-size-fits-all approach, we doubt if this is in fact accurate. The Proposal covers different types of investment funds (e.g. including open-ended real estate funds, commodities funds, hedge funds, private equity funds, fixed income funds etc.) while most of the proposed rules do not distinguish between these different types of investment, structure, objectives and risk profile. Private equity funds are confronted with different issues than hedge funds, and open-ended funds are different from closed-ended funds. This should be reflected in the applicable regulation. The Proposal does not take into account that the funds concerned do operate under different terms and conditions. This "one-size-fits-all" regulatory approach might have negative drawbacks on the functioning of financial markets.

Examples of this one-size-fits-all approach are the following:

- (a) Real estate funds, private equity funds and listed investment trusts, for example, will also be required to conduct an independent valuation of their assets once a year. In practice, these funds do not need regular valuation. This is the essence of these funds – not being subjected to a short term focus, but enabling companies to invest in structural reform for the benefit of their long-term profitability. For closed-end funds, the interim valuations do not affect the value obtained by investors and fund managers. They have to wait until the fund actually realises value in order to receive a share of the capital gains. The audited accounts of the entity will serve to provide a measure of any impairment of the assets.
- (b) The Proposal subjects all AIF to the same set of rules although it is widely accepted that not all AIF pose systemic risk (see, e.g., findings of the EU Commission Open Hearing on Hedge Funds and Private Equity on 26 and 27 February 2009). In this way the Proposal offers little benefit but imposes costs on sectors that have not contributed to the recent problems in financial markets and the economy. This can have serious consequences.<sup>1</sup>

If there are concerns about the impact of certain AIF strategies on the stability of the financial system, and if more regulation is felt necessary to mitigate that impact, then more carefully targeted rules should be brought forward to tackle them, taking into account the differences between funds. A set of rules imposed on all but the very smallest AIF could have adverse effects. Regulation should therefore distinguish between the different AIF, on the basis that the vehicles raise different issues which call for suitably differentiated responses. The Proposal should accommodate these significant differences between the main types of alternative investment strategies.

#### **5. The Proposal leads to high compliance costs and potentially lower quality of supervision**

If the Proposal would be implemented as currently drafted, it will lead to a massive number of institutions requiring registration. The costs for this will eventually be paid by investors in AIF, such as the undersigned. Previous large-scale European legislation projects – such as MiFID, which had a smaller scale than the Proposal – has shown that the costs of implementation and compliance with such legislation can be significant. There are already estimates available that the total costs for pension funds are approximately EUR 25 billion per year, were the Proposal implemented in its current form.

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<sup>1</sup> We doubt whether a special set of disclosure requirements for some types of AIF is needed – and could not more effectively be arranged via existing Directives, in order to guarantee a level-playing-field between different providers of asset management services.

The Proposal will lead to a large number of AIFM requiring a license, thereby making it more difficult and costly for market participants to offer their products in or from the EU. In addition the ongoing compliance requirements for these AIFM that come with such a license could mean increased costs with a direct impact on the returns for the AIF they manage. The pension funds that invest in these funds – and effectively the pension beneficiaries of these pension funds – will end-up paying for the compliance costs associated with the Proposal. It is therefore essential that a careful cost/benefit analysis is made for each requirement in the Proposal.

Furthermore, the Proposal will lead to a significant increase in the workload of European supervisors. We are concerned that and that introducing significant new tasks will undermine the effectiveness of the Proposal and that it may also have a serious impact on the overall quality of supervision of financial markets. A more fit-for-purpose approach, with supervisors focusing on areas where there are increased risks for the functioning of the financial system could prevent this. We would like to ask you to also take this aspect into consideration when further considering the Proposal.

## **6. Depositaries**

The Proposal suggests that a European credit institution is to be appointed as depositary for each AIF, which depositary will need to safekeep the financial instruments of the AIF and verify whether it has obtained the ownership of all other assets in which the AIF invests. In our view, the compulsory use of EU credit institutions as depositaries is a step backwards in terms of risk and exposes investors to more systemic risk rather than less.

Firstly, the undersigned understand the need for general protection and segregation of investor's assets, but the requirement that such depositary be an EU credit institution seems to be unnecessary. In everyday funds practice there are several ways in which this protection can be achieved. Despite what the Proposal states there are very few examples of situations where having a separate depositary of the type suggested in the Proposal would have added to the protection of investors. At the same time the Proposal would lead to very substantial (legal) cost in case of a multi-jurisdictional fund with one depositary being responsible for safekeeping of assets and verifying the obtaining of ownership.

Secondly, it should be noted that in certain European countries, such as The Netherlands, there are already contractual fund structures in place in which a single purpose vehicle adequately fulfills the role of the independent depositary. These entities are low-cost and low-risk depositary vehicles that have only a single purpose, *i.e.* to serve as depositary for one or more funds thereby solely acting in the interest of investors. These structures generally function very well and will be made impossible by the Proposal.

Thirdly, the EU credit institutions that will serve as depositaries have a normal banking business to run. As such, they are very much exposed to economic cycles and the accompanying risks. By requiring depositaries to be EU credit institutions the risks of safekeeping of assets will be concentrated with only a few institutions.<sup>2</sup> This will in itself increase the systemic risk the Proposal intends to mitigate.

In addition, given the broad one-size-fits-all scope of the Proposal it is unclear how the function of a depositary would work out in respect of the enormous variety in types of assets that an AIF can invest in, such as real estate, infrastructure or fund-of-funds. Safekeeping for those funds is very different than safekeeping for equity funds, for example.

Not every legal system in Europe is equipped for safekeeping assets of an AIF separate from the assets of the EU credit institution itself. The holding of AIF assets by such an EU institution could result in the co-mingling of AIF assets with other assets, resulting in a credit risk on that institution. This could lead to EU based credit institutions not being able to provide this service and thereby limiting AIFM in their choice of depositaries.

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<sup>2</sup> It should be noted that some of the largest "depositaries" currently operating in the EU are not in fact EU credit institutions at all.

Finally, the probable lack of competition between depositaries as a result of the small appetite for providing such service if it has such a low liability threshold, will most likely lead to a substantial cost increase. This will in turn lead to a reduction of the return on investments, which will be much to the detriment of pension funds and the millions of beneficiaries they represent.

## 7. Conclusion

We support the initiative taken by European Commission. However, there are aspects of the Proposal we are concerned about as they will have a negative impact. Currently, the overall effect of the Proposal will lead to a reduction of investment opportunities, higher costs and lower returns. The many millions of European citizens who have a financial interest in this issue via their pension funds could, in our assessment, be adversely affected by the Proposal.

In case of a revision of the Proposal, we would very much welcome if our views would be taken on board in this process. We hope that we can contribute to a broad consultation and effective impact analysis from an institutional investors' point of view. Therefore, we would be pleased to discuss our views with you or your representatives. At a further stage we would also be willing to provide more detailed comments on the various specific provisions or to explain our position bilaterally.

The institutions listed below fully support the views and concerns expressed herein and hope that their concerns will be considered in such way that the Proposal will serve the interest of the pension funds they service in general and the interest of their pension beneficiaries in particular. Finally, we would like to point out that we have been informed that also pension funds in other Member States with significant pension assets have serious concerns regarding the Proposal. They will communicate their concerns separately.

If you require further information, please do not hesitate to contact Gerben Everts, Compliance Officer of APG All Pensions Group, at +3120 604 8168 or via [Gerben.Everts@apg-am.nl](mailto:Gerben.Everts@apg-am.nl).

Yours sincerely,

APG  
Blue Sky Group  
Doctors Pension Fund Services  
Hoogovens Pension Fund  
Mn Services  
PGGM  
Philips Pension Fund  
Progress  
Shell Asset Management Company  
Syntrus Achmea Asset Management

The following pension industry representative organizations support this initiative:

The Dutch Association of Industry-wide Pension Funds (*Vereniging Bedrijfstakpensioenfondsen*)  
The Dutch Association of Company Pension Funds (*Stichting voor Ondernemingspensioenfondsen*)

Cc:

- (i) The European Parliament;
- (ii) The Swedish presidency of the EU;
- (iii) The Netherlands Ministry of Finance (*het Ministerie van Financiën*);
- (iv) The Permanent Representation of The Netherlands to the EU; and
- (v) The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*)



APG manages and administers the collective pension schemes for *inter alia* the government and educational sectors, construction companies and housing corporations. With 3,400 staff, APG administers the pensions of 4 million Dutch citizens on behalf of more than 20,000 employers. APG has assets under management of approximately EUR 205 billion (30 June 2009) and manages around 30% of all collective pension schemes in The Netherlands.



Blue Sky Group provides everything a pension fund needs. Around 110 employees take care of the administration of pension schemes for nearly 75,000 insured people. Blue Sky Group manages around 10,4 billion Euro in capital for its clients. The clients of Blue Sky Group include – amongst others – the three KLM Pension Funds, Pension Fund BP Netherlands, Alcatel-Lucent Pension Fund, Pension Fund OPG and Pension Fund Schoen-, Leder- en Lederwarenindustrie.



Doctors Pension Funds BV (DPFS) administers the pension schemes and manages the pension fund assets for Stichting Pensioenfonds voor Huisartsen (Medical Practitioners) and Stichting Pensioenfonds voor Medisch Specialisten (Medical Specialists). With respectively approximately 15,000 and 14,000 active, retired and deferred members these funds represent the vast majority of people from these two professional groups in the Netherlands. Both clients together have approximately EUR 11 billion in pension funds assets under management.



Mn Services is active in the Dutch pension world as an asset manager and as a pension administrator for institutional clients. The organization manages assets worth over EUR 56 billion (2009) for 1.7 million present and former participants of various pension funds, and also takes care of the pension administration for over 1.2 million people and around 35,000 employers. This makes the company one of the largest asset managers and pension administrators in the Netherlands.



PGGM currently manages over EUR 78 billion in assets for Pensioenfonds Zorg en Welzijn and others in the care and welfare sector that share our socially responsible vision and investment policy

## PHILIPS PENSIOENFONDS

Philips Pension Fund is one of the largest corporate pension plans in The Netherlands. The fund is responsible for running pension arrangements for Philips employees in The Netherlands. This includes administration and payments of pensions. Also the fund is responsible for robustly managing and investing of the assets (approximately EUR 13 billion). Currently the fund has about 120.000 members.



Progress is an independent organization that is responsible for the management of the pension plan of Unilever Netherlands. Progress has been established since 1921 and is one of the relative big Corporate Pension Funds within the Netherlands. The current assets under management are approximately EUR 3 billion.



Shell Asset Management Company B.V. (SAMCo) is an asset management company set up in 2006 to provide investment advice and asset management services to pension funds associated with Royal Dutch Shell plc worldwide.



Syntrus Achmea Asset Management is an authoritative, innovative asset manager. Its customers are over 50 business sector pension funds, occupational pension funds and company pension funds representing more than 2,5 million employees. With a managed capital of EUR 45 billion, it belongs in the top three outsourced pension asset managers in the Dutch market.



The Dutch Association of Industry-wide Pension Funds (VB) promotes the pension interests of approximately 4.7 million participants, over 1.2 million pensioners and 6.8 million early leavers. Nearly all Dutch industry-wide pension funds are associated with VB. VB's members represent over 75% of the total number of participants in collective pension schemes. The total investments of its members amount to about EUR 500 billion. VB is a member of EFRP and its European umbrella of joint organizations, AEIP.



The Dutch Association of Company Pension Funds (OPF, *Stichting voor Ondernemingspensioenfondsen*) is the leading voice of corporate pension provision in the Netherlands, promoting the interests of about 350 Dutch company pension funds. These represent about 1.5 million constituents (active members, members with paid-up pension entitlements and pensioners). OPF affiliated funds hold combined assets of about EUR 150 billion.

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