

## A Comparison Of Investment Adviser Reporting Forms

*Law360, New York (January 10, 2012, 1:05 PM ET)* -- On Oct. 26, 2011, the U.S. Securities and Exchange Commission adopted Form PF, the form to be used by SEC-registered investment advisers to provide the new Financial Stability Oversight Council, the systemic risk oversight body created by the Dodd-Frank Wall Street Reform and Consumer Protection Act, with information necessary to help it monitor the systemic risk created by private funds, among other things. For further information, see Form PF: Private Fund Systemic Risk Reporting in the United States.

Just days later, on Nov. 11, 2011, the European Securities and Markets Authority (ESMA) published its final report containing ESMA's technical advice to the European Commission (the "ESMA Advice") on possible implementing measures of the Alternative Investment Fund Managers Directive.

This final report contains a pro forma "template" for reporting by alternative investment fund managers (AIFMs) to competent authorities in compliance with Article 24 of the Directive in respect of the alternative investment funds (AIFs) that they manage (referred to in this article as the "ESMA Form").

Both the SEC and ESMA, in accordance with their respective mandates, have taken into account the systemic risk reporting initiatives of various regulators around the world, including each other's initiatives. Both the SEC and ESMA mention the desirability of globally harmonized reporting requirements.

However, despite (or perhaps because of) the common goal of harmonization, and having advance knowledge of the requirements the other was considering, the SEC and ESMA have developed tantalizingly similar yet frustratingly different reporting forms and filing requirements.<sup>[1]</sup> For ease of reference, persons providing investment advice or investment management services (discretionary and nondiscretionary) to clients are referred to in this article as "investment advisers."

## Who Has to File and Which Funds Have to be Reported on?

### *Form PF*

Form PF must be filed by an investment adviser that:

- is registered with the SEC as an investment adviser (each a “Registered Adviser”);
- advises one or more “private funds” (as defined in the sidebar); and
- has reportable assets under management attributable to private funds of at least \$150 million (about €111 million at current exchange rates).

Accordingly, investment advisers relying on the “foreign private adviser” exemption, the “private fund adviser” exemption (the exemption most likely to be used by non-U.S. investment advisers to private funds) or the “venture capital fund adviser” exemption (each an “Exempt Adviser”), as well as Registered Advisers who do not manage any private funds and Registered Advisers with less than \$150 million of reportable assets under management attributable to private funds, do not have to file Form PF.

### *Private Funds vs. AIFs*

Both private funds and AIFs are collective investment vehicles that raise capital from multiple investors with a view to investing it in accordance with a defined investment policy for the benefit of the investors. Both definitions also carve out certain publicly offered funds under their own legal regimes.

Specifically, a “private fund” is any issuer relying on the exception from the definition of “investment company” under Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940, as amended (the “Investment Company Act”). This will include most types of funds offered on a private placement basis in the United States and excludes SEC-registered investment companies such as mutual funds and exchange traded funds (ETFs).

Because they are not permitted to be SEC-registered investment companies, non-U.S. funds (including UCITS, discussed below) offered in the United States will be considered “private funds” regardless of the fact that they may be publicly offered elsewhere.

The definition of “AIF” specifically excludes open-ended funds available to the public and organized as Undertakings for Collective Investment in Transferable Securities (UCITS). However, in addition to privately offered AIFs, the definition of AIF includes non-UCITS publicly offered funds such as U.K. investment trusts and investment companies admitted to trading on regulated markets.

Thus, funds that are not private funds in the United States (e.g., mutual funds and ETFs) can be AIFs in the European Union and funds that are not AIFs in the EU (e.g., UCITS) can be private funds in the United States.

The Form PF will have to cover all private funds advised by the Registered Adviser, subject to some limited exceptions. Registered Advisers based outside the United States will be permitted to omit any private funds that: (i) are not U.S.-domiciled entities; (ii) were not beneficially owned by one or more US persons; and (iii) were not offered in the United States during the preceding 12 months.

### *ESMA Form*

The ESMA Form is intended to be the means by which AIFMs will report and provide the information required pursuant to Article 24 of the Directive in respect of each AIF that they manage.

The extent of the required reporting/information provision and its frequency varies depending on a number of factors, including, inter alia, an AIFM's overall AIF assets under management, whether such assets under management include assets acquired by way of leverage, and whether or not the relevant managed AIF invests in nonlisted companies and issuers in order to acquire control.

An AIFM is a legal person whose regular business is "managing" one or more AIFs. In this context, "managing" consists of performing at least one of either portfolio management or risk management (although an AIFM may perform other functions in the course of the "collective management" of an AIF, e.g., administration and marketing).

For the purposes of the Directive, each AIF, regardless of whether (i) it is domiciled inside or outside the EU, and (ii) whether it receives services from an EU or non-EU investment adviser, will have a single AIFM. In certain circumstances, an AIF may qualify to be self-managed, making the AIF itself the AIFM.

The obligation to report/provide information under the ESMA Form pursuant to Article 24 will apply to:

- EU investment advisers in respect of all EU AIFs as to which they are treated as the AIFM;
- EU investment advisers in respect of all non-EU AIFs as to which they are treated as the AIFM, regardless of whether those AIFs are marketed in the EU;
- non-EU investment advisers in respect of all EU AIFs as to which they are treated as the AIFM; and
- non-EU investment advisers in respect of all non-EU AIFs as to which they are treated as the AIFM which are marketed in the EU.

### *Challenges*

For investment management groups with potential reporting exposures under Form PF and/or the ESMA Form, there are some obvious reporting challenges. An EU-based Registered Adviser may have to report to the SEC on Form PF with respect to funds for which it is not obligated to file an ESMA Form. For example, a Registered Adviser to a UCITS, which is outside the scope of the Directive, will still have to report on Form PF if the UCITS is privately placed in the United States.

Another example is where an Exempt Adviser serves as the AIFM for an AIF being offered in the United States and that Exempt Adviser appoints a Registered Adviser to provide portfolio management services. In such a case, the Registered Adviser would have to report on Form PF regarding the fund, even though the Registered Adviser is not the AIFM and so would not be responsible for filing the ESMA Form for that fund.

Some administrators providing administration services to UCITS, and entities providing outsourced middle/ back office functions to investment advisers of UCITS, may not be attuned to supporting Registered Advisers' reporting obligations in respect of Form PF, or have processes to assist with these filings since (i) the requirements attach solely because the investment adviser is registered with the SEC, and (ii) the UCITS will not be required to make the similar filings with ESMA under the Directive on the ESMA Form. Registered Advisers in this position will need to organize/ outsource the effective collation of the necessary information in a format and at the times required for them to be able to make the required filings.

An EU-based Registered Adviser to an SEC-registered investment company, such as a mutual fund or ETF (whether or not such fund is marketed in the EU), will have an obligation to file an ESMA Form covering such fund if there is no other AIFM appointed and regardless of where (and whether) the fund is marketed in the EU, even though there is no similar obligation to make a filing on Form PF with respect to such fund.

## **What Information Needs to be Reported?**

### *Form PF*

Registered Advisers that advise private funds with aggregate reportable assets under management of at least \$150 million are required to complete Sections 1a and 1b of Form PF in respect of the private funds they advise, regardless of the category of private fund. These Sections request basic information about the Registered Adviser and its assets under management and basic information about each private fund advised.

Whether a Registered Adviser is required to file other sections of the Form PF depends on the categories of private fund the Registered Adviser advises. The categories of funds for this purpose are: (i) hedge funds; (ii) liquidity funds; and (iii) private equity funds. The amount and types of information required in these additional Sections vary. Sections 1b, 1c, 2a and 2b are the parts of Form PF most closely analogous to the ESMA Form.

### *ESMA Form*

AIFMs managing portfolios of AIFs whose total AIF assets under management are under certain specified thresholds,  
i.e.:

- do not exceed €100 million (including assets acquired by way of leverage); or
- do not exceed €500 million (where the AIF portfolios are unleveraged and have no redemption rights within five years),

will be required to report to the competent authority of the AIFM's home member state the information required in Sections 1 and 2 of the ESMA Form with respect to each EU AIF they manage and with respect to each AIF they market in the EU.

AIFMs falling below the reporting thresholds are not required to complete the entire ESMA Form; they are permitted to omit certain detailed breakdowns by asset type otherwise required in some questions.

AIFMs managing portfolios of AIFs whose assets under management exceed the above thresholds will be required to report to the competent authority of the AIFM's home member state the information required in Sections 1, 2 and 3 of the ESMA Form with respect to each EU AIF they manage and with respect to each AIF they market in the EU.

The ESMA Form is broken down into three sections based on the type of information required. exposures, including information about investment strategy, geographical focus, individual exposures and portfolio turnover.

Section 1 of the ESMA Form requires information about the main instruments traded and individual exposures, including information about investment strategy, geographical focus, individual exposures and portfolio turnover.

Section 2 of the ESMA Form requires information regarding principal markets in which AIFM trading represents a significant proportion of daily market volume, investor concentration, portfolio concentration and controlling influence exercised by the AIF.

Section 3 of the ESMA Form asks for data regarding market risk, counterparty risk, liquidity risk, borrowing risk, exposure risk, oper risk and other risks.

### *Challenges*

The ESMA Form will require significantly more data for all types of funds (other than hedge funds) than the Form PF. However, with respect to liquidity funds and private equity funds reported on the ESMA Form, the Form PF information will be a burden that is different in form and nature.

Since the ESMA Form does not generally distinguish between types of funds, much of the data requested will not be the type of information that certain types of funds (e.g., private equity funds) are collecting or monitoring currently in the regular course.

### **But on the Bright Side ...**

Although the differences between the reporting forms will create challenges for investment advisers and funds, those same differences present opportunities for administrators who are seeking to differentiate their service offering or increase their market share. Those administrators who are able to provide easy full service solutions to assist with these filings should be able to leverage this opportunity to grow their businesses.

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[1] This article is an excerpt from a more detailed DechertOnPoint.

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