

# Asset Management & Investment Funds Update

October 2022



## ESMA Sustainability Preference Guidelines

On 23 September 2022, ESMA published revised MiFID Suitability Guidelines incorporating guidance for compliance with the MiFID sustainability preference rules which came into effect on 2 August 2022 (the **Guidelines**).

### Application date

The Guidelines were preceded by an industry consultation process (see [here](#) for further details) which concluded in April 2022. In response to industry feedback as to the complex and challenging nature of the MiFID sustainability preference rules and the wider EU sustainable finance legislative framework, ESMA has set the date of application of the Guidelines to six months after the publication of their translations on the ESMA website, instead of the originally proposed two months in the draft guidelines issued for consultation. Publication of the translations of the Guidelines is currently awaited.

### Guidelines v consultation version

The Guidelines differ in several other respects to the draft version issued for consultation however, many of the provisions which were highlighted by respondents to the consultation as problematic have been retained.

#### *Professional investors*

No additional flexibility as regards the application of the Guidelines when engaging with professional clients has been incorporated, however ESMA has left the door open to doing so via other Level 3 measures: "ESMA notes issues related to the application of the MiFID II suitability requirements to professional clients might be quite specific and therefore [ESMA] notes that it believes it will be more efficient to develop specific Q&As in response to practical issues emerging rather than developing a new section in the guidelines."

#### *Lack of available products to meet sustainability preferences*

In response to respondents' feedback citing a lack of available products in the market to meet investors' sustainable preferences, ESMA notes in its feedback statement that the "recent estimates put the share of [Article 8 and 9 funds] in the total assets managed by UCITS investment funds available for sale in the EU at 50%, with this share still growing".

The limitation of MiFID firms' ability to discuss product availability with clients at the same time as collecting sustainability preferences has been retained and a new Guideline has been included stating that firms may only disclose information about available products after, but not before, the client adapts its sustainable preferences.

### *PAI product preferences*

A welcome change however, when compared to the consultation version, is the alignment of the Guidelines on the collection of clients preference for products which consider principal adverse impacts (PAIs) with the MiFID sustainability preference rules. While the consultation version referred to the collection of clients' preferences for products which consider PAIs using quantitative and qualitative criteria demonstrating the consideration of PAIs, the Guidelines amend this to either quantitative or qualitative criteria. ESMA also confirmed in the feedback statement that, "while considering it is a good practice, firms are not bound by the use of SFDR PAI indicators and there is no minimum number of PAIs indicators that has to be considered when collecting clients' sustainability preferences."

### *Timing of collection of clients' sustainability preferences*

While the Guidelines clarify that firms were required by MiFID sustainability preference rules to have new client questionnaires ready as of 2 August 2022 such that new or existing clients that wished to update their profile could do so from that date, ESMA has retained the ability for firms to collect clients' sustainability preferences at the 'next regular update'. However, this is subject to the regulatory expectation that firms 'launch the campaign to proactively invite clients to update their profiles with regard to sustainability preferences (unless they have already done so) no later than 12 months after the entry into application of the rules' i.e., 2 August 2023. ESMA further clarifies that, until the firm acquires information on the client's sustainability preferences, the client will be considered as "sustainability-neutral" and can therefore be recommended products both with and without sustainability-related features.

### *Next steps*

The Guidelines are to apply six months after the publication of their translations on the ESMA website. Accordingly, while MiFID firms have been subject to the MiFID sustainability preference rules since 2 August 2022, firms will have at least another six months during which to comply with these rules in line with the Guidelines.

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