

MEMO# 33047

January 15, 2021

EU ESG: ESMA Requests Clarification from Commission on SFDR Interpretation

[33047]

January 15, 2021 TO: ICI Global Members

ESG Task Force

EU Sustainable Finance Strategy Working Group

ICI Global Regulated Funds Committee SUBJECTS: ESG

International/Global

MiFID, EMIR, AIFMD, UCITS V RE: EU ESG: ESMA Requests Clarification from Commission on SFDR Interpretation

The European Securities Markets Authority (ESMA) has published a letter[\[1\]](#) to the European Commission asking for clarification on several areas of uncertainty in the interpretation of the Sustainable Finance Disclosure Regulation (SFDR), including application to Article 8 and 9 products (*i.e.*, ESG funds).[\[2\]](#)

The letter is helpful in outlining the areas where ESMA and the other European Supervisory Authorities (ESAs) are struggling to interpret the SFDR level 1 legislative requirements as they work to finish drafting the level 2 regulatory technical standards (RTS) by the end of this month. The letter echoes many of the questions we have heard from members, and it is useful to see which questions remain unanswered at the policymaker level.

The letter asks the following questions:

Application of SFDR to non-EU Alternative Investment Fund Managers (AIFMs) and registered AIFMs

- Does SFDR apply to registered (sometimes referred to as sub-threshold) AIFMs referred to in Article 3(2) AIFMD?
- Does SFDR apply to non-EU AIFMs, for example when they market a sustainable EU Alternative Investment Fund under a National Private Placement Regime?

Application of the 500-employee threshold for principal adverse impact reporting on parent undertakings of a large group (see SFDR

Art. 4)

- Does SFDR apply to registered (sometimes referred to as sub-threshold) AIFMs referred to in Article 3(2) AIFMD?
- Does SFDR apply to non-EU AIFMs, for example when they market a sustainable EU Alternative Investment Fund under a National Private Placement Regime?

The meaning of “promotion” in the context of SFDR Article 8 products (i.e., that “promote” environmental or social characteristics)

- Can the name of a product, which may include words like “sustainable”, “sustainability”, or “ESG” be considered to qualify a product to be promoting an environmental or social characteristic or to be having sustainable investment as its objective?
- While a financial product to which Article 8 applies does not need to explicitly promote itself as targeting sustainable investments (within the meaning of Article 2(17) SFDR), would a reference to taking into account a sustainability factor or sustainability risk in the investment decision be sufficient for Article 8 to apply? If the answer is yes, how can financial market participants that disclose mandatory information according to Article 6(1) or Article 7(1) SFDR ensure that this is not automatically considered as “promoting environmental or social characteristics”?
- Must a product to which Article 8 applies invest a minimum share of its investments to attain its designated environmental or social characteristic in order to be considered to be promoting environmental or social characteristics?
- In the absence of active advertising of an environmental or social characteristic of the product, would an intrinsic characteristic of the product, such as a sectoral exclusion (e.g. tobacco) which is not advertised, also qualify as “promotion”?
- In addition, would complying with a national legal obligation, which applies to the financial market participant, such as a ban on investment in cluster munitions, also bring the product into the scope of Article 8?

Application of SFDR Article 9 (i.e., “where a financial product has sustainable investment as its objective”)

- Must a product to which Article 9(1), (2) or (3) SFDR applies only invest in sustainable investments as defined in Article 2(17) SFDR? If not, is a minimum share of sustainable investments required (or would there be a maximum limit to the share of “other” investments)?
- Where an EU Climate Transition Benchmark (EU CTB) or EU Paris-aligned Benchmark (EU PAB) exists, is it necessary for a product to track an EU PAB or an EU CTB on a passive basis for Article 9(3) SFDR to apply to it?
- If the questions above are answered in the affirmative and if the minimum standards of an EU PAB or an EU CTB do not require the index components to be sustainable investments, can the product fall within the scope of Article 9(3) SFDR?

Application of SFDR product rules to MiFID portfolios and other tailored financial products

- For portfolios, or other types of tailored financial products managed in accordance with mandates given by clients on a discretionary client-by-client basis, do the disclosure requirements in SFDR apply at the level of the portfolio only or can they apply at the level of standardised portfolio solutions?
- If the disclosure requirements of SFDR apply at the portfolio level, how is it possible to maintain confidentiality obligations to the client in view of the disclosures required, especially the website disclosures required by Article 10 SFDR?

We will keep you posted on any further developments!

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endnotes

[1] See Letter from Steven Maijoor, Chair of the ESAs' Joint Committee, to John Berrigan, Director General, Directorate-General Financial Stability, Financial Services and Capital Markets Union, European Commission, dated 7 January 2021, *available at* https://www.esma.europa.eu/sites/default/files/library/jc_2021_02_letter_to_eu_commission_on_priority_issues_relating_to_sfdr_application.pdf.

[2] For more details on anticipated upcoming developments related to SFDR, *please see* ICI Memorandum No. 33039, *available at* https://www.ici.org/my_ici/memorandum/memo33039 (see attachment with compliance dates and links to the various requirements).