

Mandanteninformation

Regulatory Law

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New Investment Regulation has been passed

On 25 February 2015, the Federal Cabinet passed an amendment to the Investment Regulation and the Pension Fund Investment Regulation. After the Capital Investment Code (*Kapitalanlagegesetzbuch*, KAGB) came into force on 22 July 2013, now the Investment Regulation (AnlV) has also been adjusted to the KAGB. With this, a legislative process that has dragged on for 19 months has finally come to an end, and with it the uncertainty regarding the investment guidelines for the whole investment sector and its institutional investors has now ended.

The last draft of an amended AnlV—published in the context of the consultations in the legislative process—dates back to May 2014 (cf. our previous [client alert](#)). This draft had been highly criticized by the funds industry, including associations, market participants, and ourselves. Some of the comments have now been addressed by the law maker and included in the version of the AnlV, which has now come into force.

According to § 2 Abs. 1 Nr. 13 b) AnlV, Private Equity / Venture Capital AIF, which are managed by AIFM which are not licensed, but only registered (§ 44 KAGB, so called "Registration AIFM" or "small AIFM"), can now also be included in the restricted assets of the insurers. According to the draft from May 2014, this was only intended for AIF if their management company had a (full) AIFM license. Given the fact that numerous management companies in the funds segment are only registered, but not fully licensed, this would have represented a great challenge for parts of the industry.

Amendments in the area of real estate funds

In addition to further amendments, there have been some corrections in the area of real estate funds. The relevant regulation here is § 2 Abs. 1 Nr. 14 c) AnlV. Only those real estate funds, which fulfill the requirements of this regulation, can be included in the restricted assets via the so called "real estate quota" of 25% according to § 3 Abs. 5 AnlV. Other real estate funds are admissible in principle, but have to be added to the restricted assets via the so called open quota. Such a qualification of real estate funds is often not in the interest of the investors, as the open quota is only 5% (with BaFin permission up to 10%), and is usually needed for other investments.

According to the draft AnlV of May 2014, investments in close-ended institutional real estate funds (i.e. especially the closed-ended institutional Investment Limited Partnership (InvKG)) were not admissible. This mistake has now been corrected and the catalogue of permissible real estate funds expanded to include institutional real estate funds of any nature (trust funds (*Sondervermögen*), InvKG, Investment-Corporation (InvAG)) and close-ended retail AIF (InvKG, InvAG). Open-ended real estate retail trust funds (*Offene Immobilien-Publikums-Sondervermögen*) are still not admissible according to § 2 Abs. 1 Nr. 14 c) AnlV.

The extension of the real estate quota to real estate held by open-ended institutional mixed funds pursuant to § 2 para. 1 Nr. 16 AnlV is also certainly a positive development. This type of real estate can be included in the real estate quota based on its value (not on the value of the entire mixed fund).

Unfortunately, the law maker has ignored two crucial points of criticism related to the regulation of real estate funds.

According to § 2 Abs. 1 Nr. 14 c) AnlV, only German and comparable EU-AIF continue to be admissible. The proposed extension to AIF formed under the law of a member state of the OECD has not been accepted. As a result, US real estate funds in particular do not qualify for § 2 Abs. 1 Nr. 14 c) AnlV and hence not for the real estate quota. This is difficult to understand, as OECD (including US) REITs are permissible for the real estate quota (pursuant to § 2 Abs. 1 Nr. 14 b) AnlV) and OECD private equity funds are also admissible as part of the participation quota of § 2 Abs. 1 Nr. 13 AnlV. The reasoning behind the discrimination of OECD real estate funds remains inexplicable.

Furthermore, the law maker has refrained from a clarification in § 2 Abs. 1 Nr. 14 c) aa) AnlV that the respective AIF can also hold funds' assets as liquidity (in the sense of §§ 231 Abs. 1 Nr. 7 and 253 KAGB) in addition to the real estate and real estate companies there described. This omission has no negative effect, however. It goes without saying that AIFs must hold liquidity, it is also in part an explicit legal obligation, cf. § 253 Abs. 1 sentence 2 KAGB.

Also, the sentence "in the event of investments via a master fund into real estate target funds, the target fund must also qualify according to no. 14 lit. c)," remained in the explanatory notes to the AnlV. This requirement, however, is not apparent from the wording of the law, leaving the legal implications of this sentence unclear.

If admissible (pursuant to § 2 Abs. 1 Nr. 14 c) AnlV) German or EU real estate funds, under the regulations set for them (including the requirements of § 2 Abs. 1 Nr. 14 c) AnlV), are permitted to invest in an OECD real estate funds, which is, given the right structure, indeed possible, the sentence mentioned above should not be able to contradict this legal consequence. However, further developments in this respect remain to be seen. If necessary, different structuring options can be applied in order to make such investments possible.

Outlook

The new AnlV applies to the same extent as the previous AnlV, i.e. it does apply in particular to all insurance undertakings and by state law or voluntary application to most profession-based pension funds. This is going to change after the implementation of the Solvency-II-Directive taking effect at the beginning of 2016. The new investment regime for all (except for small) insurance undertakings no longer uses the previous concept of regulating the types of admissible investments, mixture and diversification quota. Rather, it is based on a risk-related, mathematical and actuarial approach. It remains to be seen if the AnlV will remain in force for small insurance undertakings and the profession-based pension funds or whether it will be substituted by a new set of rules, possibly made at the level of the federal states with respect to the profession-based pension funds.

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