

GREAT FUND INSIGHTS

SFDR and Taxonomy deadline

October 2022

1. Speed read

As the start date looms for the Regulatory Technical Standards (RTS) under SFDR and the product disclosure regime in the Taxonomy Regulation, firms are progressing their implementation projects. This bulletin gives a snapshot of what is required and by when.

2. How did we get here?

The Sustainable Finance Disclosure Regulation 2019/2088 (**SFDR**) was adopted on 27 November 2019 – it began to apply in a phased way from 10 March 2021.¹

The **Taxonomy Regulation** entered into force on 12 July 2020.² Among other things, it introduces a detailed product disclosure regime for products in scope of SFDR, via both directly applicable requirements and amendments to SFDR. It also began to apply in a phased way, beginning on 1 January 2022.

Under SFDR and the Taxonomy Regulation, the European Supervisory Authorities (**ESAs**) were mandated to develop Level 2 requirements or Regulatory Technical Standards (**RTS**). After a protracted process and many delays, these have been bundled into a single RTS which is hopefully now in its final form.

The RTS were published in the Official Journal on 25 July 2022, titled “Commission Delegated Regulation (EU) 2022/1288”. The RTS begins to apply on/from 1 January 2023.

3. Final RTS

For the official version of the RTS (including the disclosure templates firms are required to use going forward), see [here](#) or [here](#). The full title is as follows:

COMMISSION DELEGATED REGULATION (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of ‘do no significant harm’, specifying the content, methodologies and presentation of information in

relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in pre-contractual documents, on websites and in periodic reports

For useful background, see also the explanatory memorandum published by the European Commission on 6 April 2022 with the final text of the RTS.³

4. What asset and fund managers have to do next, and when?

High level

- Determine which templates (if any) you need to use/complete going forward, and by when
- Obtain word versions of the applicable templates and create templates on your internal system that can be readily used/amended going forward
- Confirm how you will source any applicable required data (internally or externally)
- Confirm if you need to update your prospectus/PPM (or an equivalent document), and identify key deadlines in that process
- Update your product governance and other internal policies and procedures to reflect any disclosures, data, indicators etc to be included in the templates

- Ensure you are plugged into the valuable industry work being done on SFDR and the taxonomy by various trade bodies – eg to obtain market intel on likely regulatory expectations and evolving best practice, and obtain industry views on key areas of uncertainty under the new law

For a copy of our client bulletin explaining how to fill in the templates and our views on FAQs, speak to your usual A&O contact.

For an updated version of our cheat sheet, see Schedule 1.

For a detailed breakdown of relevant dates and actions, see Schedule 2.

¹ <https://eur-lex.europa.eu/eli/reg/2019/2088/oj>

² Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment – <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32020R0852>

³ [https://ec.europa.eu/finance/docs/level-2-measures/C_2022_1931_1_EN_ACT_part1_v6%20\(1\).pdf](https://ec.europa.eu/finance/docs/level-2-measures/C_2022_1931_1_EN_ACT_part1_v6%20(1).pdf)

5. Points to note

Indicators – mandatory or optional?

Although the new law is expressed to be a “disclosure” regulation, the EC and ESMA may take the view that the references to indicators in the RTS and templates mean that it is in fact mandatory to develop these; in other words, this is implicitly required by the new law. For example they may consider that, if a firm puts a fund forward as having a particular ESG characteristic, the firm must formulate an indicator to measure and report on ongoing compliance with that characteristic. Although arguments can be made each way on this, a number of firms in the industry are taking a conservative approach on this point.

ESMA guidance

ESMA has issued a roadmap to explain work it is conducting or planning to conduct in the next two years on ESG related matters.⁴ This includes the issue of guidance on SFDR and the taxonomy in Q4 2022. ESMA has also said that it has commenced “a study on disclosure requirements under SFDR Articles 8 and 9”, and “ESMA plans to publish a study on the extent to which its Guidelines on disclosures of ESG factors have been incorporated”. These may contain useful information as to regulatory expectations and good and poor practice.

Firms should therefore keep a careful watch for further materials issued by ESMA and/or the ESAs on these topics.

Questions on key issues of interpretation

On 9 September 2022, the ESAs issued a list of questions for the European Commission on key points of interpretation.⁵ It is possible that the European Commission will take a stringent approach to SFDR and the Taxonomy Regulation when responding to these, consistent with its approach in the past. Firms may therefore wish to manage the expectations of their internal stakeholders in case the European Commission’s views require changes to the internal approach taken on key points to date (eg how the term “sustainable investment” should be interpreted), as well as disclosures already issued (which may then need to be revised or updated). Where possible, firms may also wish to consider including disclaimers or other similar wording in their client or investor facing materials to indicate the risk that changes may be necessary once further regulatory guidance becomes available. Indeed, a number of firms in the industry are already taking this approach.

Meaning of “sustainable investment” under SFDR

This continues to be a key issue under SFDR. Various industry groups have initiatives underway on this point, and it is included in the ESA list of questions mentioned above. If you would like further information on the direction of travel, please speak to your usual A&O contact.

Greenwashing

A number of European Commission and ESMA initiatives are underway on this, which is likely to continue to be a governmental and regulatory priority. For example, we note the following:

- The European Commission has issued a request for input to the ESAs “by means of a progress and final report on several aspects related to greenwashing and its related risks as well as the implementation, supervision and **enforcement** of sustainable finance policies aimed at preventing greenwashing.”⁶ In terms of timing, the progress reports are due within 12 months and the final reports are due within 24 months.

The Commission paper suggests a push on the enforcement front: “In parallel to the implementation of key policies, the monitoring of greenwashing is important. Greenwashing risks can arise in different parts of the financial market, including those not covered by sustainability rules and policies. The effectiveness of sustainable finance policies depends on an adequate level of supervision and **enforcement** across the EU” (emphasis added).

- A proposal has been introduced for a Directive amending Directives 2005/29/EC⁷ and 2011/83/EU⁸ as regards empowering consumers for the green transition through better protection against unfair practices and better information: “More specifically, the proposal aims to contribute to a circular, clean and green EU economy by enabling consumers to take informed purchasing decisions and therefore contribute to more sustainable consumption. It also targets unfair commercial practices that mislead consumers away from sustainable consumption choices”.

⁴ https://www.esma.europa.eu/sites/default/files/library/esma30-379-1051_sustainable_finance_roadmap.pdf

⁵ https://www.esma.europa.eu/sites/default/files/library/jc_2022_47_-_union_law_interpretation_questions_under_sfdr.pdf

⁶ https://www.ecopa.europa.eu/sites/default/files/publications/letters/european_commission_-_request_to_esas_on_greenwashing_monitoring_and_supervision.pdf

⁷ Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, see: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>

⁸ The Consumer Rights Directive, see: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083> and <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02011L0083-20220528>

So far, this is likely to extend to certain financial services and products, although various trade bodies are lobbying on this.

A key point from the proposal (emphasis added):

“Empowering consumers and providing them with cost-saving opportunities is a key building block of the sustainable product policy framework. This is to be achieved through the improved participation of consumers in the circular economy, in particular by... stepping up the protection of consumers against unfair commercial practices that prevent sustainable purchases, such as:

- greenwashing practices
(ie misleading environmental claims)
- the use of unreliable and non-transparent **sustainability labels** and information tools.

More precisely, the proposal aims at: ...

- Ensuring that traders do not mislead consumers about environmental and social impacts, ... of products.
- Ensuring that a trader can make an environmental claim related to future environmental performance only when this involves **clear commitments**.
- A ban on displaying a **sustainability label** which is not based on a certification scheme or not established by public authorities. ...”

By way of example, this underlines the argument that it can be challenging for a firm to rely on non-binding characteristics of a product to justify that product being classified as falling under Article 8, eg features of a product that are discretionary or subject to caveats, limitations, exceptions etc.

In our view, it is therefore preferable to ensure any characteristics relied on for Article 8 purposes are fairly “hard wired” into the product – eg for a fund, mandated in its investment objectives etc.

We note also that ESMA has cited the following as potential instances of greenwashing:

*“... the marketing documentation focuses on exclusion policies [ie negative screening] which do not per se result in selecting a fully sustainable eligible investment universe, or an ESG integration strategy is presented **but no commitment is made** to use ESG considerations in the investment decision-making. This is a problem affecting both institutional investors and retail investors. The latter increases the risk of misinformation, mis-pricing and mis-selling...”⁹*

ESMA has also noted the following:¹⁰

“... Recital 11 of the SFDR Delegated Regulation, with regards to funds disclosing under Article 8 SFDR, notes that disclosure of criteria for the selection of underlying assets should be limited to those criteria that are binding on the fund manager in the investment decision-making process. ... Recital 16 of the SFDR Delegated Regulation warns against the greenwashing risks where funds apply “non-binding” exclusion strategies.”; and

“A sustainable investment policy and/or objectives should be included in the fund documentation and the fund should be managed according to it”.

We appreciate, however, that this issue is complex. If you would like further advice, please speak with your usual A&O contact.

6. Key reference materials¹¹

For a copy of SFDR, see [here](#), or for a consolidated version, see [here](#).

For a copy of the Taxonomy Regulation, see [here](#).

For a copy of the RTS, see [here](#) or [here](#).

7. Next steps



If you have any questions about the topics in this bulletin, or about ESG more generally, please get in touch with your usual A&O contact.

⁹ https://www.esma.europa.eu/sites/default/files/library/esma30-379-1051_sustainable_finance_roadmap.pdf

¹⁰ https://www.esma.europa.eu/sites/default/files/library/esma34-45-1427_supervisory_briefing_on_sustainability_risks_and_disclosures.pdf

¹¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019R2088>

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02019R2088-20200712>

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32020R0852>

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1288&from=EN>

https://eur-lex.europa.eu/eli/reg_del/2022/1288/oj

8. Schedule 1 - Cheat Sheet

Key materials	What does it cover?
<p>European Commission Q&A July 2021¹²</p>	<ul style="list-style-type: none"> - Application of SFDR to non-EU AIFMs and small/registered AIFMs - 500-employee threshold for compulsory PAI reporting and groups - Whether Article 9 products can only invest in sustainable investments - When Article 9 products may make “other” investments - Whether these “other” investments must meet minimum environmental or sustainable safeguards - Whether carbon reduction Article 9 products must track an EU Climate Transition Benchmark (EU CTB) or EU Paris-aligned Benchmark (EU PAB), where they exist <i>[although note – we have questions as to how this guidance should be read. Please speak to your usual A&O contact if you wish for further advice on this]</i> - Questions of interpretation of Article 8 and how products should be classified under SFDR (ie “where the line should be drawn” as regards Article 6 vs Article 8) - Integration of sustainability risk and impact on SFDR classification - Meaning of the term “promotion” in Article 8 SFDR and what a firm should consider when classifying products under SFDR - Relevance of binding vs non-binding characteristics of a product - How a product’s name may affect its SFDR classification - How a negative exclusion may affect a product’s SFDR classification (eg no tobacco) - How a characteristic that is not advertised may affect a product’s SFDR classification - How a local law obligation may affect a product’s SFDR classification (eg no investments in cluster munitions) - Link between SFDR obligations and greenwashing risk – ie conveying a false impression, or providing misleading information about how a financial product is performing in terms of ESG sustainability - How to make website disclosure under SFDR in relation to portfolios

¹² https://www.esma.europa.eu/sites/default/files/library/sfdr_ec_qa_1323237.pdf and https://www.esma.europa.eu/sites/default/files/library/sfdr_ec_qa_1313978.pdf
 See also the small amends made by https://www.esma.europa.eu/sites/default/files/library/c_2021_8620_f1_amendment_to_internal_decision_en.pdf

Key materials	What does it cover?
<p>European Commission Q&A 17 May 2022¹³</p>	<ul style="list-style-type: none"> – PAI regime – can a firm “opt out” at an entity level but still have products for which PAI is considered (including Article 9 products)? – If so, what SFDR disclosures are required? – Timing for disclosures by advisers under Article 6(2) of SFDR – Application of SFDR to advisers that provide advice on products out of scope of SFDR – PAI regime for advisers, including application of the regime to advisers that provide advice on products out of scope of SFDR – How to interpret certain references in SFDR to employees – eg full time, part time, owner managers, etc – How SFDR applies to legacy products – eg new vs existing products, products no longer available to new investors, etc – What “good governance” means for Article 8 and 9 products – How to interpret SFDR references to “good governance” in the context of government bonds – What you should do, in terms of taxonomy disclosures, when you cannot get reliable data – When you should say “zero” – Whether/when you can supplement such a disclosure with narrative explanations and risks arising from this – What sources of information you can use in “exceptional cases” for the purposes of taxonomy disclosures and what else you should say in your disclosure in these circumstances – When an Article 8 SFDR product must take disclosures under the Taxonomy Regulation – When an Article 8 product must make periodic disclosures under the Taxonomy Regulation – ie when the obligation to include taxonomy information in periodic reports is triggered – When a pre-contractual disclosure must be updated to reflect changes over time in a product’s lifetime – When an Article 9 product with a social objective must make disclosures under the Taxonomy Regulation <p><i>[But note – the guidance on the taxonomy regime is often difficult to make sense of. Please speak to your usual A&O contact if you wish for further advice on this]</i></p> <p>Helpfully, the Q&A also notes the following:</p> <p><i>“The purpose of Articles 5 and 6 of [Taxonomy] Regulation (EU) 2020/852 is to incentivise a behavioural change in the whole value chain, including delivery of sound information on sustainability performance on underlying investments.”</i></p> <p><i>“Financial market participants may only disclose such information for the purposes of disclosures under Articles 5 and 6 of [the Taxonomy Regulation] for which they have reliable data, otherwise they would risk, where relevant, infringing [SFDR] and [the Taxonomy Regulation], sector specific rules, incurring liability, or avoidance of contracts under national law.”</i></p> <p>In our view, these are very useful takeaway points to bear in mind when looking at the regulation.</p>

13 https://www.esma.europa.eu/sites/default/files/library/c_2022_3051_f1_annex_en_v3_p1_1930070.pdf and <https://www.esma.europa.eu/document/ec-qa-sustainability-related-disclosures>

Key materials	What does it cover?
<p>ESA Supervisory Statement 25 February 2021¹⁴</p> <p>ESA Updated Supervisory Statement 24 March 2022¹⁵</p>	<ul style="list-style-type: none"> – Timing as to when different SFDR and taxonomy obligations begin to apply and how – In particular, how you report using the PAI template as at 1 January 2023 – When information on “reference periods” must begin to be included in those disclosures, and what the first reference period will comprise – Supervisory expectations in relation to disclosures before 1 January 2023 (ie when the RTS comes into effect) – Including what clarification can or should be provided in relation to disclosures before or during that interim period – eg re sources of information – How firms should interpret the periodic reporting requirements – between 10 March 2021 and 1 January 2023, and from 1 January 2023 onwards <p>A key takeaway point is that periodic reports issued in 2023 under the RTS must include information captured for 2022, before the RTS was actually finalised or in force.</p>
<p>ESA Clarifications on RTS 2 June 2022¹⁶</p>	<ul style="list-style-type: none"> – Confirmation that sustainability indicators and PAI indicators are two different things <p>A useful takeaway: <i>“There is no direct link between sustainability indicators and PAI indicators.”</i></p> <ul style="list-style-type: none"> – When/how (if a firm wishes) PAI indicators may be used to measure the success of a product in achieving its environmental or social objectives, or having a sustainable impact – Examples as to when/how the PAI indicators could be used in relation to other “strands” of SFDR – eg “do not significantly harm” (DNSH) disclosures <p>Two key takeaways: <i>“the use of PAI indicators is mandatory to demonstrate that an investment qualifies as a sustainable investment”</i> and <i>“The ESAs consider that using PAI indicators to fulfil the DNSH of SFDR does not require any PAI consideration at entity level pursuant to Article 4... SFDR.”</i></p> <ul style="list-style-type: none"> – Guidance on PAI calculation methodology in the context of periodic disclosures of financial products – “Look through” to be applied for indirect investments when calculating PAI (eg funds, fund of funds and derivatives), or when investing in a holding company or SPV – What to do where (on a “look through approach”) information in an underlying asset is not available <p>A useful takeaway: <i>“Where such information is not available, in order to be able to fulfil the disclosure requirement for those investments, the RTS provided that the section should also contain details of the best efforts used to obtain the information either directly from investee companies, or by carrying out additional research, cooperating with third party data providers or external experts or making reasonable assumptions.”</i></p> <ul style="list-style-type: none"> – Guidance on making pre-contractual and periodic disclosures, where a product makes indirect investments – What “environmental and social safeguards” are recommended or required for residual investments in an Article 8 or 9 product, and what should be disclosed on this and why <p>A useful takeaway: <i>“... financial products that have sustainable investment as an objective should only make sustainable investments. However, disclosures are still required on the amount and purpose of any remaining assets to demonstrate how those do not prevent the financial product from attaining its sustainable investment objective.”</i></p> <ul style="list-style-type: none"> – Detailed guidance on PAI indicators in the PAI reporting template – How to interpret the taxonomy requirements where a product makes different investments over time – Guidance re using capital expenditure or operating expenditure disclosures vs turnover of non-financial investees for the calculation of the taxonomy alignment of financial products

14 https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Draft%20Technical%20Standards/2021/RTS%20on%20disclosure%20under%20SFDR/963544/JC%202021%2006%20Joint%20ESAs%20supervisory%20statement%20-%20SFDR.pdf

15 https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Draft%20Technical%20Standards/2021/RTS%20on%20disclosure%20under%20SFDR/1028649/JC%202022%2012%20-%20Updated%20supervisory%20statement%20on%20the%20application%20of%20the%20SFDR.pdf

16 https://www.esma.europa.eu/sites/default/files/library/jc_2022_23_-_clarifications_on_the_esas_draft_rts_under_sfdr.pdf

Key materials	What does it cover?
<p>ESA Clarifications on RTS 2 June 2022</p>	<ul style="list-style-type: none"> – When pre-contractual disclosures could or should be amended over the life of a product – Guidance on periodic disclosures – Guidance on taxonomy disclosures – eg “minimum proportion” of taxonomy-aligned investments in pre-contractual disclosures, and what should be included in periodic disclosures – Guidance on the issue of binding vs non-binding objectives and commitments <p>A useful takeaway: <i>“The ESAs consider that the commitments on the “minimum proportion” of Taxonomy-aligned investments are intended to be binding commitments to ensure transparency to end investors on the taxonomy ambitions of the financial product. In that respect, as for any other binding commitment included in the pre-contractual information, penalties for failing to respect such commitments are set out in the sectoral legislation referred to in Article 6(3) SFDR.”</i></p> <ul style="list-style-type: none"> – Guidance on how to calculate taxonomy numbers when one financial product invests in another financial product, including how to apply a “look-through” approach – Guidance on DNSH disclosures and product-level PAI disclosures <p>Two useful takeaways: <i>“For the avoidance of doubt, there is no direct link between the two types of disclosures, which apply independently. A financial product making sustainable investments must make DNSH disclosures, whereas the PAI disclosures at financial product level referred to in Article 7 SFDR apply separately under that Article.”</i></p> <p>and</p> <p><i>“The ESAs acknowledge that their final reports did not specify exactly how the PAI indicators should be used for the purpose of the DNSH disclosures for sustainable investments in the RTS or the financial product disclosures. However, best practice could be to disclose DNSH for sustainable investment by extracting the indicators from Table 1 of Annex I, and any additional relevant indicators from Table 2 and 3 of Annex I, and show the impact of the sustainable investments against those indicators, proving through appropriate values (eg where feasible in compliance with the Climate Delegated Act and the Complementary Climate Delegated Act) that the sustainable investments do not significantly harm any environmental or social objectives.”</i></p> <ul style="list-style-type: none"> – Guidance on DNSH disclosure under SFDR vs Taxonomy Regulation <p>A useful takeaway: <i>“The DNSH principle under TR is not applied in the same way as it is under... the SFDR. When assessing whether an economic activity qualifies as environmentally sustainable, the TR sets out detailed DNSH activity level criteria under Article 17 TR and in technical screening criteria... In contrast, the SFDR sets out this principle for the purpose of assessing at the level of the investment which may qualify as sustainable... [and] to qualify as a sustainable investment in the meaning of SFDR, an investment in a taxonomy-aligned economic activity must also respect the DNSH principle as set out in Article 2(17) SFDR.”</i></p> <ul style="list-style-type: none"> – Guidance as to when a firm should show that investments are aligned with OECD guidelines and/or UN Guiding Principles, including the International Bill of Human Rights <p>A useful takeaway: <i>“The objective of this provision is to bring the DNSH disclosures under SFDR in line with the minimum safeguards in Article 18 TR.”</i></p>

Key materials	What does it cover?
<p>ESMA Sustainable Finance Roadmap 2022-2024¹⁷</p>	<p>Some key takeaways:</p> <ul style="list-style-type: none"> – Data gaps – ESMA recognises a number of problems on the legislative side in relation to ESG – this includes timing issues such as the “misalignment” between the dates for various directives, meaning data gaps. It states that: <i>“Investors and supervisors in the EU... have to cope with the current sub optimal status of sustainability reporting still for some years.”</i> It is hoped, however, that there will be some regulatory forbearance in the interim. – Interpretation issues – ESMA recognises the different interpretations taken of SFDR and suggests work to ensure a <i>“consistent application of the EU rulebook through convergence tools such as Q&As and Guidelines”</i>. It also suggests work on <i>“clarifying definitions and disclosure obligations for sustainability products”</i>, among other things. <p>This would be much welcomed by the market, which has suffered from a lack of regulatory guidance.</p> <ul style="list-style-type: none"> – Greenwashing – Judging from the roadmap, we can expect this will be one of the most significant priorities of ESMA for the coming three years. As noted above, ESMA also cites the following as potential instances of greenwashing: <i>“... the marketing documentation focuses on exclusion policies [ie negative screening] which do not per se result in selecting a fully sustainable eligible investment universe, or an ESG integration strategy is presented but no commitment is made to use ESG considerations in the investment decision-making. This is a problem affecting both institutional investors and retail investors. The latter increases the risk of misinformation, mis-pricing and mis-selling...”</i> – Future work – ESMA notes where it will conduct further work or feed into work planned by the European Commission: <ul style="list-style-type: none"> – (2022) Contribute to the EC’s work on minimum sustainability criteria for SFDR Article 8 products, or a combination of criteria for financial products that disclose under Article 8 of SFDR – (2022) Review the RTS to clarify: PAI indicators; and PAI on social and employee matters, human rights, anti-corruption and anti-bribery – (2022-2024) Flag to the EC any need to amend/clarify/interpret Level 1 and Level 2 such as for SFDR, Taxonomy Regulation, UCITS Directive or AIFMD – (2022-2024) Contribute to consistent implementation of new requirements applicable to asset managers (eg SFDR/Taxonomy Regulations): <ul style="list-style-type: none"> – National Conduct Authorities (NCAs) to share supervisory cases to promote effective and consistent supervision – Develop ESMA guidance to NCAs and/or the market to ensure effective and consistent application of rules as needed – Maintain up to date/develop new supervisory briefings – (2022-2024) Survey landscape of EU/national ecolabels – (2023-2024) Undertake a Coordinated Supervisory Action (CSA) on sustainability disclosures – (2022-2024) Analyse disclosures under Articles 8 and 9 of SFDR in the investment management sector to support supervisory convergence efforts and the identification of greenwashing cases – (2022-2024) Assess data availability and quality for asset managers

¹⁷ https://www.esma.europa.eu/sites/default/files/library/esma30-379-1051_sustainable_finance_roadmap.pdf

Key materials	What does it cover?
<p>ESMA</p> <p>Supervisory briefing</p> <p>Sustainability risks and disclosures in the area of investment management 31 May 2022¹⁸</p>	<p>Some key takeaways:</p> <ul style="list-style-type: none"> – Proportionate and risk-based approach – ESMA encourages local regulators to take a risk-based approach and “to be proportionate in their supervision”: <p><i>“The extent of information sought, and the frequency and intensity of supervisory engagement should consider elements such as the type of assets the fund manager intends to invest in, the complexity of the investment policy and strategy of the fund and the type of investors in the investment fund. The engagement should also be commensurate with the risks identified.”</i></p> <p>No doubt, these points will be welcomed by the industry.</p> <ul style="list-style-type: none"> – Greenwashing – As noted above, ESMA makes some observations about greenwashing risks that firms may wish to take on board in their product governance and other internal processes: <p><i>“Recital 11 of the SFDR Delegated Regulation, with regards to funds disclosing under Article 8 SFDR, notes that disclosure of criteria for the selection of underlying assets should be limited to those criteria that are binding on the fund manager in the investment decision-making process... Recital 16 of the SFDR Delegated Regulation warns against the greenwashing risks where funds apply “non-binding” exclusion strategies.”</i></p> <p>In our view, this indicates a “direction of travel” on this issue among regulatory bodies more generally.</p> <ul style="list-style-type: none"> – Checklists – ESMA recommends certain points for a local regulator’s checklist, in terms of compliance with key requirements for SFDR and taxonomy related disclosures (pre-contractual, periodic and website). These items may helpfully be copied/pasted into a firm’s product governance policies and procedures. – PAI product-level disclosures – ESMA suggests as follows, although this may be controversial in the industry, as it may increase the length and complexity of product disclosures by some margin: <p><i>“It is worth noting that NCAs could reasonably expect that products disclosing under Article 9 SFDR would disclose the Principal Adverse Impacts of investment decisions referred to in Article 7 SFDR, even though it is not mandatory, due to the requirements of DNSH disclosures for sustainable investments in the SFDR Delegated Regulation which require the disclosure of how the indicators for adverse impacts in Annex I of the SFDR Delegated Regulation have been taken into account and because Article 9 SFDR products should only make sustainable investments.”</i></p> <ul style="list-style-type: none"> – Consistency across fund documents and marketing materials – ESMA flags that there should be consistency on this front, focusing on: <i>“The way the sustainability-related disclosures are presented; The fund’s name; The investment objective and policy; and The investment strategy.”</i> <p>Again, this is a useful checklist for a firm’s product governance policies and procedures.</p> <ul style="list-style-type: none"> – Key points to bear in mind when making ESG-related disclosures – ESMA provides a useful “shopping list” of key points here, eg: <ul style="list-style-type: none"> – Although possibly more relevant for retail products – no boilerplate language with complex disclaimers, nor technical jargon – The repeated use of the same or similar text across different funds is a red flag for supervisors – No cross-references and hyperlinks, except where prescribed – eg one of the RTS templates has a question <i>“Where can I find more product specific information online?”</i> – <i>“Sustainability-related disclosures should be made in a manner that ensures that investors are not required to search for the relevant information, or otherwise obscure the disclosures in the volume of general information provided. Any link to other information should be to the exact place where the relevant information may be found. Any hyperlinks should be maintained over time to ensure that investors do not find broken links where information is no longer available”</i> – Fund documents should disclose the SFDR classification <i>“and if relevant, the TR”</i>, although it is not clear what this means. – “Rules of the road” when naming a fund – ESMA provides useful pointers here to address greenwashing risk, eg: <ul style="list-style-type: none"> <i>“Funds’ names should not be misleading, as the disclosure of sustainability characteristics should be commensurate with the effective application of those characteristics to the fund. The use of terms such as “ESG”, “green”, “sustainable”, “social”, “ethical”, “impact” or any other ESG-related terms should be used only when supported in a material way by evidence of sustainability characteristics, themes or objectives that are reflected fairly and consistently in the fund’s investment objectives and policy and its strategy as described in the relevant fund documentation.</i>

¹⁸ https://www.esma.europa.eu/sites/default/files/library/esma34-45-1427_supervisory_briefing_on_sustainability_risks_and_disclosures.pdf

Key materials	What does it cover?
<p>ESMA</p> <p>Supervisory briefing</p> <p>Sustainability risks and disclosures in the area of investment management</p> <p>31 May 2022</p>	<p><i>[Local regulators] may raise questions and challenge the use of such terms in the fund's name if it is perceived as misleading when compared to the actual investment objectives and strategy. For instance, a weak level of application of a fund's sustainable characteristic or objective to its assets may be a risk indicator warranting further investigation and may lead, in case of a fund that does not demonstrate binding sustainability characteristics focused on a specific sustainability theme or pillar, to reject the use of such a specific theme or pillar in its name."</i></p> <p>The word "sustainable" or "sustainability" should be used only by (1) funds disclosing under Article 9 of SFDR, OR (2) funds disclosing under Article 8 of SFDR which in part invest in economic activities that contribute to environmental or social objectives, OR (3) funds disclosing under Article 5 of TR.</p> <p>Words like "impact", "impact investing" or similar should be used only by funds whose investments are made with the intention to generate positive, measurable social and environmental impact alongside a financial return.</p> <p>In terms of good and poor practice:</p> <ul style="list-style-type: none"> – "A "climate impact" fund investing in companies with business in activities focused on enabling the adaptation to, or mitigation of, climate change can refer to the impact in its name; – A "sustainable water" fund investing in sustainable companies which supply to the value chain of water or which offer products or technologies which are more water efficient than others in their category can refer to this in its name; – A "sustainable energy" fund having a non-specific investment policy not supported by a strategy aiming to invest in sustainable energy companies engaged in alternative energy and energy technologies should not be allowed to use such specific terms in its name; and – An index-tracking fund that applies an exclusion policy which only excludes a small number of securities, or where the holdings are not materially different from a similar non-ESG index should not use ESG-related terms in its name." <p>– Rules of the road for investment policies, etc – Again, ESMA provides useful pointers here to address greenwashing risk, eg:</p> <p><i>"A sustainable investment policy and/or objectives should be included in the fund documentation and the fund should be managed according to it."</i></p> <p><i>"The sustainable objectives or characteristics should be clearly identified and expressions such as "the fund pursues ESG objectives in general" without any further specification should be avoided. In case of environmental objectives, a way to clearly identify those objectives is if they are referred to in Article 9 [of the Taxonomy Regulation]."</i></p> <p><i>"The sustainable investment policy and objectives must clearly reflect any claims made in the fund documentation and marketing materials suggesting ESG or sustainability characteristics, themes or outcomes."</i></p> <p><i>"The strategy should be clearly identified in the relevant fund documentation. As reference, [local regulators] should rely on a non-exhaustive list of sustainability strategies (ie best in class, thematic, ESG integration, ESG engagement, impact investing, exclusions). It should also clearly state how the strategy is linked to the formulated sustainable objectives or characteristics and how it helps to achieves this."</i></p> <p><i>"For a strategy to be clearly identified at least some of the following non-exhaustive key elements should be disclosed: Investment universe (including limits and thresholds); Screening criteria applied; Specific ESG characteristics/themes or non-financial impacts pursued; Use of benchmark/indices and relative expected tracking error (if applicable); or Stewardship approach."</i></p> <p>– Depositaries – ESMA considers that "depositaries should include all ESG-related investment restrictions in the monitoring of the compliance of the instructions coming from the management company or the investment manager".</p> <p>– ESG risk management – ESMA considers it likely that large managers will have sophisticated tools in place, whereas small- and medium-sized managers may "struggle to comply with these new rules". It is suggested this will be a supervisory priority – sample checks on websites are also suggested, alongside questionnaires, with both a desk-based and on-site approach recommended. It also suggests that all fund managers should conduct a review of their relevant policies and procedures on a periodic basis.</p>

Key materials	What does it cover?
<p>BaFin Q&A (5 September 2022)¹⁹ (Currently available only in German)</p>	<ul style="list-style-type: none"> – Non-application of SFDR to German located advisers outside the scope of MiFID. NB: This view may be useful for other firms considering scope issues. – How to interpret the term “promote” in SFDR. NB: BaFin’s suggests the “promotion” must be targeted and communicated to the outside world, but cannot be interpreted as simply “to advertise”. – Obligation to review a fund’s investments for taxonomy alignment and/or to collect data. NB: <ul style="list-style-type: none"> (1) Some firms are taking BaFin as saying that a firm with an Article 8 product with environmental characteristics, where the firm has not committed to investing in any environmentally sustainable economic activities as per the taxonomy, is not obliged to assess taxonomy alignment or to collect (or use best efforts to collect) corresponding data. They are also taking BaFin as saying that firms must disclose the actual degree of alignment with the taxonomy. This can be zero, eg if no data is collected. This view of the new law is likely to be welcomed in the industry but it is uncertain whether the European Commission and the ESAs will agree. (2) Some firms are interpreting the European Commission May 2022 Q&A as suggesting the Taxonomy Regulation does not require financial products to invest in taxonomy-aligned economic activities.²⁰ – BaFin expects that disclosures regarding the taxonomy alignment in the pre-contractual information and periodic reports will regularly be zero. – What disclosures firms might make on taxonomy alignment if no taxonomy data has been collected. NB: BaFin considers it acceptable (and not greenwashing) for firms to disclose lower taxonomy alignment figures (or indeed zero) than might otherwise be the case. – Legacy products – Article 8 and 9 products no longer being distributed before 10 March 2021 must still comply with Articles 10 and 11 (where relevant), based on an assessment of the product at the time it was being distributed. The obligation to prepare a pre-contractual disclosure does not, however, apply – subject to further views of the European Commission and/or the ESAs.
<p>CSSF Press release 6 September 2022²¹</p>	<p>Helpful practical information on how and by when firms should make relevant filings within the CSSF.</p>

¹⁹ “Fragen und Antworten zur EU-Offenlegungsverordnung” – see https://www.bafin.de/SharedDocs/Downloads/DE/Anlage/dl_Anlage_Fragen_und_Antworten_OffenlegungsVO.pdf?__blob=publicationFile&v=5

²⁰ See https://www.esma.europa.eu/sites/default/files/library/c_2022_3051_f1_annex_en_v3_p1_1930070.pdf (page 11)

²¹ “Communication to the investment fund industry on SFDR RTS confirmation letter” – see <https://www.cssf.lu/en/2022/09/communication-to-the-investment-fund-industry-on-sfdr-rts-confirmation-letter/>

9. Schedule 2 - SFDR timeline for asset managers that are subject to SFDR

Time	Legislation	Requirement(s)	Pre-contractual disclosure	Website disclosure	Periodic reports	Legislative reference
10 March 2021	SFDR	<p>Entity and product level disclosures:</p> <p>Various requirements began to apply for relevant asset managers:</p> <ul style="list-style-type: none"> – Website disclosure re sustainability risk (Article 3). – Subject to an “opt out”, website disclosure re principal adverse impacts (PAI) (Article 4). – Website disclosure re sustainability risk in remuneration policy (Article 5). – Pre-contractual product disclosure re sustainability risk (Article 6). – Pre-contractual product disclosure for firms that do not consider PAI (Article 7(2)). – Pre-contractual product disclosures for Article 8 and 9 products (Articles 8 and 9). – Website disclosures of product level information in relation to Article 8 and 9 funds (Article 10) <p>NB: Only comply with Level 1 SFDR – largely ignore the RTS.</p>	√	√		Articles 3-13 SFDR
Ongoing from 10 March 2021	SFDR	<p>Marketing: Continue to review marketing communications to ensure they do not contradict any information disclosed under SFDR.</p>				Article 13 SFDR
Ongoing from 10 March 2021	SFDR and Taxonomy Regulation	<p>For Article 8 and Article 9 Funds:</p> <ul style="list-style-type: none"> – Begin to collect data on/from 10 March 2021 to include in periodic reports. 			√	Article 11 SFDR, Taxonomy Regulation and RTS
30 June 2021	SFDR	Entity level PAI disclosure – PAI “opt out” for larger FMPs fell away – ie if they had not made a positive PAI disclosure before, they must have done so by this date.		√		Article 4 SFDR
	SFDR	Product level PAI disclosure – Update or delete any disclosure previously made in a pre-contractual document to the effect that PAI is not considered, if this is out of date because the “opt out” was previously used but has fallen away.	√			Article 7(2) SFDR
1 Jan 2022	Taxonomy Regulation	<p>For any of your funds that do not fall within Article 8 or 9 SFDR – Include in the fund’s pre-contractual disclosures and periodic reports the following statement: “The investments underlying this financial product do not take into account the EU criteria for environmentally sustainable economic activities.”</p> <p>NB: You may also wish to consider including this boilerplate disclosure in the fund documents for your Article 8 and 9 SFDR funds even, if no detailed taxonomy product disclosure requirements apply for them – ie to make the position clear.</p>	√		√	Article 7 Taxonomy Regulation
Periodic reports issued in 2022	SFDR	<p>For your Article 8 and 9 funds (if any) – periodic reports issued during this period (only):</p> <ul style="list-style-type: none"> – Include prescribed new disclosures in periodic reports, but in line with the Level 1 SFDR requirements only. – For Article 8 products, as to the extent to which the relevant environmental (E) or social (S) characteristics are met. – For Article 9 products, as to: (a) the overall sustainability-related impact of the product by means of relevant sustainability indicators; or (b) where an index has been designated as a reference benchmark, a comparison between the overall sustainability-related impact of the product with the impacts of the designated index and of a broad market index through sustainability indicators. <p>Essentially this requires transparency as to the success of the product in attaining its E/S characteristics or sustainable investment objective.</p> <ul style="list-style-type: none"> – This can be done in high-level terms, as the detailed requirements of the RTS will not yet apply – ie in our view, you can ignore the RTS and templates. <p>NB: Periodic reports must comply with the prescribed requirements from 1 January 2022 in compliance with SFDR Level 1, and from 1 January 2023 in compliance with the RTS (ie Level 2). This means that in 2023 asset managers must draw up respective periodic reports in compliance with the RTS, irrespective of reference periods.</p>			√	Article 11 and 20(3) SFDR

NOTES: (1) References in this matrix to “asset managers”, “funds” etc mean those subject to SFDR. (2) If a row is shaded, it only applies to those of your funds (if any) caught by the detailed taxonomy product disclosure requirements. Ignore these rows if you have no such funds. (3) The position on PAI disclosures (at entity and product level) is complex – for further advice on this, speak to your usual A&O contact. (4) All references to regulations or articles are to SFDR Level 1 unless otherwise specified.

Time	Legislation	Requirement(s)	Pre-contractual disclosure	Website disclosure	Periodic reports	Legislative reference
1 Jan 2022	Taxonomy Regulation	<p>If you have an Article 9 fund that invests in an economic activity that contributes to an environmental objective OR an Article 8 fund that invests in sustainable investments with an environmental objective, PLUS the environmental objective/s is one or both of the following: (a) climate change mitigation (b) climate change adaptation:</p> <ul style="list-style-type: none"> – Update your pre-contractual and periodic disclosures to comply with Level 1 of the Taxonomy Regulation on/from 1 January 2022, ignoring the RTS. <p>NB: For relevant Article 8 funds only:</p> <ul style="list-style-type: none"> – Include prescribed boilerplate statement: <i>“The “do no significant harm” principle applies only to those investments underlying the financial product that take into account the EU criteria for environmentally sustainable economic activities. The investments underlying the remaining portion of this financial product do not take into account the EU criteria for environmentally sustainable economic activities.”</i> 	√		√	Articles 5 and 6 Taxonomy Regulation
30 Dec 2022	SFDR	<p>Product level PAI disclosure – For asset managers that consider principal adverse impacts:³</p> <ul style="list-style-type: none"> – Include in the pre-contractual disclosures for each relevant product a clear and reasoned explanation of whether, and, if so, how the product considers the principal adverse impacts on sustainability factors and a statement that information on principal adverse impacts on sustainability factors is available in the information to be disclosed pursuant to Article 11(2) (periodic reports). – It is not strictly required for this to follow the RTS format for Article 4 entity level PAI disclosures, and we are assuming this is not required (although this may be the expectation of regulators in due course). If correct, this means that qualitative disclosures only are required – ie a narrative on relevant matters – and not quantitative disclosures – ie data. <p>NB: For Article 8 and 9 funds, the templates in the RTS indicate what is required.</p>	√			Article 7(1) SFDR
In periodic reports issued after 30 Dec 2022	SFDR	<p>Product level PAI disclosure:</p> <ul style="list-style-type: none"> – Comply with the statement referred to above – ie begin to include information on principal adverse impacts on sustainability factors in the periodic reports for the product. – See comment above re RTS format. 			√	Article 7(1) SFDR
1 Jan 2023	SFDR and RTS	<p>For your Article 8 and 9 funds (if any) – pre-contractual disclosures:</p> <ul style="list-style-type: none"> – Update pre-contractual disclosures in line with the RTS, including the prescribed templates. 	√			Articles 8 and 9 SFDR RTS templates in Annex II and III
1 Jan 2023	Taxonomy Regulation and RTS	<p>PLUS</p> <p>If you have an Article 9 fund that invests in an economic activity that contributes to an environmental objective as per the taxonomy OR an Article 8 fund that invests in sustainable investments² with any environmental objective as per the taxonomy</p> <ul style="list-style-type: none"> – Prepare pre-contractual disclosures in line with the Taxonomy Regulation and RTS. NB: The template in the RTS indicates what is required. <p>NB: For relevant Article 8 funds only:</p> <ul style="list-style-type: none"> – Include prescribed boilerplate statement: <i>“The “do no significant harm” principle applies only to those investments underlying the financial product that take into account the EU criteria for environmentally sustainable economic activities. The investments underlying the remaining portion of this financial product do not take into account the EU criteria for environmentally sustainable economic activities.”</i> 	√			Articles 8(2a) and 9(4a) SFDR, and RTS Articles 5, 6 and 25 Taxonomy Regulation RTS template Annex II and III

2. Note the following from the ESA consultation on the amendments to be made to the SFDR RTS for the taxonomy: “The ESAs’ draft RTS provide for the content and presentation of additional information to the SFDR product disclosures where the product makes sustainable investments contributing to environmental objectives. This CP proposes a set of amending Articles for products making sustainable investments, more specifically investing in activities having environmental objectives in compliance with the TR. The amendments are particularly targeted at Article 9 SFDR products but are also relevant **for Article 8 SFDR products that intend to make sustainable investments in environmental objectives in compliance with the TR**” (paragraph 10, emphasis added).

3. The position on product level PAI disclosures is complex, including as regards when product level PAI disclosures can/must be made, and their content.

Time	Legislation	Requirement(s)	Pre-contractual disclosure	Website disclosure	Periodic reports	Legislative reference
In periodic reports issued from 1 Jan 2023 onwards	SFDR and RTS	<p>For your Article 8 and 9 funds (if any) – periodic reports:</p> <ul style="list-style-type: none"> – Include prescribed new disclosures in periodic reports in line with the RTS, including the prescribed templates: – for Article 8 products, as to the extent to which the relevant environmental (E) or social (S) characteristics are met; and – for Article 9 products, as to: (a) the overall sustainability-related impact of the product by means of relevant sustainability indicators; or (b) where an index has been designated as a reference benchmark, a comparison between the overall sustainability-related impact of the product with the impacts of the designated index and of a broad market index through sustainability indicators. <p>Essentially this requires transparency as to the success of the product in attaining its E/S characteristics or sustainable investment objective.</p> <ul style="list-style-type: none"> – Include a historical comparison covering up to five previous reference periods and the top 15 investments made during a particular reference period. – For products making sustainable investments, the RTS requires disclosure on how the product has relevantly and successfully complied with the DNSH (this being part of the test for when something is a sustainable investment). This draws on the indicators used in the PAI regime and the minimum safeguards under Article 18 of the Taxonomy Regulation. – Use template in the RTS and follow the RTS requirements. 			√	Article 11 SFDR RTS and RTS template in Annex IV and V
In periodic reports issued from 1 Jan 2023 onwards	Taxonomy Regulation and RTS	<p>PLUS</p> <p>If you have an Article 9 fund that invests in an economic activity that contributes to an environmental objective OR an Article 8 fund that invests in sustainable investments with an environmental objective as per the taxonomy</p> <ul style="list-style-type: none"> – Include disclosures as per the RTS templates on the taxonomy related matters. <p>NB: For relevant Article 8 funds only:</p> <ul style="list-style-type: none"> – Include prescribed new boilerplate statement: “The “do no significant harm” principle applies only to those investments underlying the financial product that take into account the EU criteria for environmentally sustainable economic activities. The investments underlying the remaining portion of this financial product do not take into account the EU criteria for environmentally sustainable economic activities.” 			√	Article 5 and 6 Taxonomy Regulation RTS and RTS template Annex IV and V
1 Jan 2023	SFDR RTS	<p>Entity level PAI disclosure – For asset managers that consider principal adverse impacts, issue updated PAI disclosure that complies with SFDR RTS.</p> <ul style="list-style-type: none"> – Use the template in RTS Annex I, but leave blank any sections requiring disclosures for one or more reference periods. Under the RTS, a reference period is a calendar year – 1 January to 31 December (Article 1 RTS). – These sections only have to be completed in the firm’s report as at 30 June 2023, for the reference period 1 January 2022 to 31 Dec 2022. <p>Information that must be published in the first statement not related to reference periods includes the following sections in Table 1 of Annex I: “Summary”, “Description of policies to identify and prioritise adverse sustainability impacts”, “Engagement policies” and “References to international standards”.</p>		√		Article 4 SFDR RTS and RTS Annex I

Time	Legislation	Requirement(s)	Pre-contractual disclosure	Website disclosure	Periodic reports	Legislative reference
1 Jan 2023	SFDR and RTS	For your Article 8 and 9 funds (if any) – website disclosures: – Update website disclosures of product level information in relation to Article 8 and 9 products, so they comply with the RTS. These requirements cover both where and how the disclosures must be made, and what must be disclosed – eg as regards the methodology, data sources used, screening criteria etc. The RTS also requires a summary.		√		Article 10(1)(d) SFDR and RTS
1 Jan 2023	SFDR	For your Article 8 and 9 funds (if any) – website disclosures: – Add to website your new/updated pre-contractual and/or periodic disclosures as above.	√	√	√	Article 10(1) SFDR
By 30 June 2023	SFDR and RTS	Entity level PAI disclosure – For asset managers that consider PAI at an entity level: – Publish a PAI statement in accordance with the RTS, now including the information that refers to a reference period (in respect of the reference period relating to 2022).		√		Article 4 SFDR and RTS RTS Annex I
By 30 June 2024, 2025 etc	SFDR and RTS	Entity level PAI disclosure – Going forward, asset managers that consider PAI at an entity level must publish annual PAI statements by 30 June each year which must include information on the most recent reference period (ie the previous calendar year) plus historical reference periods.			√	As above

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