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Reduction of liability and plausibility check for investment advisors for closed-end fund offers – Part I

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The liability risks of insurance brokers, investment brokers and consultants, but also of distributors and financial planners, differ depending on the customer (advice suitable for investors), capital investment (advice suitable for the property) or the risk involved (advice following property inspection and risk analysis).

Obligation to disclose commissions – or reverse the transaction:

This first part deals with the mediation and consulting in the sale of closed investments. There are still few models in which the customer pays the agent the commission or a fee – the latest rulings of the Federal Court of Justice (BGH) require disclosure to the customer: This concerns closed participations from 15% internal commission or 16% as the sum of internal and external commission. This is the flip side of the derailment,

that paradoxically, the intermediary or adviser is obliged and liable to the customer – but the remuneration is not (yet) paid directly by the customer. The missing or not provable clearing-up of the capital investor means practically that the investor can separate at expense of the mediator and/or advisor later from its participation (back completion) and besides escaped investment interest can be required (payment of damages).

Obligation to inform about negative press – or reversal of the transaction:

Basically, the investor shifts his investment risk to the agent or advisor. He will only make use of it if the system does not run as expected. Often it is management mistakes or criminality in the house of the initiator that make an investment worthless: However, this is not a direct reason for liability on the part of the intermediary or advisor – however, the argument of a lack of information about negative press coverage is often used. This controversial sin of omission can also lead to a reversal of the transaction: It is also felt to be unjust that nobody really knows for sure which media will be used as “compulsory reading” by courts later on.

From the status follow obligations to advise – or reversal of the transaction:

The agent does not owe the customer any advice – in principle he only owes information, including information on risks, and the customer can also find this information in the investment prospectus. However, it is always a prerequisite that the customer has had sufficient time to study the prospectus – one to two weeks between handing over the prospectus and signing the application are necessary from the perspective of the courts: Who does not keep to it, risks that the customer could separate later comfortably from the investment at expense of the mediator. Only very few intermediaries work with clean contracts and documentation in such matters.

However, the intermediary is the practical exception, because the very start of a consultation from the customer’s point of view makes the intermediary in the status of an advisor – completely automatically, and without any special contractual agreement. This applies accordingly if the intermediary acts externally as “business consultant, financial planner, consultant, etc.”: Already the company name, the telephone directory entry, the website or the stationery can generate the far stricter obligations of the consultant.

The advisor not only owes information, but also an evaluation of the investment object, whether it “fits” the customer. He may only make a recommendation after he has comprehensively checked the product characteristics of the prospectus (more is usually not available to him) and compared them with the individual circumstances and wishes of the investor. Experience has shown that as a brochure deliverer and question beant-answer you are far from being accepted as an investor’s partner and that others may be driving the sales turnover. Experience has shown that some intermediaries have slipped into the more liability-incriminating role of investment advisor without realising it, which can be very bad for them when dragged to court. Up to the destruction of existence in case of success of the plaintiff for (high) damages.

Limits of a reduction of liability by corporations?

In the apron of its occupation admission as investment consultants therefore one recommends to create a adhesion-limiting corporation (GmbH or Limited). However, this alone is not enough, because a correct distribution of the roles as management and shareholder, as well as a functioning liability management must be added: Whoever is not up to this effort, risks sooner or later to lose his entire private assets.

The corporation offers some protection, but not if the advisor exudes “personal trust” and acts as a specialist or expert towards the investor. The “personal trust” slides over into unlimited personal liability with all company and private assets. In order to protect private assets, the investment advisor should have the possibilities of “asset protection” designed for himself in good time. The absolutely legal possibilities range from solutions abroad (foundation, trust, insurance shell, fund, etc.) to the transfer of assets within the family (marriage contract, special insurance arrangements, transfer of assets in exchange for pension benefits, etc.). Even a transfer of assets to a partner requires the design of a (separation) risk insurance.

Limits of a financial loss liability insurance (VSH)?

First and foremost, the corporation or its managing director and employees are advised to take out a sufficiently high level of financial loss liability insurance. The amount of liability should be based on the maximum possible extent of liability, not that the sum insured is exhausted halfway through. If the investment adviser operates a risk management system, he has a written property check and risk analysis from the VSH broker, which shows which liability sum and which maximisation was calculated and how: A “worst-case scenario”, taking into account the serial loss clause, is also included. In addition, there is an examination of the employees and their connections, as well as advice on typically uninsured risks – depending on the VSH provider, there are remarkable differences about which only very few VSH brokers know anything. There are even fewer VSH brokers who can show the investment advisor the way to reduce liability, i.e. who know and advise him on all sensible measures so that the VSH cover only covers the so-called residual risk. The vast majority of VSH brokers are liable to their customers, investment advisors and brokers in a “bombshell”: According to the higher courts, VSH brokers must be experts in liability law and must inform their customers about changes in jurisdiction without being asked to do so – a practical overcharge, and for investment brokers and advisors a fine recourse option in the case of frequent under- and misinsurance.

Limits of the IdW-S4 Prospectus Report?

It is common practice that VSH cover for closed-end investments is only available if the sale of closed-end fund investments is made by means of a prospectus that has been examined by a competent auditor without objections in accordance with IdW guidelines S 4. In it, the auditor (WP) confirms that the prospectus makes true, complete and clear statements about the investment up to the date of the audit. It has examined all important contracts and checked the creditworthiness of the initiators and guarantors and confirms that an investor can form an accurate picture of the investment on the basis of the information in the prospectus. The IdW’s catalogue of guidelines for this examination complex is general for all forms of investment, but also specified for the product lines real estate funds, ship investments, film and wind power investments etc.

The securities auditor, which in turn is covered by a VSH policy, is liable for its statements. Questionable is only its VSH sum, which, with a limited four million EURO, should hardly suffice for the damage sum of a participation offer with an investment volume of 200.000.000 EURO. If a clause would limit the liability ineffectively, which would be the practical rule in WP business conditions, the liability of the WP is regularly unlimited: Then it must force itself on the investment adviser to question the creditworthiness of the securities accountant and the actual amount of the securities accountant’s VSH cover. But this alone is not enough to trigger a liability claim against the WP, and certainly not for enforcement !

Dealing with the WP to improve liability on the client side:

As soon as prospectus and/or prospectus expertises are faulty, the investor points to the broker or advisor – because the courts dutifully demand to check the plausibility: Not to question a concept legally, fiscally and economically can even produce criminal law reproaches, as the recent media fund participations show.

For the “joint liability” of the WP it is not sufficient to know that an expert opinion has been prepared. It must be present before conclusion of the declaration of accession to the investor (and naturally also the mediator and/or advisor!) as “its copy” and it must have taken note of the contents in time, otherwise it has no legal effect; neither for the investor nor for the advisor and/or mediator. From an organisational point of view, it must be ensured that the WP report is available at the same time as the prospectus, so that the investor can take note of both in good time. This is also a question of documentation in order to have legally binding evidence, because if the investor does not receive the prospectus audit report before his or her subscription, it can no longer be used as a justification for the subscription to no longer incur any causal liability of the WP.

Thus also the question arises whether the VSH of the investment adviser steps into the liability, if a WP appraisal was provided in time for the beginning of selling, but this was not announced to the investor or not in time before entry and he did not receive a copy ?

Indemnity declaration – no protection against reverse transaction !

A popular means of weighing the investment broker and advisor, but also the sales department at the front in supposed security, are the so-called “indemnity declarations”, which the initiator is happy to issue to his sales partners. If the sales partner has fulfilled certain conditions, the initiator will gladly step into liability. But what happens if the damage to the fund shares becomes so massive that it leads to the insolvency or bankruptcy of the initiator/fund? Then these declarations of exemption have become completely worthless, as the cases of FALK, GEW, Phoenix, Securenta-Göttinger-Gruppe etc. in recent years have shown. No investment advisor should rely on this. In any case, as an advisor he has to fulfil his main duties, which the Federal Court of Justice and its case law describe as checking the plausibility of the prospectus. These main duties cannot be performed by anyone else, so that an investment advisor must have comprehensive knowledge of the legal, tax and economic fields. Of course, the consultant can limit his liability through client agreements – but these things must then be legally effective: This point, up to and including the waiver of consultancy, must be put to the test in risk management – it is not possible to start the test until liability has been established, as court decisions are often the most expensive option for legal implementation.

Legal and tax opinions as well as initial consultations can reduce liability:

In legal matters, he will be able to rely on specialised lawyers who require comprehensive knowledge of the company structure (GbR, KG or KGaA) and its effects on the investment. In tax law, he will be allowed to use the services of tax consultants and auditors. Existing legal and tax opinions must be requested and reviewed. Whether these appraisals will endure due to recent considerations of the tax authorities – as recently doubted for certain forms of film investments – remains an open question. It should never be overlooked that numerous “lawyers, professors, auditors” in the foreground or background of sales have helped with “courtesy reports and advertising statements” to sell products. The rule of thumb for such “expert statements” is obviously that one is not aware of the responsibility – an adequate VSH coverage is then regularly not recognizable.

Duty to advise, plausibility check – up to software errors:

In economic matters, the consultant is often left to his own devices. The prospectus provides him with liquidity forecasts and sensitivity analyses for the entire project, but also as an example for a specific investment amount. With the help of provided, rarely correctly calculating software programs, he is allowed to create individual calculations for his investors, which are all based on more or less uncertain future values. Whether these expectations will ever come true, the investment advisor must tremble clearly about it and enlighten about the uncertainty, if he does not want to announce false promises to the investor. According to the case law, the catalogue of obligations includes information on the sale of closed participations, information on the total loss risk and information on the lack of fungibility (possibly a tight secondary market for liquidation before expiry).

It is not uncommon for investment advisors to notice that statements about “guarantees” or yield are not covered in the VSH. Yes, especially if it is an objective investor deception, such as the IRR yield that is used and commented on in deficit. In the case of partially debt-financed investments, a court expert will later charge the consultant that the “secure leverage gain” as stated in the prospectus was unfortunately a foreseeable investment loss. Even some sales departments of credit institutions have already painfully experienced through liability lawsuits that the economic plausibility check is hardly possible without an external financial mathematical assessment. The verification of business key figures, the correction and the disclosure to the investor requires a correct logging and documentation of the plausibility check. This applies, by the way, to all investment criteria that the investment advisor must coordinate with the investor’s

individual ideas (investor-oriented advice).

by Dr. Johannes Fiala / Diplom-Kaufmann Edmund J. Ranosch / Prof. Dr. Hans Jürgen Ott

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Dr. Johannes Fiala

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Sie haben gefunden, wonach Sie gesucht haben? Sie kennen jemanden der unserer Unterstützung benötigt?
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