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12/06/2023

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Additional Information

Level 1 Regulation

Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Level 2 Regulation

AIFMD - Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision

Topic

Leverage

Additional Legal Reference

Article 6 of Delegated Regulation (EU) 231/2013

Subject Matter

Calculation of the leverage of AIFs investing in real estate

Question

When calculating the leverage of an AIF whose core investment policy is to invest in real estate directly or indirectly, shall the AIFM include the exposure contained in financial or legal structures involving third parties controlled by that AIF as referred to in Article 6(1) and (3) of Delegated Regulation (EU) 231/2013?

ESMA Answer

13-06-2023

Original language

[ESMA34-32-352, Section VII, Q&A 8]

Yes. Under Article 6(3) of Delegated Regulation (EU) 231/2013, an AIFM must include the exposure contained in financial or legal structures involving third parties controlled by the AIF when calculating the leverage of such AIF, where these structures are specifically set up to directly or indirectly increase the exposure at the level of the AIF. For instance, financial or legal structures involving third parties (eg. special purpose vehicles controlled by the AIF), put in place to acquire real estate assets, which obtain leverage for that purpose, directly or indirectly create leverage at the level of the AIF investing in real estate.

The exemption referred to in the second sentence of Article 6(3) of Delegated Regulation (EU) 231/2013 for AIFs whose core investment policy is to acquire control of non-listed companies or issuers, applies solely to non-listed companies (mostly venture capital and private equity funds), provided that the AIF or the AIFM acting on behalf of the AIF does not have to bear potential losses beyond its investment in the respective company or issuer. Therefore, that exemption should not apply to AIFs, which acquire real estate assets indirectly through non-listed companies, as such non-listed companies are being utilised by the AIF with the purpose of implementing the AIF's investment policy, which is the acquisition of real estate assets.

The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.