



AIFMD

Seven Tips and Lessons Learned from January 2015 AIFMD Filers

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By *Jeanette Turner, Advise Technologies, LLC*

The vast majority of fund managers under the Alternative Investment Fund Managers Directive (AIFMD) have now survived their first filing of the consolidated AIFMD reporting template – commonly referred to as Annex IV. Fund managers that have yet to file can learn from the experiences of those who just filed in January 2015, for the reporting period that ended on December 31, 2014. Jeanette Turner, Managing Director & General Counsel at Advise Technologies, LLC, shares useful feedback and lessons learned from hedge and other fund managers that filed in January.

Next Wednesday, February 18, from 10:00 a.m. to 11:00 a.m. EST, Turner will expand on the thoughts in this article in a webinar entitled “Lessons Learned from the January Filing.” She will be joined in that webinar by *Simon Whiteside*, a partner at Simmons and Simmons LLP, and *Stefanie Kirchheimer*, a Director at PwC. The webinar will be moderated by the Hedge Fund Law Report.

For further insight from Turner, see “*HFLR-Advise Technologies Panel Explores AIFMD Marketing and Annex IV Reporting Requirements*,” Hedge Fund Law Report, Vol. 8, No. 2 (Jan. 15, 2015). The Hedge Fund Law Report interviewed Turner in “*Key Pain Points in AIFMD Annex IV Reporting and Proven Strategies for Surmounting Them*,” Hedge Fund Law Report, Vol. 7, No. 44 (Nov. 20, 2014); and she co-authored “*A Practical Comparison of Reporting Under AIFMD versus Form PF*,” Hedge Fund Law Report, Vol. 7, No. 41 (Oct. 30, 2014).

It Is Not Obvious Which Questions Are Required

Some of the most commonly asked questions about Annex IV are about which questions are required for certain fund managers (AIFMs) and funds (AIFs).

Sections and Content Type

Annex IV contains four sections: AIFM 24(1), AIF 24(1), AIF 24(2), and AIF 24(4). Which section is required depends on whether the AIFM is above-threshold, whether the AIF is an EEA AIF, whether the AIF is marketed in the EEA and whether the AIF employs leverage on a substantial basis. If an AIFM is below threshold and registered under Article 3(3)(d), it only completes the two 24(1) sections. Above threshold AIFMs complete all sections of the form, as applicable to each type of AIF.

Section AIFM 24(1) includes aggregated information from all AIFs managed (for non-EEA AIFMs, for all AIFs marketed in the jurisdiction). Section AIF 24(1) is completed for each AIF managed (for non-EEA AIFMs, for each AIF marketed in the jurisdiction). Section 24(2) is completed for each EEA AIF and each AIF marketed in the EEA, leaving out non-EEA AIFs not marketed in the EEA (for non-EEA AIFMs, for each AIF marketed in the jurisdiction). Section 24(4) is completed for each AIF that is substantially leveraged (for non-EEA AIFMs, for each AIF marketed in the jurisdiction and that is substantially leveraged). These parameters are confusing to some filers. Indeed, Question 5 (content type), which simply asks which sections are required for the reporting AIFM or AIF, was one of the most frequently asked about questions on the form.

To complicate things further, although section 24(2) is not required for non-EEA AIFs that are not marketed, in some jurisdictions the section is required if the non-EEA AIF is a master AIF of a feeder AIF that is being reported on. Filers must look to each jurisdiction to determine whether the section is required for particular AIFs. For non-EEA AIFMs, the same rule applies to all sections, not just section 24(2).

Questions Marked with an Asterisk

Some questions are marked with an asterisk, indicating that it is up to each jurisdiction to require them. The questions were in the consultation draft of the Annex IV form and ESMA guidelines. Respondents to the consultation paper pointed out that the questions went beyond the scope of the Regulations. The questions are no longer required, but ESMA did not remove them from the form. Instead, when ESMA published its final guidelines, it also issued an “opinion” suggesting that individual national regulators should require the additional information. As such, firms must look to each jurisdiction to determine whether the questions are required.

Optional Questions

The ESMA IT technical guidance indicates that certain questions on the form are optional. ESMA Q&A instructs that information marked as optional must be reported if the AIFM has information to report. Some filers interpret this to mean that the information is required if the AIFM has such information readily available, while others interpret it to mean that the information is required if the question applies to the AIFM, and that the AIFM should obtain such information if it is not readily available.

Reporting for a Feeder Fund

Under AIFMD, Annex IV is completed separately for each AIF. This means that firms cannot aggregate master-feeder funds, but instead must submit a filing for the master and feeder separately, without “looking through” to the other fund. As expected, the filing for the feeder fund will lack answers for a majority of the questions. Many filers – particularly non-EEA AIFMs that are only filing for feeders but not masters – were uncomfortable doing so and felt the need to “look through” for some questions. See [“U.K. FCA Guidance Confirms Simplified Transparency Reporting for Certain Private Placements of Master-Feeder Funds,”](#) Hedge Fund Law Report, Vol. 7, No. 44 (Nov. 20, 2014).

Understanding the Questions Takes a Lot of Work

Annex IV appears simple but is actually complex. The form itself is an Excel spreadsheet with four tabs to designate the four sections. It does not include instructions or a glossary of defined terms. Instead, to answer a question on the form the filer must reference several documents, including the Directive, Regulations, ESMA Guidelines, ESMA IT technical guidance and ESMA Q&A, among others. In addition to such AIFMD materials, filers must also reference guidelines and Q&A published from each applicable jurisdiction. To further complicate things, the questions do not instruct the filer as to which references apply to the particular question. Filers found the exercise of locating and cross-referencing the various sources of information to be quite onerous.

Where guidance is lacking, filers sometimes seek direction from local legal counsel or directly from the regulators. However, filers have at times received conflicting information from various local counsel as well as from regulators, leading to confusion and frustration. Some filers faced language barriers, with guidance not being published in English, and with emailed replies to questions lacking clarity and requiring follow-up conversations via telephone.

Even when there is published guidance applicable to a question, filers sometimes find it too cumbersome to apply and instead opt to apply their own methodologies. For example, some filers found the conversion methodologies for derivative instruments to be burdensome.

Likewise, many filers found certain aspects of the commitment method for calculating leverage to be too difficult to apply, such as the application of hedging and netting arrangements.

Every Step Is Time Consuming

Data must be gathered from multiple internal and external sources, including investor relations, risk, accounting, legal and compliance, fund administrators, prime brokers and other counterparties, and risk providers. Some filers found that it took time to obtain the data necessary to answer the questions, and at times the exercise was futile. For example, not all filers have information regarding their exposure to CCPs and must reach out to third parties to obtain such information. Filers utilizing U.S. prime brokers were unable to obtain the information necessary to report the percentage of collateral that was rehypothecated during the reporting period. Even when filers had the data, adaptations were sometimes necessary. For example, many firms had to start tracking which short positions were deemed to be hedges, often requiring some tough decisions on internal procedures and operations.

You Can't Just Copy Form PF

Much is said about the overlap between the two forms and some filers mistakenly believe that they can simply copy and paste certain information provided in Form PF. It is true that there is significant overlap in the raw data used to answer questions in both forms and fund managers that automated their Form PF filings are steps ahead in preparing for Annex IV. However, even questions that appear identical on both forms are not actually the same and filers must be mindful of the need to apply different methodologies and calculations.

One example is question 39 on Form PF, which asks “[d]uring the reporting period, did the reporting fund clear any transactions directly through a CCP?” An FAQ published by the SEC instructs filers that if the reporting fund is not a clearing member and did not directly clear through the CCP (but instead, for example, cleared through an FCM that is a clearing member), it would respond “no”. Question 172 on Annex IV is “[d]uring the reporting period, did the AIF clear

any transactions directly through a CCP?” Some filers were quick to assume that because the questions were nearly word-for-word identical, the answer would be the same. However, the ESMA guidelines instruct that “[t]his question should be understood as covering AIFMs that have an *account* with clearing members” (emphasis added). Clearing via an account with a clearing member calls for a “no” answer on Form PF but a “yes” answer for Annex IV.

Another example is geographical exposure. In a nearly word-for-word identical question, both forms ask for a geographical breakdown of the investments held by the fund (question 28 on Form PF and question 78-93 on Annex IV). An FAQ published by the SEC gives filers flexibility to determine how to report the geographical area of investments, allowing filers to classify investments in a manner that is consistent with their internal methodologies and the reporting of such information to investors. Accordingly, many filers classified investments based on country of risk. For Annex IV, however, filers are to look at the domicile of the investments made.

The First Reporting Period and Deadline Can Be Confusing

AIFMs report for the first full quarter after the quarter in which the reporting requirement is triggered in a jurisdiction, until the end of the AIFM’s reporting period. In some jurisdictions (for example, the U.K.) the reporting requirement is triggered at the time the AIFM gives notice of its intent to market an AIF, and in other jurisdictions (for example, Sweden) the requirement is triggered when the regulator approves the registration of the AIF. For many January 2015 filers the requirement was triggered in Q3 and therefore the first reporting period was for Q4, even if the AIFM was an annual or half-yearly filer. Many firms mistakenly believed that the filing requirement did not begin until the first full reporting period, which would have been Q1-Q2 of 2015 for half-yearly filers and Q1-Q4 of 2015 for annual filers.

To further complicate the matter, if a non-EEA AIFM is seeking to market an AIF in multiple jurisdictions, the first reporting period might be different in the various jurisdictions. For example, if in Q2 the firm submits applications in the U.K. and Sweden, but does not receive approval from Sweden until Q3, the first filing deadline in both jurisdictions will be January 31, but the U.K. filing will include information from Q3 and Q4 while the Sweden filing will include only Q4. This nuance affects some questions in the form.

Even the Filing Logistics Can Be Painful

Do not underestimate the effort required just to prepare to file. Some jurisdictions have a lengthy multi-step process before a firm can submit a filing. Some do not allow filers to manually type in the information on a website, but instead require submission of an XML. Some require the XML submission via an online portal, while others require that the XML be emailed to the regulator. The U.K. regulator, the Financial Conduct Authority (FCA), requires a different version of the XML, and the form used by the Netherlands regulator, De Nederlandsche Bank (DNB) includes extra sections to be completed. The Denmark regulator, the Danish Financial Supervisory Authority (FSA), requires use of an Excel spreadsheet, which creates its own problems since some cells require multiple pieces of information. Some regulators require a separate filing for each AIF while others require a single submission for all AIFs. Some regulators have very specific instructions around how to submit the filing, including how to compress and encrypt it. The Luxembourg regulator, the Commission de Surveillance du Secteur Financier (CSSF), requires the use of one of two approved third-party software vendors. Some filers did

not realize this extra step, which requires 2-4 weeks for proper set-up of the software. The regulator in Sweden, the Financial Supervisory Authority (FI), mails filers a physical reporting card and card reader that utilizes a USB port, creating difficulties for hedge funds that disable USB ports. Some filers struggled with the reporting cards, and it did not help that the instructions were not in English.

And then there are the deadlines. The January 31, 2015 deadline fell on a Saturday. In some jurisdictions the deadline was moved to Friday; in some it was Saturday but there was no available technology support; and in others it was moved to Monday. It is imperative that filers know the precise filing requirements for each applicable jurisdiction.

When logging into the U.K. reporting portal, filers are faced with a default profile established by the FCA. Per a Q&A published by the FCA, filers are to correct the information by utilizing certain codes in Annex IV. Filers that had not read the applicable materials published by the FCA were confused when their profile indicated that they had a different reporting obligation than they expected.

When Submitting the Filing, Allow Time for Things to Go Wrong

Many regulators were under pressure for the January 31, 2015 filing deadline. Some did not have online reporting systems in place, opting instead to accept filings via email. The DNB reduced pressure by extending the filing deadline for some filers. In December 2014, the DNB confirmed that, until further notice, non-E.U. AIFMs would not need to report for the reporting period ending December 31, 2014. Instead, these AIFMs will receive a letter in due course informing them of their initial filing deadline.

As some anticipated would happen, the regulators that were accepting filings via online reporting systems were kept busy with system issues and bugs that will need to be resolved for future filings. In Ireland, it sometimes took hours to process filings, leaving filers with a notice that the status of their submission was “queued.” The DNB granted an extension to March 31, 2015 because it made last minute corrections to its reporting form. The FCA granted filing extensions for filers that did not receive the required national codes by January 1, 2015 and when the reporting system was “timing out” in the days leading up to the deadline, the FCA granted short-term extensions to those filers that were unable to gain access and timely submit their filings.

Even when filings were accepted by the various online systems, filers had to navigate various bugs. Some firms filing in the U.K. received warnings that they were not supposed to answer the leverage questions in section 24(2), even though the questions are required. Filers also received a validation error if national codes were missing for share classes, even though the fields are optional and many filers do not have such codes for share classes.

Hopefully most of the issues from the January 2015 filing will be resolved before the April 30 filing. Even so, regulators are navigating a complex reporting requirement and new bugs will be introduced as they make corrections and aim to improve their systems. Filers should allow time to work around the various issues that they might face when submitting their filings.

Jeanette Turner is Managing Director & General Counsel at Advise Technologies, LLC. An attorney with more than 10 years of experience working with the financial services industry, she is an expert

on legal and regulatory compliance issues for fund managers. At Advise, Turner focuses on global regulatory requirements that affect fund managers and is head of the “best practices” group with regard to such requirements. She also focuses on regulatory exams and compliance requirements for fund managers. In addition to moderating and speaking on panels, Turner produces thought leadership through white papers, articles and other guidance, on issues affecting fund managers.

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