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External Valuer Liability

Under AIFMD Article 19(10), an external valuer has unlimited liability to the AIFM for any losses suffered by the AIFM as a result of the external valuer's negligence or intentional failure to perform its tasks.

In many Member States, real estate valuers – adopting professional guidelines – cannot accept unlimited liability for negligence. Furthermore, professional indemnity insurance is not available for unlimited liability. In these Member States, therefore, valuers generally are not willing to perform the role of external valuers of the real estate assets held in funds.

As a result of AIFMD Article 19(10), then, AIFMs in many cases have had to operate the valuation function in-house i.e. operate with internal valuations – rather than use independent external valuations. This runs counter to long-established investor protection and good corporate governance principles.

We therefore recommend revising Article 19(10) to read: “the external valuer is liable to the AIFM for any losses suffered by the AIFM from the external valuer's ~~negligence~~ serious error or intentional failure to perform its tasks.”

This recommendation would enable independent external real estate valuers to perform valuations – for example, without fear of unlimited liability for minor errors – as well as address investor protection and good corporate governance expectations.

In addition, we would welcome guidance clarifying that an external valuer's liability is limited only to the assets that they value, combined with a requirement to have professional indemnity insurance.

Friction: Exercise of Passport Entitlement

Inconsistent interpretation and implementation by Member State regulators of some of AIFMD's requirements creates unnecessary on-going costs and complexity for non-listed real estate fund managers. In particular, "gold plating" by some regulators relating to obtaining or exercising the passporting entitlement is a problem.

We welcome the European Commission's recent proposal to develop consistent requirements applying to obtaining or exercising the passporting entitlement. In particular, we welcome the definition of the important concept of “pre-marketing” as “direct or indirect provision of information on investment strategies or investment ideas by an AIFM or on its behalf to professional investors domiciled or registered in the Union in order to test their interest in an AIF which is not yet established.”

We also welcome the Commission recognition of the lack of transparency of Member State fees related to passporting entitlement and their proportional relation to supervisory tasks. Regulatory fees should be more transparent at EU level, and we would welcome the introduction of high-level principles to ensure more consistency in the way regulatory fees are determined.

National Private Placement Regime (NPPR)

The NPPR has provided a flexible alternative to the passport, with the exception of a few Member States – who apply “gold plating” standards. We are looking for the NPPR to continue until the “Third Country” passport applies to relevant non-EEA jurisdictions. In practice, the NPPR maintains the EEA’s “open for business” status for non-EEA managers, while still achieving the AIFMD objectives for investor protection, transparency and addressing concerns about systemic risk. In addition, we would welcome guidance that achieves a level playing field – and prohibits a few members from “gold plating” standards.

Calculation of Leverage

Leverage is defined in AIFMD Article 4 as “any method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means. In practice, AIFMs use a combination of the gross and commitment methods for calculating leverage. We suggest guidance to ensure a consistent approach to the calculation of leverage for AIFs. For instance, the guidance should focus on cash borrowings associated with the investments, or derivatives and other instruments of the AIF.

Wind-up Funds

AIFMs are obliged to report information and to comply with the full range of regulatory requirements under AIFMD until the fund is legally terminated. At a certain point, however, AIFMs start to dispose of the AIFs’ real estate assets and distribute proceeds to investors. We suggest that Member State regulators should be permitted to exempt AIFMs from elements of the AIFM obligations under AIFMD in respect of an AIF that is in the process of being wound up.

