



Investment Management ADVISORY ■

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Fiscal Year 2014 Annex IV Reporting Under AIFMD Due February 1, 2015

Now that the phase-in period for compliance with the European Union's Alternative Investment Fund Managers Directive (AIFMD) has expired, certain non-EU alternative investment fund managers (AIFMs)¹ will be required to report specified information on a regular basis to regulators in each EU member state in which its alternative investment funds (AIFs)² are domiciled and/or marketed. The reports, referred to as "Annex IV Reports," will be due from certain AIFMs by February 1, 2015.

Who has to report?

Generally, the extent to which Annex IV Reports are due from a non-EU AIFM is determined by the domicile of the AIFs that the AIFM manages and/or whether the AIFM markets its AIFs within the EU. The requirement to file Annex IV Reports will only apply to non-EU AIFMs that manage one or more AIFs domiciled in the EU or one or more AIFs that are marketed in the EU regardless of domicile.

As a result, AIFMs domiciled outside of the EU with AIFs also domiciled outside of the EU do not have an obligation to file Annex IV Reports if they do not market interests in those AIFs to investors in the EU.

If an AIFM either manages one or more AIFs domiciled in the EU or one or more AIFs marketed in the EU, there will first be a requirement to register under the private placement regime of the relevant EU member state where the AIF is domiciled and/or marketed; such registration will trigger the requirement to file Annex IV Reports.

AIFs are encouraged to seek local counsel when assessing reporting and compliance requirements under the AIFMD, including registration under the private placement regime of the relevant EU member state.

¹ An AIFM is any legal person whose regular business is managing one or more AIFs.

² An AIF is an investment fund that (1) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors, and (2) does not require authorization as an undertaking for collective investment in transferable securities. Accordingly, AIFs include hedge funds, private equity funds, property and commodity funds, and funds of funds.

Though the European Securities and Markets Authority drafted the AIFMD in part to harmonize the regulation of AIFMs and AIFs across the EU, the regulations associated with the AIFMD will differ by EU member state.

What constitutes “marketing”?

Under the AIFMD, “marketing” is defined by each EU member state; however, it generally includes both direct and indirect offerings of AIF interests to investors domiciled in, or with registered offices located in, the EU.³ Actively marketing, or making available for purchase, AIF interests to or by EU investors will generally be considered “marketing” under the AIFMD.

The AIFMD has been read to provide a limited exclusion from the definition of “marketing” for communications made in response to reverse solicitation.⁴ While the scope of the exclusion for reverse solicitation is up to the interpretation of the relevant EU member state, it is generally understood to involve a situation in which an AIFM responds to an investor’s request for information, made at the investor’s initiative, without any solicitation on the part of the AIFM.

The United Kingdom’s Financial Conduct Authority has stated that, while a confirmation from an investor that the offering or placement of interests of the AIF was made at the investor’s initiative should normally be sufficient to demonstrate compliance with reverse solicitation, the agency also stressed that an AIFM may not use such confirmation as a means to circumvent the requirements of the AIFMD.⁵ Most other EU member states have provided little or no guidance on the issue. Given this lack of guidance, great care should be exercised in relying upon reverse solicitation to comply with the AIFMD.

What information needs to be reported?

The AIFMD requires Annex IV Reports at both the AIFM level (for an AIFM’s portfolio of AIFs) and at the individual AIF level. In general, Annex IV Reports require general identification information to be disclosed, including contact information and assigned identification codes. Annex IV Reports also require disclosure of the main instruments traded and the principal markets where the AIFM and/or AIF trade, as well as reporting of assets under management (AUM). AIFMs and AIFs must also report their exposure to various risks, including liquidity, borrowing and operational risks, as well as counterparty exposure and total borrowings.

The Annex IV Reports generally require similar information to that reported to the U.S. Securities and Exchange Commission (SEC) on Form PF by private fund advisers registered, or required to be registered, with the SEC⁶ as investment advisers, although the Annex IV Reports are structured in a different format than Form PF.

³ See Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers, 2011 O.J. L 174/18.

⁴ See Recital 70 of Directive 2011/61/EU, *supra*.

⁵ See Financial Conduct Authority, *Implementation of the Alternative Investment Fund Managers Directive*, PS13/5 (June 2013), available at <http://www.fca.org.uk/static/documents/policy-statements/ps13-05.pdf>.

⁶ Form PF is only due from such private fund advisers if such adviser and its related persons, collectively, had at least \$150 million in private fund assets under management as of the last day of the adviser’s most recently completed fiscal year.

When are Annex IV Reports due?

In general, the first Annex IV Reports must be submitted by February 1, 2015. For AIFMs of funds of funds, the deadline is February 15, 2015.

How frequently must Annex IV Reports be filed?

If an AIFM must submit Annex IV Reports, the deadlines and frequency of reporting depend on the total AUM of the AIFs it manages. An AIFM with AUM of over €1 billion is required to report quarterly, with less frequent reporting (half-yearly or annually) for AIFMs with smaller AUM.

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