

Sustainable Finance update (asset management): SFDR RTS adopted by the European Commission

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On 6 April 2022, the European Commission ("EC") adopted the EU Sustainable Finance Disclosure Regulation ("SFDR") Regulatory Technical Standards in the form of a delegated regulation ("RTS").

As previously announced, the EC decided to consolidate all 13 SFDR RTS into one single delegated act, which is expected to apply from 1 January 2023.

The RTS should provide the asset management industry and EU regulators with much needed certainty when preparing for compliance.

In the Explanatory Memorandum of the RTS, the EC expressly links the pre-contractual and periodic disclosure templates (annexes II-V of the RTS) to the MiFID ESG rules¹, which will notably require investment firms and financial advisers to establish their client's sustainability preferences, by stating that these disclosures will "facilitate the application of 'sustainability preferences' requirements...". It should be noted that the MiFID ESG rules will start applying from 2 August 2022.

The following aspects in the RTS are noteworthy in comparison to the last version of the draft RTS contained in the ESA's Final Report on Draft Regulatory Technical Standards dated 22 October 2021:

- The structure and format of the RTS has changed significantly. According to the EC, none of the substantive requirements have been changed but that it had: "...adapted the provisions of the standards to ensure legality and legislative quality of this Regulation as well as consistency of the rules in this Regulation with the Sustainable Finance Disclosures Regulation". To avoid duplication of the rules in "enacting terms" and the disclosure templates, the EC has removed a certain number of the "enacting terms" from the RTS. For instance, most of the provisions on article 8 and 9 SFDR pre-contractual disclosures in chapter III of the RTS have been removed (provisions on the presentation and calculation of taxonomy-alignment remain however).
- The definitions section in chapter I has been revised. The definition "taxonomy-aligned

economic activity” has been replaced with “environmentally sustainable economic activity”.

- Helpfully, the pre-contractual and periodic disclosure templates remain largely unchanged although some of the notes and explanations have been revised. In Whereas (29) the EC highlights once again the importance of the comparability of the Principal Adverse Impact (“PAI”) statement and the pre-contractual/periodic disclosures and that the standard templates (including the explanations of key terms in these templates) are therefore appropriate for the presentation of this information. It therefore seems unlikely that the ESAs/national regulators will allow any deviation from the templates annexed to the RTS (except to the extent permitted by the RTS).
- A new requirement has been added for financial advisers. They need to explain in their PAI statement (to be published on the website) the process for selecting financial products they advise on, including how they use the information published by financial market participants (such as AIFMs and UCITS management companies) and whether they rank and select financial products based on the PAI indicators as well as any criteria or thresholds based on the PAI to select or advise on financial products.

A number of open questions remain, such as the exact scope of the pre-contractual taxonomy-alignment reporting requirement for article 8 SFDR funds promoting environmental characteristics but which do not intend to invest in taxonomy-aligned sustainable investments as well as the application of the so-called Do No Significant Harm test and how the PAI should be taken into account in that respect. More guidance from the EC and/or the ESAs would therefore be welcome.

Next steps

The Council and the European Parliament now have three months to scrutinise the RTS (this period may be shortened or extended).

- 1 Delegated Regulation (EU) 2021/1253 (MiFID II sustainability preferences)

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