

Supervisory Authorities issue Clarifications on SFDR RTS

The regulatory technical standards (“RTS”) issued pursuant to the Sustainable Finance Disclosures Regulation (“SFDR”) are acknowledged to be highly complex. As a result of queries from both market participants and national supervisory authorities the European Supervisory Authorities (“ESAs”) have accordingly issued related guidance (the “Guidance”) to assist in clarifying certain aspects.

Overview

The relevant RTS have been issued under Regulation 2019/2088, the SFDR. Implementation of the application date for the relevant rules has been delayed to 1 January 2023 in view of the level of work required by market participants to adjust their practices to comply with the new rules as well as facilitating comprehensive analysis. The clarifications provided in the Guidance, dated 2nd June 2022, relate primarily to the principal adverse impact (“PAI”) disclosures, financial product disclosures, the “do not significantly harm” (“DNSH”) disclosures and guidance pertaining to the use of investment options, as detailed further separately below.

PAI Disclosures

Clarifications have been included in relation to the use of “sustainability indicators”, the PAI calculation methodology, the potential use of a “look through” approach for related disclosures as well as the scope of investments covered.

Pre-contractual Disclosures

Clarification is given regarding how funds which invest in a mixture of environmental and social objectives should calculate the minimum proportion of taxonomy aligned investments as well as required disclosures, both on an ongoing basis and where this is subject to change, as well as the basis for such disclosures in pre-contractual documentation.

Adverse Impact Indicators

Some granular level clarifications are included on the basis to be used for various calculations required for disclosing adverse impact exposures, including of

“average” for gender pay gaps and diversity, or water usage and recycling and the appropriate methodology for the aggregation of exposures where investments are made through multi-asset products, for example.

Guidance is also included on the methodology for determining exposure to companies with exposure to severe human rights issues, noting that breaches of the Charter of Fundamental Rights of the EU could be used as a relevant basis for such determinations.

Periodic Disclosures

The Guidance clarifies that for investments into underlying investment funds, which come within the list of a fund’s top 15 holdings, the domicile of that underlying fund should be disclosed and there is no need to look through to investments held by it.

Taxonomy Disclosures

The guidance clarifies that the disclosed minimum proportion of taxonomy aligned investments should be viewed as binding rather than aspirational, with penalties for any breach of this being as provided for under the SFDR. It further clarifies that while turnover is the standard measurement for pre-contractual disclosures pertaining to environmentally sustainable economic activities related to climate change adaptation, capital expenditure or operating expenditure may be used if more representative of taxonomy alignment and all three should be included in the periodic reports, represented in the form of a bar chart.

Where a product invests into other products (including fund of funds) the calculation of the taxonomy alignment should be based on the market value of the proportion of taxonomy aligned investments in the underlying.

GDNSH Disclosures

The guidance clarifies that the disclosures to be made when making sustainable investments under the SFDR and the PAI disclosures at product level under Article 7 of the SFDR apply independently. They also note the benefit of using the metrics provided for in the Climate Delegated Act and the Complementary Climate Delegated Act, where feasible, when preparing indicators for relevant values. It also distinguishes the DNSH provisions in the SFDR from those under the Taxonomy Regulation (the “TR”), while observing that the RTS includes a requirement to show whether investments are aligned with the OECD Guidelines for Multinational enterprises and the UN Guiding Principles on Business and human Rights, which brings the DNSH disclosures under SFDR in line with the minimum under the TR.

Products including Options

Clarification has been provided relating to website disclosures for multi-option products, the extent of disclosures to be provided and the manner and format of the presentation of such disclosures.

How Clerkin Lynch can help

Clerkin Lynch is firmly focused on the legislative requirements pertaining to the SFDR and other aspects of recent EU legislation pertaining to sustainability and Green Finance. This concentration means that we are ideally placed to assist clients to ensure compliance with related provisions.

Our assistance in this area can include the drafting of related policies and procedures as well updating documents to ensure appropriate disclosures are included.

Asset Management at Clerkin Lynch

We advise on the structuring, establishment and ongoing operation of investment funds in Ireland, including UCITS and Alternative Investment Funds, for international distribution. We assist clients in liaising with and obtaining appropriate regulatory authorisations from the national regulatory authority, the Central Bank of Ireland. We also advise on issues affecting clients throughout the asset management and broader financial sector, including with regard to AML, MiFID, crypto[1]currencies, distance selling and internet-based products and investments. ESG is an area of particular focus for the practice and one the team has specific expertise in, with six members of the team having undertaken courses in Climate Change Law. The Asset Management and Funds team liaises with other departments of the firm, including Banking and Financial Services, Corporate, Data Protection and Technology to assist clients with a comprehensive range of legal services when appropriate. The result is ensuring that client issues can be addressed in a seamless and efficient manner. We only provide Irish legal services but work through our network of international legal firms to provide comprehensive cross border legal services, and when required, to provide cost efficient solutions in related contexts.



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