

# Legal 500

## Country Comparative Guides 2024

Ireland

### Alternative Investment Funds

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This country-specific Q&A provides an overview of alternative investment funds laws and regulations applicable in Ireland.

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## Ireland: Alternative Investment Funds

### 1. What are the principal legal structures used for Alternative Investment Funds?

Irish alternative investment funds are principally, but not exclusively, established as regulated products. The Central Bank of Ireland (the "Central Bank") separates alternative investment funds into two distinct regulatory classifications, the qualifying investor alternative investment fund ("QIAIF") and the retail investor alternative investment fund ("RIAIF") (together "AIFs").

QIAIFs, as their name implies, are open to *qualifying investors* (see 31 below) only and have a minimum subscription of €100,000 (or other currency equivalent). A RIAIF, by contrast, is a regulated AIF open to retail investors with no such minimum subscription requirement.

There are five bespoke legal structures for regulated investment funds, all of which require authorisation by the Central Bank:

- the Irish Collective Asset-management Vehicle ("ICAV") established under the ICAV Act, 2015.
- the Investment Limited Partnership ("ILP") established under the Investment Limited Partnerships Act, 1994 (as amended).
- a Public Limited Company ("PLC"), established pursuant to Section 24 of the Companies Act, 2014 (as amended).
- Unit Trusts established pursuant to the Unit Trusts Act, 1990.
- a Common Contractual Fund ("CCF"), established pursuant to the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.

AIFs are primarily established as QIAIFs in Ireland as they are, in most cases, subject to very limited investment or borrowing restrictions and, in almost all circumstances, can avail of the Central Bank's 24-hour authorisation process. The principal legal structure used for AIFs in Ireland is the ICAV, which replaced the PLC as the default structure for AIFs. The ICAV and the PLC are corporate entities while the remaining structures do not have separate legal personality and are created pursuant to a partnership agreement (ILP), a deed (Trust Deed) or a contract (CCF).

There are also a number of unregulated AIFs established in Ireland, largely in the form of limited partnerships formed under the Limited Partnerships Act 1907, as well as other structures such as real estate investment trusts that are in the form of public limited companies.

Under Irish law, the Alternative Investment Fund Managers Directive ("AIFMD") will apply to any entity which meets the definition of an "AIF" as defined in the AIFMD.

### 2. Does a structure provide limited liability to the investors? If so, how is this achieved?

A manager's liability to investors in an AIF it manages would be governed by AIFMD (and any relevant contractual provisions).

For investors in AIFs, their potential loss is limited to the sum invested. An investor in a QIAIF is required to certify in writing that they are aware of the risks involved in investing in the QIAIF and of the fact that inherent in such investments is the potential to lose all of the sum invested.

### 3. Is there a market preference and/or most preferred structure? Does it depend on asset class or investment strategy?

The ICAV is the most common structure and is the only bespoke corporate structure for investment funds. Since its inception in 2015, it has surpassed all other legal forms in popularity.

The ILP (a bespoke partnership structure for investment funds) has been receiving increasing attention from managers since the amendment of the ILP Act in 2020, which aligned the ILP more with market expectations and existing partnership structures in other jurisdictions.

A range of factors can influence the choice of legal vehicle, including tax treatment, potential investor preferences, regulatory status, operational requirements and willingness to set up a separate Irish management company.

#### 4. Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds or strategies (e.g. private equity vs. hedge)) and, if so, how?

All AIFs are equally subject to the requirements imposed under AIFMD and the AIFM Regulations in Ireland. AIFs are able to have differing liquidity features; however, for those that are regulated by the Central Bank, the AIF Rulebook ("AIF Rules") applies additional requirements with regard to the closed-ended period of the regulated AIF and certain requirements regarding the redemption and settlement periods for open-ended and open-ended with limited liquidity funds.

Similarly, a regulated AIF may be subject to enhanced requirements under the AIF Rules where they pursue a particular strategy, e.g. venture capital RIAIFs, real estate RIAIFs, loan originating QIAIFs and money market AIFs.

#### 5. Are there any limits on the manager's ability to restrict redemptions? What factors determine the degree of liquidity that a manager offers investor of an Alternative Investment Fund?

The primary factor in determining the liquidity profile of an AIF is the portfolio of underlying assets held by that AIF. An AIFM is required to employ a liquidity management policy in respect of each AIF under its management. Such policy sets out, inter alia, how the AIFM maintains appropriate liquidity in the AIF based on the liquidity of its assets and the time required to liquidate such assets to meet redemption requests as they fall due. An AIFM must also impose liquidity management limits and conduct regular stress tests under normal and exceptional liquidity conditions.

#### 6. What are potential tools that a manager may use to manage illiquidity risks regarding the portfolio of its Alternative Investment Fund?

AIFMs can employ a wide range of liquidity management tools in respect of AIFs under management, including:

- Redemption Gate
- Borrowing
- In specie redemption
- Holdbacks
- Writedowns
- Suspend dealing

- Side pockets
- Redemption charge
- ADL
- Swing Pricing

#### 7. Are there any restrictions on transfers of investors' interests?

The constitutional document of an AIF may provide investors with the ability to switch their shares in a sub-fund of the AIF to another class of that same sub-fund or shares in another sub-fund of the umbrella structure. The investor may be charged a switching fee in respect of such switch (up to a maximum of 5% of value of the holding).

Similarly, the constitutional document of the AIF will set out the process available for investors to transfer their shares, including any applicable transfer fee (up to a maximum of 5%), circumstances in which the AIF may reject a transfer request and how the transfer is effected (e.g. by way of a change in entry on the AIF register).

In respect of QIAIFs, shares may not be transferred to an entity or person who does not meet the requirements of a qualifying investor.

An investor in a CCF may not transfer its interests to a natural person (or their nominee). CCFs are only available to institutional investors and corporate entities.

#### 8. Are there any other limitations on a manager's ability to manage its funds (e.g., diversification requirements)?

Regulated AIFs are subject to certain general restrictions, including that AIFs (i) may not raise capital from the public through the issue of debt securities (other than specified loan originating QIAIFs); (ii) may not grant loans or act as a guarantor on behalf of third parties; and (iii) are not permitted to acquire shares carrying voting rights which would enable them to exercise significant influence over the management of issuing bodies nor are they permitted to appoint an AIFM, management company or general partner who would do so. AIFs which are structured as PLCs are also subject to a statutory based requirement of 'spreading investment risk' as set out under the Companies Act.

As standard, QIAIFs are not subject to any investment or borrowing restrictions.

RIAIFs are subject to more restrictive requirements than QIAIFs, including a 20% NAV limit on investment in (i)

unlisted securities; (ii) securities issued by the same institution; and (iii) any class of security issued by any single issuer.

Other specific fund type restrictions apply to certain AIFs, e.g. private equity AIFs, money market AIFs, real estate AIFs, loan originating QIAIFs or fund of funds / master-feeder AIFs.

### **9. What is the local tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors (or any other common investor type) in Alternative Investment Funds? Does the tax treatment of the target investment dictate the structure of the Alternative Investment Fund?**

Investors in AIFs can be categorised as (a) Irish resident investors; (b) non-Irish resident investors; and (c) exempt Irish resident investors.

(a) When a distribution or any other gain is made by an Irish resident investor who does not fall within any of the exempt categories (see below), tax will be deducted at a rate of 41% (or 25% where the investor is a company and has made an appropriate declaration).

(b) There are no Irish withholding taxes payable on distributions or any gain arising to a non-Irish resident investor who has provided the AIF with an appropriate declaration of non-Irish residence.

(c) There are certain categories of exempt Irish investors who are treated as if they are non-Irish resident (i.e. no withholding taxes are due) including approved pension schemes, other collective investment schemes, charities etc..

The establishment of an AIF under a particular legal structure may be driven by the preferred tax treatment of the investors of the AIF. ICAVs may be structured to 'check-the-box' in order to be treated as a partnership or disregarded for US federal tax purposes. AIFs in the form of a CCF or an ILP are treated as tax transparent from an Irish tax perspective and no withholding taxes will be levied and there is no need for a non-resident declaration. If desired, ILPs may also 'check-the-box' in order to be treated as a corporation for US federal tax purposes. The Unit Trust is tax opaque but capable of "checking the box" for US federal tax purposes.

### **10. What rights do investors typically have and what restrictions are investors typically subject**

### **to with respect to the management or operations of the Alternative Investment Fund?**

The AIF shall, where relevant, specify in its constitutional document the circumstances under which there may be effected, and the procedure to be followed with respect to, the replacement of the AIFM/management company/general partner with another AIFM/management company/general partner.

Certain matters are also specified by the Central Bank as requiring investor involvement (including certain increases in fees and charges, a material change in the AIF's investment policy or a change in its investment objective).

### **11. Where customization of Alternative Investment Funds is required by investors, what types of legal structures are most commonly used?**

The ICAV is the most common form of structure used. In terms of customisation, the ICAV is a flexible structure which can accommodate most customisation requests – where such requests comply with overall AIFM requirements.

In addition, closed-ended QIAIFs may be established with share classes that provide for the (i) allocation of the returns of specific assets to a share class and / or (ii) participation by a share class other than on a pro rata basis. Establishment of share classes which provide for such differentiated participation are permissible to reflect: (a) issue of shares at a price other than net asset value without prior approval of the Central Bank; (b) excuse and exclude provisions; (c) stage investing; and (d) management participation.

### **12. Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?**

Every AIF established in Ireland is required to appoint an AIFM to take responsibility for the management of the AIF and for compliance with AIFMD. The AIFM shall either be (i) an external manager or (ii) the AIF itself (for PLCs or ICAVs only).

An external AIFM to an Irish AIF may be:

- an AIFM authorised by or registered with the Central Bank;
- an AIFM authorised by the regulator of another

EU Member State;

- a non-EU investment manager, designated as an AIFM (such entity must be approved by the Central Bank to act as investment manager to Irish AIFs but is not authorised by the Central Bank).

An AIFM may only delegate the investment management function to an entity which is authorised or registered for the purpose of asset management and subject to prudential supervision. Where the proposed investment manager is not located in Ireland, cooperation between the Central Bank and the relevant third country supervisory authority must be in place.

A fast-track process is in place for non-Irish EU investment managers authorised as UCITS management companies, AIFMs, MiFID investment firms or credit institutions authorised under Directive 2006/48/EC. Non-EU based applicants must complete an online application to demonstrate that it is appropriately regulated and has the necessary experience, integrity and adequacy of resources to manage Irish funds. Such application is subject to prior review by the Central Bank.

An AIFM may be approved as a *sub-threshold* AIFM where it either directly or indirectly manages AIF(s) whose AUM does not exceed €100m (or €500m where the AIFs are unleveraged and do not offer redemption rights within five years of investment).

### 13. Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

While AIFs must be approved and regulated by the Central Bank, alternative investment funds may also be established in an unregulated (but AIFMD compliant) form, including as limited partnerships under the Limited Partnership Act 1907.

### 14. Does the Alternative Investment Fund require a manager or advisor to be domiciled in the same jurisdiction as the Alternative Investment Fund itself?

There is no obligation for the AIFM to be located in the same jurisdiction as the AIF.

### 15. Are there local residence or other local qualification or substance requirements for the

### Alternative Investment Fund and/or the manager and/or the advisor to the fund?

The Central Bank's Fund Management Companies Guidance imposes significant requirements with regard to the substance and management functions of Irish AIFMs (including internally managed AIFs).

AIFs with an external AIFM are not directly impacted by these substance requirements.

### 16. What service providers are required by applicable law and regulation?

Under AIFMD, an AIF must appoint an AIFM and a depositary under AIFMD. Where the legal structure of the AIF requires (i.e. unit trusts and CCFs), the AIF is also required to appoint a management company.

Most AIFMs will delegate the administration and investment management functions in respect of an AIF to a fund administrator and an investment manager, respectively. In addition, the following service providers are commonly seen as service providers to or in respect of an AIF:

- Investment Adviser (non-discretionary)
- Distributor / Placement Agent
- Prime Broker
- Auditor
- Legal Advisor
- Company Secretary (corporate vehicles only)
- MLRO

The depositary is required to be incorporated in Ireland or have a registered branch in Ireland. The depositary must be one of the following:

- an EU credit institution;
- a MiFID investment firm authorised to provide depositary services;
- other entities subject to prudential regulation and ongoing supervision which are eligible to act as UCITS depositaries.

### 17. Are local resident directors / trustees required?

A corporate AIF (i.e. PLC and ICAV) must appoint two Irish resident directors and it may not appoint any common directors between the AIF and the board of directors of the depositary of the AIF. For non-corporate AIFs this requirement is imposed on the AIF's management company or general partner.



## 18. What rules apply to foreign managers or advisers wishing to manage, advise, or otherwise operate funds domiciled in your jurisdiction?

As described above, an EU investment manager authorised as a UCITS management company, an AIFM, a MiFID investment firm or a credit institution (with approval to provide portfolio management services under MiFID) will be approved to act as investment manager to Irish AIFs pursuant to their local authorisation and prudential supervision.

A non-EU based applicant will be required to make an application seeking approval from the Central Bank to act as discretionary investment manager to an Irish AIF. The applicant must demonstrate to the Central Bank that it is appropriately regulated in its home state. In this regard, the Central Bank provides an online list of jurisdictions which it has deemed to provide a comparable regulatory regime. In addition to its appropriate regulation, the applicant must demonstrate its expertise, integrity and adequacy of financial resources which should include details of the applicant's background details and experience, proposed portfolio managers, shareholders, assets under management and financial statements.

Prior Central Bank clearance is not required for non-discretionary investment advisors although the Central Bank requires: (i) the relevant adviser to have the appropriate licence in its home jurisdiction; and (ii) appropriate disclosure, depending on the nuances of the arrangement

## 19. What are common enforcement risks that managers face with respect to the management of their Alternative Investment Funds?

The Central Bank regularly carry out themed inspections to assess how AIFMs are managing the AIFs under their management. The themed inspections focus on particular areas of the AIFM's business, such as anti-money laundering, fitness and probity and compliance with the Central Bank's Fund Management Company Guidance.

## 20. What is the typical level of management fee paid? Does it vary by asset type?

The management fee to be paid is a commercial matter between the AIF and the relevant investment manager and may differ between sub-funds of the same AIF and also between share classes of the same sub-fund. The maximum annual fee (inclusive of any performance fee) must be set down in the AIFs constitutional document or

management agreement and can only be increased with the approval of a majority of investors.

In practice, we see management fees ranging, on average, from 0.5% to 2.00% of the Net Asset Value of the fund, although they may be lower or higher than this range. Funds with similar investment strategies tend to apply similar management fees, however as fees are individually negotiated they may vary from one fund with a specific strategy to another with a similar strategy. As outlined below, we expect any such gap in fees to close as ESMA and local regulators enhance transparency requirements and alignment of fees of funds with common investment strategies.

In 2020, ESMA issued a Supervisory Briefing in respect of funds fees for both UCITS and AIFs in which it set out certain criteria to be considered in determining the fees charged to an AIF, including whether those fees are proportionate compared to market standards and the type of service provided (e.g. by way of comparative table displaying the costs of funds with similar investment strategies) and whether the fees are consistent with the characteristics of the AIF. In addition, the Central Bank undertook a review of costs and fees charged to UCITS as part of a wider ESMA Common Supervisory Action ("CBI Review"). The findings of the CBI Review were published in March 2023 and focus on management companies implementing and following clear policies for the design, setting and review fee structures. While the CBI Review focused on UCITS management companies, their expectation is that the findings and action of the review are equally considered by AIFMs with respect to costs and fees charged to AIFs.

While the application of fees is currently a commercial arrangement, influenced by the fund type and complexity, we expect the fee structure of AIFs to become more aligned further to the ESMA Supervisory Briefing and CBI Review and the transparency proposed, e.g. investors will see that the fees charged to an emerging market equity AIF in which they are invested are the same or similar to the fees charged to another AIF with the same strategy.

## 21. Is a performance fee typical? If so, does it commonly include a "high water mark", "hurdle", "water-fall" or other condition? If so, please explain.

An AIFM, management company, general partner or investment manager may charge a performance fee. In practice, we predominantly see performance fees set at 20% of any out-performance against a previous high NAV on which a performance fee was paid ("High Water Mark")

or "HWM") or against a specified index. AIFs principally measure performance against a HWM for the purpose of determining if a performance fee falls due and may also impose an additional hurdle rate (e.g. 5% of NAV) above that HWM for a performance fee to fall payable.

The calculation of a performance fee must be verified by the depositary or by a competent person appointed by the AIFM and approved for the purpose by the depositary.

ESMA's final report on guidelines on performance fees in investment funds is applicable to AIFs with retail investors (and so typically only RIAIFs) and seeks to harmonise how performance fees are charged to investors in RIAIFs, the circumstances in which performance fees may be paid and how they are disclosed to investors.

The Central Bank also permits closed-ended QIAIFs to be structured to include carried interest provisions.

## **22. Are fee discounts / fee rebates or other economic benefits for initial investors typical in raising assets for new fund launches?**

AIFs are typically created with different classes of shares each having its own fee structure. The use of different fee structures is not only related to the timing the investor is investing at but also often to the type of investor, the minimum investment amount and the involvement of intermediaries.

## **23. Are management fee "break-points" offered based on investment size?**

"Break-points" are more commonly seen within investment management agreements, where the fee charged to the AIF reduces on a sliding scale as the size of the fund grows.

The imposition of any such "break-point" is a commercial arrangement between the AIF and the relevant AIFM or investment manager.

## **24. Are first loss programs used as a source of capital (i.e., a managed account into which the manager contributes approximately 10-20% of the account balance and the remainder is furnished by the investor)?**

We do not typically see first loss programs used as a source of capital for AIFs.

## **25. What is the typical terms of a seeding / acceleration program?**

A new share class of an AIF will initially be offered at a fixed price and shall be available at that fixed price for a period of at least 6 months (which may be extended) or until such time as the directors may determine.

Following the closure of the initial offer period, a share class will be available at the net asset value of the share class (subject to any adjustment for duties and charges as the Directors may in their sole discretion determine).

## **26. What industry trends have recently developed regarding management fees and incentive/performance fees or carried interest? In particular, are there industry norms between primary funds and secondary funds?**

ESMA and the Central Bank have continued to increase their focus on the transparency and proportionality of fees applicable to funds (including AIFs).

As we have discussed above, ESMA published updated guidance in respect of the calculation of performance fees in 2020, when they may be charged and how they are disclosed to investors (applicable to RIAIFs only). Additionally, ESMA issued a Supervisory Briefing seeking the convergence of supervision of fund fees across Europe to ensure that fees charged to AIFs are fair, transparent and proportionate while the CBI Review also (albeit indirectly for AIFs) seeks to enhance the review and approval of fees.

This increased focus on fund fees will lead to enhanced disclosure to investors with regard to the fees charged to the AIF in which they are invested, providing specific detail in terms of the value of fees, the service received for such fee, the proportionality of the fee as against market comparators etc.

## **27. What restrictions are there on marketing Alternative Investment Funds?**

The primary restriction of marketing QIAIFs is that they are authorised for marketing solely to *qualifying investors*. This restriction must be disclosed in a prominent position in QIAIF prospectuses.

A QIAIF can be marketed to 'professional investors' throughout the EU under the marketing passport of its AIFM (i.e. once an AIFM is authorised in one Member State it does not need any additional authorisation to

market a QIAIF in other Member States). The AIFM must notify its home regulator when it intends to market a QIAIF in another Member State. Importantly, the passport attaches to the AIFM, not the QIAIF itself.

As it is a retail product, a RIAIF cannot avail of the automatic right to passport across Europe under the AIFMD marketing passport described above.

## 28. Is the concept of "pre-marketing" (or equivalent) recognised in your jurisdiction? If so, how has it been defined (by law and/or practice)?

The concept of pre-marketing is recognised in Ireland pursuant to Directive 2019/1160 which introduced a definition of 'pre-marketing' into AIFMD<sup>1</sup>.

Any pre-marketing document must clearly disclose that it does not constitute an offer or invitation to subscribe to shares of an AIF and that the information presented is incomplete and should not be relied upon.

### Footnote(s):

<sup>1</sup> 'Pre-marketing' is defined as *"the provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or registered in the Union in order to test their interest in an AIF which is not yet established, or in an AIF which is established, but not yet notified for marketing in accordance with Article 31 or 32 (of AIFMD), or in compartments of such AIFs, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment."*

## 29. Can Alternative Investment Funds be marketed to retail investors?

Yes, if a RIAIF. Certain non-Irish AIFs may also be marketed to retail investors in Ireland.

As noted, a RIAIF is any AIF that does not impose a minimum subscription or imposes a minimum subscription of less than €100,000. RIAIFs are subject to less investment and eligible asset restrictions than UCITS but are more restrictive than the QIAIF regime.

European Long Term Investment Funds (ELTIFs), under the ELTIF 2.0 regime, will also be available to retail investors.

Similarly to a RIAIF, ELTIFs do not impose a minimum subscription. Equally, retail ELTIFs will be less restrictive than UCITS structures but more restrictive than QIAIF regimes.

## 30. Does your jurisdiction have a particular form of Alternative Investment Fund be that can be marketed to retail investors (e.g. a Long-Term Investment Fund or Non-UCITS Retail Scheme)?

Yes, in Ireland there is the RIAIF regime. Equally, certain forms of ELTIF may be marketed to retail investors.

## 31. What are the minimum investor qualification requirements for an Alternative Investment Fund? Does this vary by asset class (e.g. hedge vs. private equity)?

In order to invest in a QIAIF, an investor must qualify as a *qualifying investor* which falls under one of the prescribed categories set down under legislation<sup>2</sup>.

Investors in a QIAIF must certify in writing to the QIAIF that they meet the minimum criteria and that they are aware of the risk involved in the proposed investment and of the fact that inherent in such investments is the potential to lose all of the sum invested.

### Footnote(s):

<sup>2</sup> A *qualifying investor* is:

- an investor who is a *professional client* within the meaning of MiFID II; or
- an investor who receives an appraisal from an EU credit institution, a MiFID investment firm or a UCITS management company that the investor has the appropriate expertise, experience and knowledge to adequately understand the investment in a QIAIF; or
- an investor who certifies that they are an informed investor by confirming (in writing) that: (i) they have sufficient knowledge of and experience in financial and business matters to enable them to properly evaluate the merits and risks of the prospective investment; or (ii) their business involves, whether for its own account or the account of others, the management, acquisition or disposal of property of the same kind as the property of the QIAIF.



### 32. Are there additional restrictions on marketing to government entities or similar investors (e.g. sovereign wealth funds) or pension funds or insurance company investors?

No, government entities and pensions both meet the definition of a *professional investor* as defined under the MiFID Directive and, therefore, an AIF may be marketed to such entities.

### 33. Are there any restrictions on the use of intermediaries to assist in the fundraising process?

An AIFM will generally appoint a global distributor (often the same entity as the investment manager) with responsibility for the marketing and distribution of the AIF. The distribution function is not regulated by the Central Bank, however the global distributor will be a regulated entity (e.g. MiFID firm).

Local regulations in other EU jurisdictions may require the appointment of local paying agents and the maintenance of accounts by such paying agents.

### 34. Is the use of "side letters" restricted?

An AIF can enter into side letters to provide special

arrangements to a particular investor but only where such special arrangements (or preferential treatment) are disclosed in the AIF rules or constitutional document. The Central Bank's requirements around fair and equal treatment of investors also need to be considered.

### 35. Are there any disclosure requirements with respect to side letters?

All investors in an AIF must receive certain information before they invest in the AIF (as well as any material changes to such information following their investment), including a description of how the AIFM ensures fair treatment of investors and, where an investor receives preferential treatment or the right to receive preferential treatment, a description of such preferential treatment, the types of investors who obtain that treatment and, where relevant, their legal or economic links to the AIF or the AIFM.

### 36. What are the most common side letter terms? What industry trends have recently developed regarding side letter terms?

The most common side letter terms include (i) most favoured nations; (ii) transfers (closed-ended); (iii) excusal rights; (iv) enhanced reporting and information; (v) fees; and (vi) redemption rights.

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