



AIFMD

Simmons & Simmons, PwC and Advise Technologies Share Lessons Learned from January 2015 AIFMD Annex IV Filing (Part Two of Two)

Feb. 26, 2015

By William V. de Cordova, *Hedge Fund Law Report*

Many hedge fund managers made their first AIFMD Annex IV filing in January 2015. That process generated actionable lessons for hedge fund managers that can be grouped into three disciplines: regulation, data and logistics. On February 18, 2015, the Hedge Fund Law Report and Advise Technologies sponsored a panel discussion addressing lessons from the January 2015 filing in each of these three disciplines. Simon Whiteside, a partner at Simmons & Simmons LLP, addressed regulation; Stefanie Kirchheimer, a director at PricewaterhouseCoopers, discussed data; and Jeanette Turner, Managing Director and General Counsel for Advise, focused on logistics; HFLR Publisher Mike Pereira moderated.

This article conveys insights from the panel on Annex IV filing logistics, technical issues and clarifications from regulators. A [prior article](#) covered reporting obligations, data, calculations and interpretations. See also “[Seven Tips and Lessons Learned from January 2015 AIFMD Filers](#),” Hedge Fund Law Report, Vol. 8, No. 6 (Feb. 12, 2015); “[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).

Filing Logistics

Understanding the logistical requirements for filing Annex IV is one of the most important parts of the process, according to Jeanette Turner, starting with each jurisdiction’s requirements for a manager to register in order to file Annex IV. “You can’t just go to the regulator’s website and submit your files; you have to register to file,” Turner said, noting that such registration is completely separate from the process that the manager went through to become authorized or registered as an alternative investment fund manager (AIFM). See “[HFLR-Advise Technologies Panel Explores AIFMD Marketing and Annex IV Reporting Requirements](#),” Hedge Fund Law Report, Vol. 8, No. 2 (Jan. 15, 2015).

Some European jurisdictions require multi-step registration processes for managers to file Annex IV. For example, in the U.K., managers have to register through the Gathering Better Regulatory Information Electronically (GABRIEL) system, using a profile that is pre-set for each manager by the Financial Conduct Authority (FCA), but requires verification and can possibly

change. Luxembourg requires managers to use one of only two approved software vendors, requiring managers to establish a relationship with the vendor, figure out what product offering the manager wants from the vendor and enter into license agreements with the vendor – a process that can take two to four weeks before the filing process can begin. Sweden physically mails managers a card and card reader that must be used to submit the filing. Cautioned Turner, “Filing is not totally virtual, where you can just log into a website and start your filing process.”

How Must the Filing be Submitted?

Once properly registered to file, the first question for managers to determine is: how must the Annex IV filing be submitted? Some regulators require filings to be online; others (such as Denmark and Finland) require submissions via email. Turner pointed out that, while email submissions are easy, simply requiring a file to be emailed to the relevant regulator, managers have to allow sufficient time with email filings for the regulator to conduct validation checks on the filing before passing it on to the European Securities and Markets Authority (ESMA) for its own validation checks.

In addition to allowing time for such validation checks, Turner advised managers to allow sufficient time for figuring out all filing logistics and dealing with matters such as language barriers. “I know that some people struggled with some instructions not being in English, and they needed to take some extra time to figure out what the actual instructions were,” she said.

How Must the Data be Provided?

Depending on the regulator, managers could be expected to submit data via Extensible Markup Language (XML) file or via Excel spreadsheet. Even among regulators requiring the same format of electronic filing, there may be differences between jurisdictions. For example, with respect to XML, the U.K. uses XML version 1.1 whereas all other regulators use version 1.2. Likewise, although Denmark requests an Excel spreadsheet, it mandates that certain cells contain multiple pieces of information.

Beyond software format, Turner noted, managers need to be cognizant of whether any additional information is required by the jurisdiction; for example, the Netherlands requires several additional sections of reporting beyond those required by other jurisdictions. Also, some regulators may require the filing to be zipped or encrypted.

“You need to find out all this information before you begin your filing,” recommended Turner, who also stressed that some managers may have had to add additional resources in order to meet the technical demands of filing. “If you don’t have the technical resources in your firm to generate XML or you don’t have a person with that kind of knowledge, you might have to quickly find software or someone to just generate the XML for you so you can make the filing.”

Does the Manager Submit One or Multiple Filings?

The next question is whether the manager is required to submit multiple filings or just one. “In a lot of jurisdictions, you’re going to submit one XML file that includes your AIFM and all of the alternative investment funds (AIFs) that you’re reporting on,” Turner noted. “However, other jurisdictions are going to ask you to submit a separate filing for every single AIF that you’re reporting on. Sweden, for example, requires a separate filing for each AIF. Interestingly, Ireland requires a separate Excel filing for each AIF, but if you submit via XML, they want one single filing.”

What Is the Actual Deadline?

As Simon Whiteside mentioned in the previous article in this series, the filing deadline is one month from the close of the relevant reporting period. Turner reinforced this point, stating “It’s not 30 days; it’s 1 month. For this filing, the deadline was January 31, which fell on a Saturday.” Accordingly, some jurisdictions considered Friday to be the true deadline, others allowed filings on Saturday but had no technical support available and still others set the following Monday or Tuesday as the actual deadline. See “[Answers to Questions Most Frequently Asked by U.S. and Other Non-E.U. Managers on the Impact and Implementation of the AIFMD](#),” Hedge Fund Law Report, Vol. 8, No. 1 (Jan. 8, 2015).

In addition to knowing the deadline, Turner recommended allowing extra time for mishaps, especially if technical support is unavailable on a particular filing deadline. “Ask these questions: When is the actual deadline? What’s the time cutoff? You’re working in different time zones, and the cutoff isn’t necessarily midnight in every time zone. And, is technical support available?” With answers to the above in hand, managers will be better suited to ensure they are able to meet the applicable deadlines.

Who Must Submit the Filing?

Finally, Turner advised managers to determine whether the regulator has any requirements with respect to the person actually submitting the filing. For example, in Ireland, one person must submit the filing, and another person must sign off on it.

Technical Issues

Another lesson learned from the January Annex IV filings is to leave time for technical issues. Annex IV is a complex filing – “a hundred times more complex than [Form PF](#),” according to Turner – and many regulators were under pressure with respect to the filing. See “[A Practical Comparison of Reporting Under AIFMD versus Form PF](#),” Hedge Fund Law Report, Vol. 7, No. 41 (Oct. 30, 2014). Some regulators attempted to relieve this pressure ahead of time. For example, the Netherlands did not require reporting from non-E.U. funds in January and will instead notify such funds by letter when they are required to file. Likewise, other regulators accepted filings via email in January in order to allow more time to develop online systems for future filings.

Despite such efforts, however, many technical issues arose, and Turner believes that future filings may be plagued with similar problems. “These kinds of technical issues will come up again in other filings. Although hopefully the vast majority of them will be resolved, you still need to allow time for technical issues to come up.” Turner then discussed three technical issues that plagued the January filing process.

Not Being Able to File

The first technical issue that affected numerous filers was the inability to file at all. Most frequently, managers were prevented from filing due to problems with the national codes needed for each AIFM and each AIF in order to file the Annex IV. As the filing deadline approached, many managers had not received their codes. For example, Denmark, Luxembourg and Finland all posted their codes in January. The U.K. granted an extension to any managers who did not receive their codes by January 1, requiring such filers to complete the filing within one month

from the day they receive their codes. Managers who did not receive their codes in time were unable to complete the filing.

In addition, managers encountered other technological issues that prevented filing. As mentioned previously, Sweden mailed physical cards and card readers to filers, and some unsuspecting managers had to search their office for this equipment when preparing to file. Others had their card malfunction and needed an extension from Sweden while awaiting receipt of a replacement. Likewise, the Netherlands made last-minute corrections to their reporting form and granted an extension to filers in light thereof.

Validation Errors

Another common technical issue that arose in several jurisdictions involved validation errors. “Those managers who filed in various jurisdictions faced several validation errors that they weren’t expecting, many of which were incorrect. They were simply bugs in the system of the regulator,” said Turner. Thus, even if a manager submitted the correct answer in the correct manner, complying with all technical guidance, the answer could still be rejected. Furthermore, fixing the validation error often would result in an incorrect answer on the filing, forcing managers to develop a workaround to allow them to submit the filing without submitting incorrect information to the regulator. Turner said that, although particular validation errors may be resolved by the next filing, the problem will likely persist with future filings. “The U.K. put out a publication recently addressing many of the validation errors that came up through their system, and we expect that other regulators will do the same. They’ll fix the validation errors before the next filing, but inevitably there will be other validation errors as people submit different types of answers.”

Technical Issues with the Filing Itself

“Many people, knowing the pressure that regulators were under, fully expected systems to come under pressure and to crash,” Turner said, “and they did.” For example, filings in Ireland sometimes sat in a queue for several hours, prompting managers to email the filing to the regulator (along with a screenshot of the filing sitting in the queue) for assistance. Demands on the U.K.’s system in the days leading up to the deadline resulted in managers experiencing login delays and filings that waited for up to seven hours to go through before ultimately timing out. Likewise, in Sweden, filings could only be submitted for AIFs – not for the AIFM itself.

“Hopefully this will be fixed for the next filing,” Turner reiterated. “But, you still have regulators that are going to be setting up their online systems and accepting filings for the first time in future periods. So, allow for this to happen for other filings in the future with other regulators.”

Differences among Jurisdictions

Based on feedback from filers, Turner noted that some jurisdictions appeared to be easier to navigate than others. Because Denmark and Finland required email submission, managers avoided the validation errors caused by other jurisdictions’ systems. Managers found the Irish system easy to navigate in light of the information put out by the regulator. Similarly, Malta disseminated information addressing specific questions that filers had about the process (something Turner noted other regulators seemed hesitant to do or were more conservative in doing).

“People found Luxembourg to be a mix,” continued Turner. “People found it was easy to work with the software vendors, and because they were going through those vendors, they didn’t have to deal with crashes or problems. But some of the filers also found Luxembourg a little difficult with respect to communication and found that the regulator wasn’t as responsive as they would have liked.” In contrast, while the U.K. was considered difficult from a technical standpoint because they used XML version 1.1, they had the most comprehensive information available, were generally responsive to questions and issues that arose and responded quickly, despite the fact that they handled the largest number of filings.

Finally, Belgium, Sweden and the Netherlands were thought of as difficult because they published instructions and guidance in languages other than English, requiring managers to obtain translations in order to understand the filing.

The perceived differences among jurisdictions did not have an impact on marketing in those jurisdictions, however. Turner argued that managers generally do not take filing logistics into consideration when planning whether to market in a particular jurisdiction. “If the investors are there,” Turner said, “then they’re going to go in and market in those jurisdictions.”

Regulatory Clarifications

Clarifications Sought by Regulators

Now that the January Annex IV filings are complete, will regulators ask clarifying questions to managers similar to the clarifications the SEC seeks with mutual fund prospectuses? Whiteside feels that regulators will likely use this first filing as a test, giving managers latitude where there wasn’t guidance and hopefully providing guidance where filers found it necessary to heavily rely on the space for assumptions on the Annex IV form.

Turner disagreed, saying “Some regulators are absolutely going to ask follow-up questions.” Further, the response required from a manager will be dictated by the type of contact initiated by the regulator. If a regulator telephones a manager or sends a letter seeking clarification, the manager may not need to amend the filing; however, if the regulator asks for an amendment, the manager will have to submit an amended filing. In addition, a manager may also submit an amended filing on its own to correct information. However, managers need not fear an endless cycle of amendments and restatements. “Amendments will need to be submitted before you submit the next filing, so in theory, any amendment would come within the next quarter,” Turner noted. “You’re not going to be amending information from two filings ago.”

A bigger question than whether regulators will require clarifications, according to Whiteside, is whether regulators will actually use the data provided on Annex IV and, if so, how. “I’m sure they will be using it when it comes to visiting the authorized firms in that country,” he said. “For example, the FCA will look at the Annex IV report along with all the other information the manager provides.” Less clear is whether the information will be used beyond that. “The point of the reporting is to identify systemic risk. The master fund reports provided by the E.U. managers will be useful in that contest; I’m not so sure about the feeder fund reporting provided by the non-E.U. managers,” Whiteside argued.

Clarifications Sought by Managers

A common issue faced by managers with the Annex IV filing had to do with interpreting specific questions with little guidance. However, Turner believes that seeking input from regulators may

ultimately resolve such problems. Turner argued that managers generally want to avoid standing out to regulators or providing bad data; therefore, they want to answer the questions the way the regulators desire and the way other filers are answering. It would be helpful for managers to submit detailed questions to the regulators and receive guidance in return. “If managers ask the regulators questions which prompt the regulators and ESMA to put out guidance, then we’ll see more consistency in how people answer the questions.”

Kirchheimer agreed that the lack of guidance was a common issue faced by managers. And, until further guidance is issued on a particular question, Kirchheimer advised filers to make their own decisions and follow their accounting, thinking about how they would account for something on their financial statements and striving for consistency with that. “Think about consistency between filings as well,” she recommended, “among different regulators, not just in Europe but the SEC and otherwise. And do the best you can to make good judgments and file a good form that you think is true and accurate and, again, if the regulator wants something different, they’ll issue some Q&As and let you know.”

Finally, Whiteside added that, even if there are no issues of interpretation to be settled, managers may still seek input regarding practical considerations – such as how to answer specific, strategy-dependent questions on the form. Ultimately, he noted, it will come down to “each person’s particular take, with different people finding different things easy and hard.”

IMPORTANT: This article contains information protected by copyright which can only be used in accordance with the terms of your Hedge Fund Law Report subscription agreement. You must not therefore copy or forward this article, its contents, or any contents on the password-protected Hedge Fund Law Report website. (Your subscription agreement explains how you can use contents for reports and presentations.) UNAUTHORISED USE OR DISCLOSURE IS UNLAWFUL.

© 2019 Mergermarket Limited. All rights reserved.