Luxembourg, 17 September 1991

To all professionals of the
financial sector

Circular IML 91/78

Re: Detailed rules for the application of Article 60 of the amended Law of 27 November 1984 regulating private portfolio managers

Ladies and Gentlemen,

Article 60 of Part II of the amended Law of 27 November 1984 on access to and supervision of the financial sector, governing the professional activities of the financial sector other than those of credit institutions, includes provisions specific to the activity of private portfolio managers. This activity is defined in paragraph (1) of this Article as consisting in “managing their clients’ assets based on a mandate or a commission and on a non-collective basis”.

The two subsequent paragraphs of this Article define the specific limits within which the assets of the clients must be managed and they confer, at the same time, a special legal regime to these assets.

The approach of the legislator consists explicitly in making a distinction between private portfolio managers and credit institutions, which in accordance with Community law have the exclusive right to take deposits or other repayable funds from the public and to grant credits for their own account. However, private portfolio managers shall not engage in the receipt into custody of assets from their clients. The aim of the rules governing their activities is twofold: to avoid that the client’s assets are allocated in case of collective liquidation of the manager and to avoid that the manager disposes of the clients’ assets in its favour.

Consequently, private portfolio managers are required to carry out their activities in a way that allow them to fully comply with aforementioned Article 60. As is to be expected, the professionals acting for their own account, referred to in Article 61 of the aforementioned Law, in the case where they act as private portfolio manager, shall comply with the same rules.

As such, private portfolio managers cannot themselves hold in custody the assets of their clients. When they receive such assets, they are obliged to deposit them with an authorised depository that is subject to an official supervision without delay. Depending on the content of their contract with their client, managers may be more or less free to choose (a) depositary(ies).

The clients' assets shall be deposited separately from the manager's own assets. This rule is linked to the specific regime to which the clients' assets are subject in accordance with the two first sentences of paragraph (3) of aforementioned Article 60. Any infringement to this rule would thwart the separation between the managers' assets and their clients' assets. Yet, this separation is absolutely intended by the legislator, not only in case of liquidation of the manager but at any time in order to prevent the manager's creditors from seizing the assets of the clients of the latter. In that regard, in particular, the depositary of the clients' assets must not, in any case, be allowed to offset these assets with a claim it may have against the manager.

In concrete terms, this implies that a private portfolio manager which entrusts to the same depositary its own assets and assets that belong to its clients, shall have at least two accounts with this depositary, one for its own assets and another for the assets of its clients. It goes without saying that it is free, where appropriate under the contracts entered in with its clients, to deposit the clients' assets on more than one account and even to have accounts opened for each individual client. The accounts receivable shall be designated as such so that the depositary is fully informed.

The separate deposit of the clients’ assets shall not prevent the manager from debiting commissions and other amounts due to it when performing its activities from clients’ assets.

The separate deposit of the clients’ assets with an authorised depositary shall not exempt the private portfolio manager from keeping a full and detailed account of the assets of each of its clients entrusted with its management and having a documentation on its clients that notably complies with the regulations aimed at the fight against the laundering of money from criminal activities.

The private portfolio manager shall, of course, keep an account of its own assets and liabilities in its personal balance sheet. The accounts receivable shall be disclosed off balance sheet.

The reconciliation between the accounts opened by the manager for the deposit of its clients’ assets and its own account keeping shall be done at least once a month. During the inter-reconciliation period, the balance standing to the credit of the accounts opened for the clients’ assets shall, at any time, be equal to or greater than all the clients’ assets. Consequently, the reconciliation shall consist in transferring from accounts opened for the clients’ assets to accounts opened for the own assets of the manager the amounts exceeding the total individual positions of the clients in the manager’s books.

Yours faithfully,

INSTITUT MONETAIRE LUXEMBOURGEOIS

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