AFM and DNB Policy Rule on the Application and Implementation of the *Wfm BES* and *Wwft BES* 2012

Policy Rule of the Netherlands Authority for the Financial Markets and De Nederlandsche Bank N.V. of 21 August 2012 on the Application and Implementation of the Financial Markets (BES Islands) Act and the Money Laundering and Terrorist Financing (Prevention) (BES Islands) Act and the secondary legislation based on these Acts (AFM and DNB Policy Rule on the Application and Implementation of the Wfm BES and Wwft BES 2012) [Beleidsregel AFM en DNB toepassing en uitvoering Wfm BES en Wwft BES 2012]

THE NETHERLANDS AUTHORITY FOR THE FINANCIAL MARKETS AND DE NEDERLANDSCHE BANK N.V.

Having regard to the Financial Markets (BES Islands) Act (Bulletin of Acts and Decrees 2011, 612), in particular sections 2:23, 3:5, 3:8 and 3:9, 3:30, 3:38, 3:44 and 10:5 and chapter 7.

Having regard to the Financial Markets (BES Islands) Decree (Bulletin of Acts and Decrees 2012, 238), in particular articles 3:14, 3:19 and 3:21;

Having regard to the Money Laundering and Terrorist Financing (Prevention) (BES Islands) Act (Bulletin of Acts and Decrees 2011, 613);

DECIDE:

Chapter 1. General provisions

Article 1 (definitions)
In this regulation the following terms have the following meanings:
a) *DNB*: De Nederlandsche Bank N.V.;
b) *AFM*: the foundation (*stichting*) known as the Netherlands Authority for the Financial Markets;
c) *CBCS*: the Central Bank of Curaçao & St Maarten as well as its predecessor in title – the Bank of the Netherlands Antilles (BNA);
d) *the public bodies* or *the Caribbean Netherlands*: the public bodies of Bonaire, St Eustatius and Saba;
e) *Wfm BES:* the Financial Markets (BES Islands) Act *(Wet financiële markten BES)* (Bulletin of Acts and Decrees 2011, 612);
f) *Bfm BES*: the Financial Markets (BES Islands) Decree *(Besluit financiële markten BES)* (Bulletin of Acts and Decrees 2012, 238);
g) *Wwft BES*: the Money Laundering and Terrorist Financing (Prevention) (BES Islands) Act *(Wet ter voorkoming van witwassen en financieren van terrorisme BES)* (Bulletin of Acts and Decrees 2011, 613);

Chapter 2. Joint policy rules of the AFM and DNB

§2.1. Fitness

Article 2 (fitness of persons determining day-to-day policy and supervisory board members)

1. This article does not apply to the conduct of the business of a non-life or life insurance intermediary or authorised agent or sub-agent as referred to in article 3:4 of the Bfm BES.
2. When testing the fitness of persons who determine the day-to-day policy or of persons who form part of a body responsible for supervising the policy and general affairs within a financial enterprise, as referred to section 3:5, section 3:30, subsection 1, opening words and (b), or section 10:5, subsection 2, of the Wfm BES, the AFM and DNB apply the Fitness Policy Rule 2012 *(Beleidsregel geschiktheid 2012)* (Government Gazette 2012, 13546) *mutatis mutandis*.
3. When testing the expertise of persons who determine or jointly determine the policy of a pension fund as referred to in section 5a, subsection 3, of the Pensions (BES Islands) Act *(Pensioenwet BES)* (Bulletin of Acts and Decrees 2010, 597), DNB applies the Fitness Policy Rule 2012 *(Beleidsregel geschiktheid 2012)* (Government Gazette 2012, 13546) *mutatis mutandis*.
4. When applying the Fitness Policy Rule 2012 (Government Gazette 2012, 13546) *mutatis mutandis*, the AFM and DNB take account of the nature, size and complexity of the financial enterprise concerned.

§2.2. Properness

Article 3 (conflicts of interest and current and former local PEPs)

1. For the purposes of tests of properness under section 3:4 of the Wfm BES and without prejudice to the provisions of articles 3:1-3:3 of the Bfm BES, the AFM and DNB assess in particular whether conflicts of interest exist or may exist in relation to the person to be tested. Among the criteria applied in this connection are the CBCS's Corporate Governance Guidelines.
2. Conflicts of interest as referred to in paragraph 1 occur, in principle, if the person to be tested, besides holding or wishing to hold a position in which he would determine or jointly determine the policy of a financial enterprise that is subject to supervision, is also:
    a) involved in one or more legal persons or institutions that are not subject to supervision. or holds an ancillary position in one or more related parties, including parties that do business or conduct transactions with the financial enterprise in which the person to be tested holds or wishes to hold a position in which he determines or jointly determines the policy; or
    b) a current local PEP (politically exposed person), being a holder of public office, or a former local PEP, being a former holder of public office.

§2.3. Sound operations

Article 4 (prevention of money laundering and terrorist financing)

In supervising compliance with the obligations under the Wwft BES and the rules on sound operations as referred to in section 3:8 of the Wfm BES, the AFM and DNB apply *mutatis mutandis* the CBCS Provisions and Guidelines on the Detection and Deterrence of Money Laundering and Terrorist Financing, as adopted for the various sectors and as amended from time to time, as well as, in so far as they are not explicitly derogated from, the rules or further rules or policy rules adopted by the AFM or DNB for the prevention of money laundering and terrorist financing or for sound operations. These are the following Provisions and Guidelines:

a) the Provisions and Guidelines on the Detection and Deterrence of Money Laundering and Terrorist Financing for Credit Institutions – May 2011;
b) the Provisions and Guidelines on the Detection and Deterrence of Money Laundering and Terrorist Financing for Money Transfer Companies – May 2011;
c) the Provisions and Guidelines on the Detection and Deterrence of Money Laundering and Terrorist Financing for Insurance Companies and Intermediaries (Insurance Brokers) – May 2011;
d) the Provisions and Guidelines on the Detection and Deterrence of Money Laundering and Terrorist Financing for Administrators of Investment Institutions and Self-Administered Investment Institutions – May 2011; and
e) the Provisions and Guidelines on the Detection and Deterrence of Money Laundering and Terrorist Financing for Company (Trust) Service Providers – May 2011;

in each case including Appendices I and II to the Policy Rule of June 2011, in so far as relevant.

Article 5 (CBCS policy rules and guidelines on sound operations)

In supervising compliance with the rules on sound operations as referred to in article 3:8 of the Bfm BES, the AFM and DNB apply *mutatis mutandis* the following CBCS policy rules and guidelines, in so far as they are relevant to the financial enterprise concerned and as amended from time to time, as well as, in so far as they are not explicitly derogated from, the rules or further rules or policy rules adopted by the AFM or DNB in relation to sound operations: ,

a) the CBCS Policy Rule on Sound Operations in relation to Incidents and Integrity-Sensitive Positions *(CBCS Beleidsregel integere bedrijfsvoering bij incidenten en integriteitsgevoelige functies)* of January 2011 ; and
b) Corporate Governance – Summary of Best Practice Guidelines of November 2006.

Article 6 (procedures and measures relating to incidents)

A financial enterprise is required on its own initiative to give immediate written notice of an incident within the meaning of article 3:14 of the Bfm BES to DNB or to the AFM in any event in the following situations:

a) if the incident has been reported to the criminal justice authorities or it is intended to report the incident;
b) if there is a threat or potential threat to the continuity of the financial enterprise;
c) if there has been a serious failure in the design and effectiveness of the measures designed to ensure sound operations of the financial enterprise;
d) if the incident is expected to generate considerable adverse publicity, to have serious financial consequences or to cause serious reputational harm to the financial enterprise or the financial sector; or
e) where there is another occurrence of such seriousness or scope or involving circumstances of such a nature that it would be reasonable to notify DNB or the AFM of this incident, including:

   1° internal or external fraud cases involving the financial enterprise;

   2° a raid or search of the premises of the enterprise by the Public Prosecution Service or an on-the-spot audit by the Tax Administration; as well as

   3° legal actions which, in the opinion of the persons who determine or jointly determine the policy, may have consequences for the financial position or reputation of the financial enterprise or of the financial sector.

§2.4. Provision of services in the public bodies from an establishment abroad

Article 7 (initiative test in relation to the provision of services in the public bodies)

1. This article does not apply to trust service providers having their registered office abroad and operating as a trust service provider in the public bodies by providing services from an establishment abroad.
2. No licence is, in principle, required if activities in the public bodies that would otherwise require a licence, as referred to in section 2:1 or section 2:3 of the Wfm BES, are performed through the provision of services from an establishment abroad, provided that the financial enterprise concerned can demonstrate that the initiative for the provision of the service is or was taken exclusively by a client or consumer who has his ordinary place of residence in the public bodies or an establishment in the public bodies and that the activities in the public bodies are of an occasional nature.

Chapter 3. DNB policy rules

§3.1. Incoming insurers' services

Article 8 (definition of 'incoming insurers' services')

1. For the purposes of section 2:23 of the Wfm BES, the expressions 'the provision of services in the public bodies from an establishment abroad' and 'incoming services' are deemed to mean:
   a) the conclusion by a *life insurer* of a life insurance policy from an establishment abroad with a policyholder who is a natural person and has his ordinary place of residence in the public bodies or with a policyholder that is a legal person and has an establishment in the public bodies, in so far as the life insurance relates to that establishment in the public bodies;
   b) the conclusion by a *funeral service insurer* of a funeral service insurance policy from an establishment abroad with a policyholder who has his ordinary place of residence in the public bodies; or
   c) the conclusion by a *non-life insurer* of an indemnity insurance policy from an establishment abroad in relation to a risk situated in the public bodies.
2. Incoming services within the meaning of section 2:23 of the Wfm BES are in any event deemed to exist if one or more advisers, intermediaries or authorised agents or sub-agents act for or on behalf of the insurer concerned, which has its registered office abroad.

Article 9 (periods for notification under section 2:23 of the Wfm BES)

1. If an insurer which has its registered office abroad can no longer demonstrate that the initiative test referred to in article 7, paragraph 2, is fulfilled, it is required to give the notification referred to in section 2:23 of the Wfm BES to DNB as quickly as possible but in any event within four weeks after the situation occurs**.** When giving this notification the insurer must also supply the data and documentation on the basis of which DNB can assess whether the requirements of section 2:23, subsection 1, of the Wfm BES are fulfilled.
2. An insurer which has its registered office abroad and which already, prior to the date on which this policy rule enters into force, offers insurances in the public bodies from an establishment abroad through the provision of services, is required to give the notification referred to in section 2:23 of the Wfm BES to DNB by 31 October 2012 at the latest. When giving this notification the insurer must also supply the data and documentation that enable DNB to assess whether the requirements of section 2:23, subsection 1, of the Wfm BES are fulfilled.

§3.2. Sound and controlled operations

Article 10 (CBCS provisions and guidelines and policy memoranda)
In supervising compliance with the rules on controlled operations as referred to in section 3:9 of the Wfm BES, DNB applies the following CBCS provisions and guidelines and policy memoranda, in so far as they are relevant and as amended from time to time:
a) Provisions and Guidelines for Safe and Sound Electronic Banking of December 2007;
b) Policy Memorandum on the Periodic Filing of a Management Report;
c) Policy Memorandum – Management of Computer Risks for Senior Management.

Article 11 (operations of the parent company of a financial group)
The provisions of article 3:19 of the Bfm BES in respect of the general aspects of controlled operations and article 3:21 of the Bfm BES in respect of risk management apply *mutatis mutandis* to controlled operations, as referred to in section 3:44, subsection 1, of the Wfm BES, of an enterprise which has its registered office in the public bodies and is the parent company of a group of credit institutions or a group of insurers as referred to in sections 3:45 or 3:46 of this Act.

Chapter 4. Final provisions

Article 12 (amendments to this policy rule)
This policy rule may be amended by joint decision of the AFM and DNB or by separate decision of the AFM or DNB in so far as the amendment does not affect the remit of the other supervisory authority.

Article 13 (entry into force)
This policy rule will enter into force on the day after the date of the Government Gazette in which it is published, with retroactive effect to 1 July 2012.

Article 14 (short title)
This policy rule may be cited as: AFM and DNB Policy Rule on the Application and Implementation of the *Wfm BES* and *Wwft BES* 2012.

This policy rule, together with the Explanatory Memorandum, will be published in the Government Gazette.

Amsterdam, 21 August 2012

De Nederlandsche Bank N.V.,

A.J. Kellermann, director *J. Sijbrand, director*

Netherlands Authority for the Financial Markets

R. Gerritse, chairman *Th.F. Kockelkoren, director*

Explanatory Memorandum

General

The Financial Markets (BES Islands) Act *(Wet financiële markten BES /* Wfm BES), published in the Bulletin of Orders and Decrees 2011, no. 612, regulates supervision of the financial markets in the public bodies of Bonaire, St Eustatius and Saba from 1 July 2012.[1] In the Wfm BES the Netherlands Authority for the Financial Markets (AFM) and De Nederlandsche Bank N.V. (DNB) are designated as the supervisory authorities for financial enterprises that operate in these islands (also referred to below as the Caribbean Netherlands). Various provisions in the Wfm BES are elaborated in secondary legislation, including the Financial Markets (BES Islands) Decree *(Besluit financiële markten BES /* Bfm BES), published in the Bulletin of Orders and Decrees 2012, no. 238.

The rules that govern the prevention of money laundering and terrorist financing in the Caribbean Netherlands have been combined with effect from 1 July 2012 (see Bulletin of Acts and Decrees 2012, 240) in the Money Laundering and Terrorist Financing (Prevention) (BES Islands) Act *(Wet ter voorkoming van witwassen en financieren van terrorisme BES /* Wwft BES) (see Bulletin of Acts and Decrees 2011, 613). Secondary legislation has been introduced under this Act as well. This includes the Money Laundering and Terrorist Financing (Prevention) (BES Islands) Decree (*Bwft BES*; see Bulletin of Acts and Decrees 2012, 239).

Besides the Wfm BES and the Wwft BES and the related secondary legislation, there is a need for further *policy rules* on a number of subjects. Such policy rules may relate to the manner in which the supervisory authorities assess competing interests or establish facts or to the interpretation that the supervisory authorities give to statutory regulations or terms in the use of powers and supervision instruments. To keep the framework of all the rules and policy rules governing conduct-of-business, integrity and prudential supervision as compact and transparent as possible, the AFM and DNB have decided to draw up and publish a single joint AFM and DNB Policy Rule on the Application and Implementation of the Wfm BES and Wwft BES 2012 *(Beleidsregel AFM en DNB toepassing en uitvoering Wfm BES en Wwft BES 2012)*.

This policy rule has been introduced in close cooperation between the AFM and DNB and in consultation with the Ministry of Finance in The Hague, the Netherlands. The Central Bank of Curaçao and St Maarten (CBCS), the Central Bank of Aruba (CBA) and organisations of market participants in the Caribbean part of the Kingdom of the Netherlands were consulted in advance about this policy rule. More generally, the Dutch Ministry of Finance and the supervisory authorities supplied information in April 2011 and February 2012 to market participants and other interested parties about the structure of financial supervision in the Caribbean Netherlands from July 2012 (the so-called end model). The aim has always been to ensure that the contents of this joint regulation take account of the characteristics of the local financial markets and, where possible, align them with, for example, the existing guidelines and policy memoranda drawn up by the CBCS for financial enterprises that operate in or from the countries of Curaçao or St Maarten.

This AFM and DNB Policy Rule on the Application and Implementation of the Wfm BES and Wwft BES 2012 is structured as follows. Chapter 1 (entitled 'General provisions') defines some common terms used in this policy rule. Chapter 2 contains a number of joint policy rules of the

[1] The majority of the provisions in the Wfm BES entered into force on 1 July 2012. This was regulated in the *Decree of 22 May 2012 adopting the date of entry into force of the Financial Markets (BES Islands) Act, the Money Laundering and Terrorist Financing (Prevention) (BES Islands) Act, the Financial Markets (BES Islands) Decree and the Money Laundering and Terrorist Financing (Prevention) (BES Islands) Decree* (Bulletin of Acts and Decrees 2012, 240).

AFM and DNB on ‘fit and proper’ testing of policy-makers and on sound operations. In addition, chapter 2 sets out the criteria for the ‘initiative test’, which is of importance to financial enterprises that do not themselves have a registered office or branch in the Caribbean Netherlands but do occasionally have clients who reside or are established in the Caribbean Netherlands and who themselves take the initiative in contacting the financial enterprise. Chapter 3 contains a number of policy rules of DNB (alone) on what are termed the provision of ‘incoming insurers’ services’ in the Caribbean Netherlands and on controlled operations. All these subjects are explained below. The last chapter of this joint policy rule (chapter 4) contains a number of final provisions, including a provision regulating the entry into force of this AFM and DNB policy rule.

As is apparent from section 1:2 of the Wfm BES and section 1.3 of the Wwft BES, both these supervisory laws are applicable only in the public bodies of Bonaire, St Eustatius and Saba. These public bodies are sometimes referred to in this Explanatory Memorandum by the term ‘BES’ or ‘BES Islands’, but usually by the more common term the ‘Caribbean Netherlands’ (abbreviated to CN). The statutory term ‘public bodies’ rather than Caribbean Netherlands is used in the articles of this policy rule. The countries of Curaçao, St Maarten and Aruba, together with the BES Islands, form the Caribbean part of the Kingdom of the Netherlands, which also includes the European part of the Kingdom, namely the country of the Netherlands.

Notes on individual articles

Notes on article 1 (definitions)

The definitions in article 1 of this policy rule supplement the definitions in section 1:1 of the Wfm BES and section 1.1 of the Wwft BES. For the sake of readability, this policy rule uses a number of common abbreviations.

Notes on article 2 (fitness)

Section 3:5 of the Wfm BES contains rules governing the expertise of the persons who determine the day-to-day policy of financial enterprises and persons who form part of an organ of the financial enterprise responsible for supervising the enterprise’s policy and general affairs. The latter category are known as internal supervisors within financial enterprises, for example supervisory board members or non-executive board members in the case of a one-tier board. In addition, section 3:30, subsection 1, opening words and (b), of the Wfm BES provides, in brief, for an expertise criterion for people who will determine on the basis of a qualifying holding the day-to-day policy of the financial enterprise in which the qualifying holding is held. Finally, section 10:5, subsection 2, of the Wfm BES contains a transitional provision concerning persons already tested before 1 July 2012.

Sections 3:5, 3:30 and 10:5 Wfm BES have been amended by the Act introducing the Fitness Criterion and Strengthening the Cooperation between Supervisors in the context of ‘Fit and Proper’ Test *(Wet tot introductie van de geschiktheidseis en de versterking van de samenwerking tussen de toezichthouders in het kader van de geschiktheidstoets en de betrouwbaarheidstoets)*.[2] This amendment results first of all in the replacement of the existing statutory terms ‘expert’ and ‘expertise’ by the new terms ‘fit’ and ‘fitness’, although this is not intended to alter the substance

[2] Known for short as the Act introducing the Fitness Criterion. This amending act was published in the Bulletin of Acts and Decrees 2012, 7, and will enter into force (like the policy rule) with effect from 1 July 2012 (see Bulletin of Acts and Decrees 2012, 23).

of the standard. The new term ‘fitness’ relates to the assessment of knowledge, skills and professional conduct and is therefore more appropriate than the old term ‘expertise’. Another important amendment resulting from the Act introducing the Fitness Criterion is that the category of people whose expertise (i.e. in future: fitness) must be assessed includes not only the persons who determine the day-to-day policy of the financial enterprises but also internal supervisors.

As a result of this amendment to the law the existing joint AFM and DNB Expertise Policy Rule 2011 *(Beleidsregel deskundigheid 2011)* (Government Gazette 2010, 20810) of 29 December 2010 is expected to be replaced by a new joint AFM and DNB Fitness Policy Rule 2012 *(Beleidsregel geschiktheid 2012)* (Government Gazette 2012, 13546) from about 1 July 2012. For the time being, this change will mainly be of a technical nature. Article 2 of this policy rule declares that this new Fitness Policy Rule 2012 applies *mutatis mutandis* to the Caribbean Netherlands. Article 2, paragraph 4, of this policy rule provides that in applying the Fitness Policy Rule 2012 the AFM and DNB will take account of the nature, size and complexity of the financial enterprise concerned. As this proportionality principle is also reflected in these policy rules themselves, albeit in rather different wording and with a rather different scope, it has been repeated for the sake of clarity in article 2, paragraph 4, of this policy rule.

Article 2, paragraph 3, of this policy rule makes clear that the Fitness Policy Rule 2012 is also relevant in relation to DNB’s expertise tests of people who determine or jointly determine the policy of pension funds, within the meaning of section 5a, subsection 3, of the Pensions (BES Islands) Act *(Pensioenwet BES)* (Bulletin of Acts and Decrees 2010, 597). Unlike in the Wfm BES, the term ‘expert’ has not been replaced by the term ‘fit’ in the Pensions (BES Islands) Act, but this has no further significance for the meaning of this term.

Article 3:4 of the Bfm BES already contains specific rules on fitness for the purpose of conducting the business of intermediary in life or non-life insurance, or authorised agent or sub-agent. This policy rule does therefore not apply to these categories of intermediary. This exception is explicitly included in paragraph 1 of article 2 of this policy rule.

Notes on article 3 (conflicts of interest and current and former local PEPs)

The rules for assessing properness need to be elaborated in one respect, namely as regards preventing conflicts of interest. This concerns potential conflicts of interest that may arise if a person who determines or jointly determines the policy of a financial enterprise (or a candidate for such a position) is also involved or has a second job with a party associated with the financial enterprise concerned. In such a case the person concerned may pose an undesirable risk in terms of potential conflicts of interest on account of his or her personal and/or business interests in the associated party. This may raise doubts about whether the person concerned qualifies as a fit and proper person.

Special attention should also be focused in this connection on politically exposed persons (also known as PEPs)[3]. In keeping with the principle applied by the CBCS (see in this connection the CBCS Regulation on the Number of Permitted Policy-Making and Joint Policy-Making Positions per Person of January 2010), conflicts of interest may occur in the case of a current local PEP (i.e. a person who holds prominent public office) or former local PEP (i.e. a person who ceased to hold prominent public office more than a year ago). Owing to the status of the person concerned

[3] ‘Politically exposed persons’ are defined in section 1.1, subsection 1 (o), of the Money Laundering and Terrorist Financing (Prevention) (BES Islands) Act as: ‘natural persons who, other than in a capacity of middle-ranking or junior public servants, hold or have held prominent public office as referred to in section 1.2, subsection 1, with the exception of those who have ceased to hold such office at least one year earlier, and immediate family members or close associates as referred to in section 1.2, subsections 2 and 3, of these persons.’

as current or former local PEP, a situation may arise in which he or she is or will be subjected to great pressure to reach a particular decision, which would not otherwise be arrived at. This may therefore jeopardise the ability of a policymaker or co-policymaker in a financial enterprise to qualify as a proper person. The person concerned and the financial enterprise should be protected from potential conflicts of interest of this kind. In such cases, the supervisory authorities consider that the integrity of the financial enterprise is of overriding importance. For the sake of clarity, it should also be observed that for this purpose 'local' means in the Caribbean Netherlands.

Notes on article 4 (prevention of money laundering and terrorist financing)

In the context of the measures to prevent money laundering and terrorist financing the CBCS has adopted a number of provisions and guidelines, each of which deals with specific categories of financial enterprises. These CBCS policy rules are regularly updated. Article 4 of this policy rule lists the current versions of these provisions and guidelines at the moment of publication of this policy rule. In both the supervision of compliance with the Wwft BES and supervision of the sound operations of financial enterprises, the AFM and DNB apply these CBCS policy rules (and any future amendments or additions to them) *mutatis mutandis*, unless they have been explicitly derogated from in the Wwft BES or the secondary legislation.

For the sake of clarity it should also be noted that there are two appendices dated June 2011 to these CBCS Provisions and Guidelines. These are:
• *Appendix I – List of compulsory requirements as set out in the Provisions and Guidelines on the Detection and Deterrence of Money Laundering and Terrorist Financing (June 2011)*; and
• *Appendix II – The legal provisions of the supervisory legislation.*

Notes on article 5 (CBCS provisions, guidelines and policy memoranda)

Article 5 of this policy rule specifies certain CBCS provisions and guidelines and policy memoranda relating to sound operations of financial enterprises. These rules are laid down in section 3:8 of the Wfm BES and elaborated in articles 3:6 to 3:18 of the Bfm BES. In supervising sound operations, the AFM and DNB apply these CBCS policy rules *mutatis mutandis*. As regards the CBCS Policy Rule on Sound Operations in relation to Incidents and Integrity-Sensitive Positions *(CBCS Beleidsregel integere bedrijfsvoering bij incidenten en integriteitsgevoelige functies)*of January 2011, see also notes on article 6 below.

Notes on article 6 (procedures and measures relating to incidents)

Under section 3:38 of the Wfm BES, further rules may be laid down in the Bfm BES concerning, for example, the notification of incidents involving a financial enterprise. This is elaborated in article 3:14 of the Bfm BES, which contains rules governing the procedures and measures that financial enterprises must have put in place in relation to a) handling and recording incidents; and b) taking measures in response to an incident. The term 'incident' is defined in paragraph 4 of article 3:14 of the Bfm BES as 'an action or event that forms a danger to the ethical business conduct of the financial enterprise concerned'. This may also concern potential incidents. Paragraph 3 of article 3:14 of the Bfm BES provides that a financial enterprise must give immediate written notice of incidents to the AFM or DNB, as the case may be.

Under the CBCS Policy Rule on Sound Operations in relation to Incidents and Integrity-Sensitive Positions of January 2011, as referred to in article 5, financial enterprises are expected, among other things, to report incidents to the supervisory authority. These basic principles have been

adopted virtually in their entirety for the Caribbean Netherlands, in so far as an incident directly or indirectly affects the business of the financial enterprise in the Caribbean Netherlands. Where an incident takes place at a branch in the Caribbean Netherlands or primarily affects the activities of the financial enterprise in the Caribbean Netherlands, it should in any event be reported to the AFM or DNB. It is up to the financial enterprise concerned to consider whether notice should also be given to the CBCS, for example because the incident also indirectly affects the head office in Curaçao or St Maarten. And, conversely, an incident that takes place at the head office in Curaçao or St Maarten will have to be reported first of all to the CBCS, but also to the AFM or DNB if its operations in the Caribbean Netherlands are affected by the incident.

Article 6 of this policy rule lists a number of serious occurrences that a financial enterprise is in any event expected to report to the AFM or DNB. This list is not exhaustive, and there may therefore be other cases or circumstances that should be reported to the supervisory authority. Nor is it possible to set objective limits in advance on what incidents should and should not be notified to the supervisory authority. It is therefore primarily up to the financial enterprise itself to assess whether an incident is sufficiently grave to warrant reporting to the relevant supervisory authority or authorities. As a rule of thumb, notice should in any event be given to the licensing authority, while notice about incidents involving prudential supervision should always be given to DNB and notice about incidents involving conduct-of-business supervision to the AFM.

As regards the other aspects of dealing with and recording incidents and the measures to be taken in response to an incident, the AFM and DNB take the existing CBCS Policy Rule on Sound Operations in relation to Incidents and Integrity-Sensitive Positions of January 2011 as their starting point. This is also apparent from article 5 of this policy rule.

Notes on article 7 (initiative test in relation to the provision of services in the public bodies)

The initiative test, which is contained in article 7 of this policy rule, is relevant only to financial enterprises that do not themselves have an establishment in the Caribbean Netherlands (i.e. no registered office and no branch) and that occasionally carry out activities for clients who reside or are established in the Caribbean Netherlands. These occasional activities in the Caribbean Netherlands are then performed from an establishment abroad (i.e. in view of section 3:1, subsection 1, of the Wfm BES: from an establishment in Curaçao or St Maarten) through the provision of services. In that case these financial enterprises perform an activity for which a licence is required in the Caribbean Netherlands within the meaning of section 2:1 or section 2:3 of the Wfm BES, from an establishment abroad. This requirement of a licence is subject to one exception, which is restrictively interpreted by the AFM and DNB. In brief, this exception is that no licence is required under sections 2:1 or 2:3 Wfm BES in cases where the initiative is taken solely by a client who resides or is established in the Caribbean Netherlands and where the activities in the public bodies are therefore of an occasional nature. This exception is also known as the initiative test. The following example illustrates how the initiative test works and what criteria apply:

Example
A resident of Kralendijk, the capital city of Bonaire, contacts entirely on her own initiative a non-life insurer which has its offices on Curaçao to inquire whether she can take out house contents insurance for her home on Bonaire. If the insurer on Curaçao agrees to this request and concludes an insurance contract with the client on Bonaire, it will in principle be carrying out an activity for which it requires a licence from DNB pursuant to section 2:1, subsection 1, opening words and (b), of the Wfm BES. The only exception would be where the insurer can demonstrate that the initiative for the conclusion of the insurance contract was taken entirely by the client on Bonaire. In addition, it must be demonstrated that the services provided by this insurer in the Caribbean Netherlands are of an occasional nature.

The performance of activities requiring a licence in the Caribbean Netherlands as referred to in section 2:1 or section 2:3 of the Wfm BES does in any event occur if the financial enterprise concerned actively focuses its attention, from an establishment abroad, on clients who reside or are established in the Caribbean Netherlands. The enterprise may do this through its website or on the internet, as well as through other electronic or non-electronic media or advertising messages. If a financial enterprise that has its registered office on, say, Curaçao provides online information intended for residents or businesses in the Caribbean Netherlands, such as information about the tax system in the Caribbean Netherlands, it can no longer maintain that the initiative was taken solely by the client. The same applies in cases where the client declares, either at the request of the financial enterprise or otherwise, that he or she is the initiator. In such situations, the criteria for the initiative test are therefore not fulfilled and the financial enterprise concerned requires a licence for its operations in the Caribbean Netherlands. This also applies in situations where the financial enterprise provides services for a number of clients in the Caribbean Netherlands and the service provided from Curaçao or St Maarten in the public bodies is therefore of more than an occasional nature. Whether activities in the Caribbean Netherlands are of more than an occasional nature must be decided from case to case. No hard and fast figure can therefore be given for this.

As is apparent from paragraph 1 of article 7, the initiative test does not apply to trust service providers operating in the Caribbean Netherlands through the provision of services, without having an establishment (registered office or branch) in the Caribbean Netherlands. Once a trust service provider that does not have an establishment in the Caribbean Netherlands starts providing local trust services, this will often mark the start of an intensive relationship between the trust service provider and the client or principal concerned. Whether this client or principal or the trust service provider concerned itself has taken the initiative for the conclusion of this contractual relationship is not relevant in this case. However, trust service providers are obliged to obtain a licence under section 2:1, subsection 1, of the Wfm BES if they ‘operate’ (i.e. conduct business activities) as a trust service provider in the Caribbean Netherlands. If and for as long as a trust service provider provides trust services in the Caribbean Netherlands from an establishment abroad for only one single client or principal, such operations do not constitute an activity for which a licence is required in the Caribbean Netherlands.

Notes on articles 8 and 9 (the term ‘incoming insurers’ services’ and periods for notifications under section 2:23 of the Wfm BES)

Article 8 includes a number of specific DNB policy rules pursuant to section 2:23 of the Wfm BES, which deals with incoming services provided by foreign insurers in the Caribbean Netherlands. This concerns insurers that have a registered office outside the BES Islands and have no establishment (registered office or branch) in the public bodies themselves but offer

insurance in the Caribbean Netherlands through the provision of services. Such insurers are required to notify DNB under section 2:23, subsection 1, of the Wfm BES.

Article 8 of this policy rule elaborates section 2:23 of the Wfm BES in two respects. First, article 8, paragraph 1, defines what is meant by the 'the provision of services' or 'service provision' in relation to life insurers, non-life insurers and funeral service insurers. This is based on the definition of 'provision of services' in section 1:1 of the Financial Supervision Act (Wft) applicable in the country of the Netherlands. Foreign insurers that do not have an establishment in the Caribbean Netherlands but do provide services there within the meaning of article 8, paragraph 1, of this policy rule are subject under section 2:23 of the Wfm BES to a duty of notification, in other words they are obliged to notify DNB of the provision of incoming services. When giving this notification the foreign insurer concerned should be able to demonstrate compliance with the conditions of section 2:23 of the Wfm BES.

In addition, paragraph 2 of article 8 highlights a special situation in which a foreign insurer should, in the opinion of DNB, in any event be deemed to provide services in the Caribbean Netherlands. This concerns a situation in which a foreign insurer does not itself have an establishment (registered office or branch) in the public bodies, but instead operates through an intermediary (e.g. an adviser, broker or agent). Article 8, paragraph 2, is thus an addition to the initiative test in article 7 of this policy rule.

Two other special situations, which are dealt with in article 9 of this policy rule, may occur in the case of notifications by foreign insurers under section 2:23 of the Wfm BES. The first situation involves a foreign insurer that has until recently operated in the Caribbean Netherlands on an occasional basis, with clients in the BES taking the initiative themselves. If in due course this foreign insurer is unable to demonstrate that it still fulfils the criteria of the initiative test as laid down in article 7, it will become subject after all to the duty of notification in section 2:23 of the Wfm BES. Article 9, paragraph 1, of this policy rule provides for this situation: the insurer concerned must notify DNB of the incoming service that is has provided it in the Caribbean Netherlands within *four weeks* after the situation occurs**.** When giving this notification, the insurer must supply sufficient data and documentation to enable DNB to assess whether the requirements of section 2:23, subsection 1, of the Wfm BES are fulfilled.

A second special situation that may arise in connection with the application of section 2:23 of the Wfm BES – and for which article 9, paragraph 2, of this policy rule is intended – concerns a transitional situation, which may occur only once from 1 July 2012. This involves existing foreign insurers, which were active in the public bodies through the provision of incoming services before 1 July 2012. The duty of notification in section 2:23 of the Wfm BES applies to this category of insurers from 1 July 2012. In order to give these foreign insurers a reasonable period in which to comply with this duty of notification, paragraph 2 of article 9 of this policy rule provides that these insurers are obliged to notify DNB by 31 October 2012 at the latest. Once again, sufficient data and documentation should be supplied with these notifications in order to enable DNB to assess whether the conditions of section 2:23, subsection 1, of the Wfm BES have been fulfilled. These notifications will enable DNB to obtain the fullest possible picture of all foreign insurers that offer insurance in the Caribbean Netherlands by means of incoming services after 1 July 2012.

The following is also relevant in connection with the transitional provisions of the Wfm BES. Before 1 July 2012 some foreign insurers were already active in the Caribbean Netherlands through the provision of services, without having a registered office or branch in the public bodies. Examples are credit insurers with a registered office in the USA or Canada or non-life insurers, life insurers or funeral service insurers having their registered office in Aruba or the country of the Netherlands and offering insurance in the public bodies. Some of these insurers do

not have their registered office in the countries of Curaçao or St Maarten and thus do not meet the registered office requirement of section 3:1 of the Wfm BES. The provisions of section 10:3 of the Wfm BES contain transitional arrangements for this category of foreign insurers that do not have their registered office in Curaçao or St Maarten. This transitional provision means that the registered office requirement of section 3:1, subsection 1 of the Wfm BES (i.e. the requirement that a financial enterprise must have its registered office in the Caribbean Netherlands, Curaçao or St Maarten) does not apply to financial enterprises that already had their registered office in another country or in another jurisdiction on 1 July 2012. This transitional provision applies only for as long as the financial enterprise concerned does not transfer its registered office to another state or jurisdiction. However, this category of foreign insurers that were already active in the Caribbean Netherlands is required to comply with article 9, paragraph 2, of this policy rule and thus to provide timely notification to DNB of their provision of services in the Caribbean Netherlands.

Notes on article 10 (CBCS provisions and guidelines and policy memoranda)

In article 10 of this policy rule DNB mentions some CBCS provisions and guidelines and policy memoranda dealing with the controlled operations of financial enterprises. In the context of the supervision of controlled operations DNB applies these CBCS policy rules *mutatis mutandis*.

The Policy Memorandum on the Periodic Filing of a Management Report mentioned in article 10 (b) can be traced back in part to section 3:35 of the Wfm BES, in conjunction with article 5:2 of the Bfm BES. These provisions set out further rules on the other documentation to be submitted by a financial enterprise when filing the annual financial statements.

Notes on article 11 (controlled operations of the parent company of a financial group)

Section 3:44 of the Wfm BES provides, in brief, that an enterprise that has its registered office in a public body and is the parent company of a financial group should ensure that its operations are of such a nature that the financial soundness of the group as a whole and the credit institutions and insurers belonging to the group is not jeopardised by the risk management, the strategy and policy of the group as a whole, intra-group conflicts of interests or activities carried out by group members. For the credit institutions and insurers within a financial group of this kind, rules are laid down in the Wfm BES and in the secondary legislation concerning the sound and controlled operations on a ‘solo basis’, in other words at the level of the credit institution or insurer holding the licence. Needless to say, in the case of a financial group the controlled operations must also be in order at the level of the parent company of the group. This basic principle is elaborated in article 11 of this policy rule.

Notes on the final provisions (articles 12, 13 and 14)

To avoid a situation in which every future amendment or addition to this policy rule requires a decision of both the AFM and DNB, article 12 of this policy rule provides that this policy rule may also be amended by a separate decision of the AFM or DNB. An important precondition for such a unilateral amendment is that it does not affect the remit of the other supervisory authority. As the great majority of this policy rule concerns both fields of supervision, the likelihood of a unilateral amendment is fairly remote.

This policy rule will enter into force at the same time as the Wfm BES and the Wwft BES, namely with effect from 1 July 2012 (see Bulletin of Acts and Decrees 2012, 240). In this connection article 13 provides for the policy rule to be retroactive to 1 July 2012. This retroactive effect has no material significance for the financial enterprises that are subject to supervision since the policy rule does not introduce new obligations and provides, where necessary, for a transitional period.

The short title included in article 14 clearly reflects the fact that this is a joint policy rule of the AFM and DNB. This short title in article 14 needs no further explanation.

De Nederlandsche Bank N.V.,

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