







## Asset Management & Investment Funds Update

September 2021

### Key Dates & Deadlines: Q4 '21 / Q1 '22

17 December 2021		Transposition deadline for EU Whistleblowing Directive. On 12 May 2021 draft legislation providing for the transposition of the Directive, in the form of amendments to the Protected Disclosures Act 2014, was published and is proceeding through the Irish legislative process. For further details on the Directive see our December 2019 briefing <a href="#">A New Regime for the Protection of Whistleblowers</a> .
31 December 2021		Scheduled end date for UCITS transitional arrangements under PRIIPs Regulation. For further details see this month's article on this topic.
31 December 2021		Expiration date for interim company law flexibility measures introduced under the Companies (Miscellaneous Provisions) (COVID-19) Act. For further details see our August 2020 briefing <a href="#">COVID-19 Company Law Changes</a> .
31 December 2021		LIBOR cessation date. On 5 March 2021, the UK FCA announced that all of the 35 LIBOR benchmarks settings will cease to be provided by any administrator or will no longer be representative (i) immediately after 31 December 2021, in the case of all GBP, EUR, CHF and JPY settings, and the 1-week and 2-month USD settings; and (ii) immediately after 30 June 2023, in the case of the remaining USD settings. For further details see our August 2020 briefing <a href="#">EU Solution to LIBOR Cessation &amp; Non-EU FX Spot Rate Access</a> .
31 December 2021		Central Bank completion deadline for review of fund liquidity risk management frameworks (LRMF) by UCITS managers. For further details see our April 2021 briefing <a href="#">Intense Regulatory Focus on Liquidity Risk Management Continues</a> and the Central Bank's follow-up industry <a href="#">correspondence</a> of 18 May 2021.
31 December 2021		Deadline for unit trusts and ICAVs, in existence on 1 July 2021, to file PPS details of their beneficial owners on the Central Bank's register of beneficial ownership information. For further details see this month's article on this topic.

1 January 2022



SFDR periodic report and Taxonomy-related disclosure rules in effect. For further details see our March 2021 briefing ['Sustainable Finance Issue: planning for SFDR compliance post the initial deadline of 10 March 2021'](#)

3 February 2022



ESMA Guidelines on Marketing Communications in effect. For further details see our June 2021 briefing ['New Disclosure Rules for UCITS and AIF Marketing Materials'](#).

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## Legislation Proposed to Turn off UCITS KIID and Switch on PRIIPs KID for UCITS

On 5 August 2021, the Commission published a consultation on an amendment to the UCITS Directive to "turn off" the current UCITS KIID rules from 1 July 2022. Feedback to the consultation is requested by 9 September 2021.

### UCITS Directive Amendment

The proposal provides for the insertion of a new provision in the UCITS Directive which would allow UCITS produce a PRIIPs key information document or KID in satisfaction of the requirement to produce a KIID under UCITS rules. This is to ensure that UCITS, once subject to the PRIIPs Regulation and the requirement to produce a PRIIPs KID, are not subject to dual obligations under both the PRIIPs KID and UCITS KIID rules.

The proposal provides for the transposition of the new UCITS Directive provision by 30 June 2022 and its application from 1 July 2022 (the anticipated application date of PRIIPs KID rules to UCITS).

### PRIIPs Regulation Amendment

The Commission is also consulting on amendments to the PRIIPs Regulation to ensure UCITS are not subject to the PRIIPs Regulation in advance of the UCITS Directive amendment taking effect.

Currently, UCITS benefit from an exemption to produce a PRIIPs KID under a transitional arrangement set down in the PRIIPs Regulation. This transitional arrangement is scheduled to expire on 1 January 2022. To avoid UCITS being subject to both PRIIPs KID rules and UCITS KIID rules on 1 January 2022, the Commission is proposing to extend the transitional period for UCITS under the PRIIPs Regulation until 30 June 2022. The consultation on amendments to the PRIIPs Regulation also closes on 9 September 2021.

### Next Steps

As well as amending the UCITS Directive and the transitional arrangements for UCITS under the PRIIPs Regulation, the Commission intends amending the PRIIPs Regulation *"to make it easier for management companies, investment companies and persons advising on, or selling, units of UCITS to make use of the presentation, content and standard format of the KID."* Draft amendments to the PRIIPs Regulation were adopted by the ESAs in February 2021 and were expected to be finalised in July 2021, however, a final set of regulations has yet to be published by the Commission. Despite this delay, however, the Commission has stated that it continues to intend applying the revised PRIIPs Regulation, once finalised, from 1 July 2022. As a result, UCITS will have at most 10 months (September 2021-June 2022) from publication of the revised PRIIPs Regulation to switch over to preparing a PRIIPs KID in place of the UCITS KIID.

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## Commission SFDR Q&A: impacts and action items

As previously reported, the European Commission published a [Q&A](#) clarifying the application and implementation of the Sustainable Finance Disclosures Regulation (SFDR) on 26 July 2021. The Q&A was issued in response to the January 2021 ['SFDR priority issues' letter](#) from the European Supervisory Authorities' (ESA) which set out a range of questions on the following aspects of the regime:

1. application to non-EU and registered (sub-threshold) AIFMs;

2. principal adverse impact (PAI) reporting requirements for parent entities of large groups;
3. scope of Article 8 (light-green product) transparency rules and specifically the meaning of 'promotion' in that context;
4. Article 9 (dark-green product) transparency rules; and
5. application of transparency rules to portfolios and dedicated funds.

While publication of the Q&A has largely been welcomed, including by EFAMA (the European Fund and Asset Management Association), some of the Commission's answers have raised additional operational and compliance issues for entities and products in scope of SFDR. As a result, in its letter to the Commission of 20 August 2021 highlighting various SFDR implementation concerns, EFAMA have requested further clarification of several of the answers and an opportunity to discuss these at an industry workshop with the Commission. The following summarises the clarifications provided in the Q&A and highlights potential consequential impacts and action items for those in scope of SFDR. Relevant further points of clarification as requested by EFAMA are also highlighted.

### 1. Non-EU and Registered (Sub-Threshold) AIFMs

SFDR applies to AIFMs without distinction as to authorisation status or location of the AIFM.

The Q&A clarifies that SFDR applies to registered AIFMs (being sub-threshold AIFMs not authorised under AIFMD) as well as non-EU AIFMs carrying out activities in the EU under a national private placement regime (or NPPR, being a non-EU AIFM's means of accessing EU markets pending activation of the AIFMD third-country passport). While registered AIFMs are specifically referred to as in scope of both entity- and product-level SFDR transparency rules, the Q&A states that non-EU AIFMs are required to *"ensure compliance with [SFDR], including the [product-level] provisions"*. Reference to *"including"* has led EFAMA to query with the Commission the implication that non-EU AIFMs marketing in the EU are subject not only to product-level SFDR transparency rules for EU-marketed products (which, according to EFAMA, was the prevailing market view), but to all entity- and product-level SFDR transparency rules. A requirement under SFDR for non-EU AIFMs to publish both entity- and product-level disclosures, including in respect of non-EU marketed products, raises questions as to the extra-territorial reach of SFDR. Notably, the Commission has previously commented on the extra-territorial reach of the EU Sustainable Finance Action Plan (of which SFDR is a key legislative measure). In its 2020 Q&A on the application of the Taxonomy, the Commission states that the *"disclosure obligations [under the Taxonomy] apply to anyone offering financial products in the EU, regardless of where the manufacturer of such products is based"* and that *"[t]his approach is not different to other corporate or financial product disclosure obligations already in place in the EU"* while noting that *"[t]he international influence of the EU Taxonomy will exist despite there being no intention to bind third countries on their own sustainability or sustainable finance activities."*

As entity and product-level SFDR transparency rules (other than for periodic report and Taxonomy-related disclosures) have been in effect since 10 March 2021, registered and non-EU AIFMs not currently in compliance with their obligations under these rules should take immediate steps to rectify the position.

### 2. Principal adverse impact reporting for parent entities of large groups

Under SFDR, in-scope entities with ≤ 500 employees have the option to explain non-compliance with the requirement to assess and report on the principal adverse sustainability impacts (**PAI**) of investment decisions. Since 30 June 2021, in-scope entities with > 500 employees and in-scope parent entities of groups with > 500 employees are mandated to comply with the SFDR PAI reporting rules i.e. these entities no longer have the option to explain non-compliance and must assess and report on investments' PAIs.

The Q&A clarifies that the calculation of the 500-employee threshold by an in-scope parent entity must count employees both of the parent entity and each subsidiary entity, regardless of whether the subsidiaries are established inside or outside the EU. EU parent entities currently explaining non-compliance with PAI reporting rules based on a headcount of EU group entities only must therefore, to the extent there are non-EU subsidiaries within the group, revisit their calculation to include employees of all (EU and non-EU) group entities. Any entity which, following this recalculation, exceeds the employee threshold should seek to comply as a matter of priority given the June 2021 deadline for compliance.

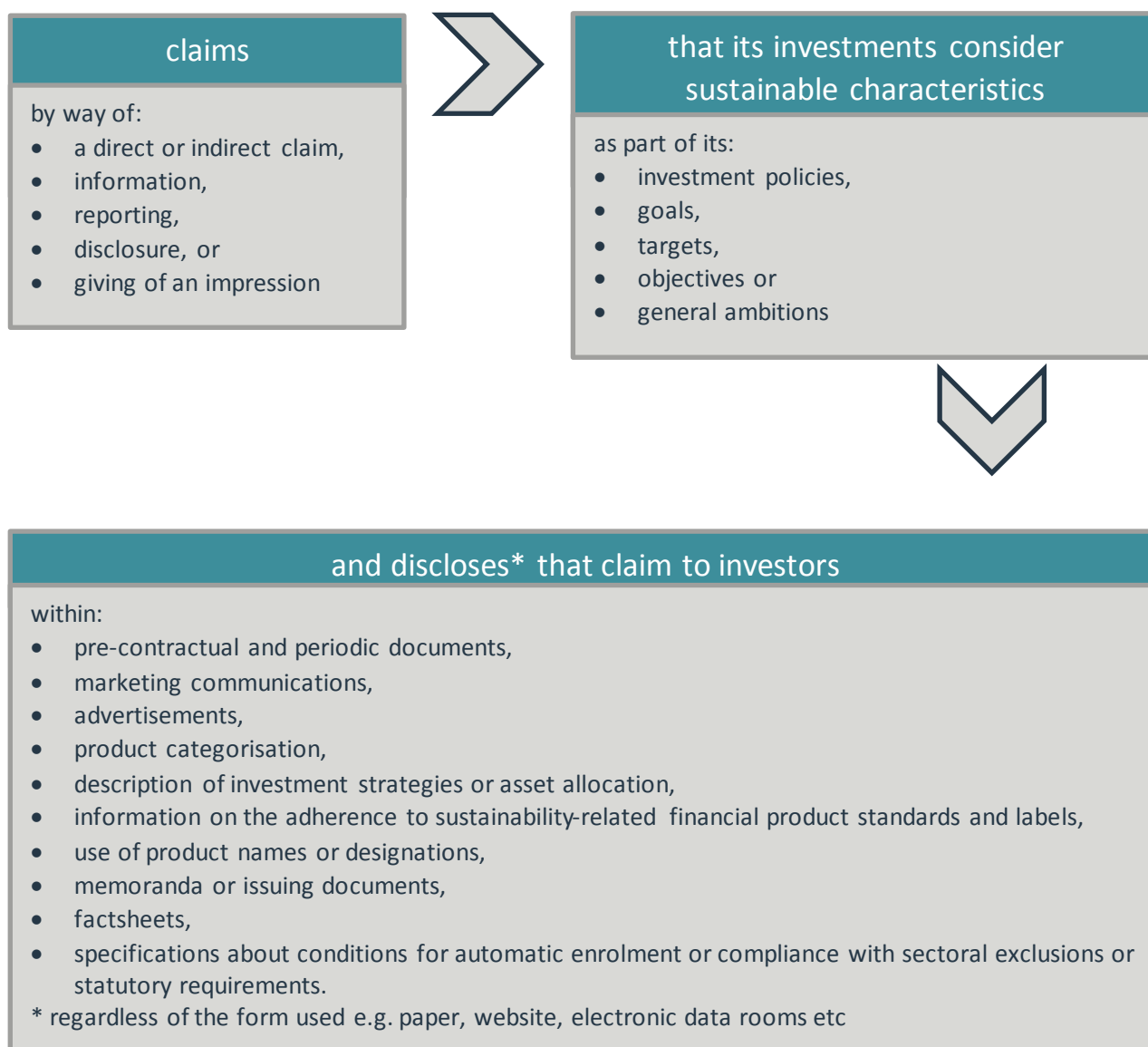
The Q&A further clarifies that a parent entity of a group which exceeds the 500-employee threshold, in complying with its PAI disclosure obligations, need only disclose in respect of itself and not the group as a

whole. While the Q&A acknowledges that subsidiary or group entities may themselves exceed the 500-employee threshold and therefore be in scope of mandatory PAI reporting rules, the parent entity should report PAI details adapted to its specific situation, as the criterion of a group is solely relevant for the headcount that triggers the reporting obligation.

### 3. Scope of Article 8 (light-green product) transparency rules

Article 8 SFDR requires products which "promote environmental or social characteristics" to make prescribed website, pre-contractual and periodic report disclosures. Despite the passing of the first key SFDR compliance deadline on 10 March this year, uncertainties as to the scope of Article 8 transparency rules have persisted.

The Q&A provides several clarifications on the scope of Article 8 transparency rules, key amongst which is the interpretation of the term "promote" in the context of Article 8. According to the Commission, a product is considered to be "promoting" a sustainable characteristic if it:



The following clarifications of the scope of Article 8 transparency rules are either specifically clarified in the Q&A or may be inferred from the interpretation of the term "promote":

- **product names:** use of words like "sustainable", "sustainability", or "ESG" in the name of a product is likely to bring a product in scope of Article 8 transparency rules given "promotion" includes disclosing "an impression" that investments have "a general ambition" to consider sustainable characteristics through the "use of product names";

- **advertising:** the absence of active advertising of an environmental, social or sustainability-related characteristic may not be sufficient to take a product out of scope of Article 8 transparency rules as "promote" is a broad concept that goes beyond active advertising;
- **legal requirements:** if a product complies with an environmental, social or sustainability-related requirement or restriction laid down by law (including international conventions, or voluntary codes) and such compliance is "promoted", the fund is subject to Article 8 transparency rules;
- **sustainability risks:** integration per se of sustainability risks is not sufficient for Article 8 transparency rules to apply. Therefore, compliance with SFDR sustainability risk disclosure rules is unlikely to bring a product in scope of Article 8 transparency rules;
- **sustainable characteristics:** in-scope products are free to choose how they pursue any "promoted" environmental or social characteristic as SFDR is neutral in terms of the design of financial products which are in scope of Article 8 transparency rules. Specifically, products in scope of Article 8 transparency rules are not subject, under SFDR, to minimum investment thresholds or eligible investment targets or required to adopt specific styles, tools, strategies or methodologies in the implementation of a sustainable characteristic. The only relevant criteria when determining the scope of Article 8 transparency rules is whether the product "promotes" a sustainable characteristic;
- **sustainability factors:** a product that discloses a strategy which aims to reduce the principal adverse impacts (PAIs) of its investments on sustainability factors is likely in scope of Article 8 transparency rules on the basis that this would meet the criteria for "promotion" of a sustainable characteristic. As SFDR requires product-level disclosure (by 30 December 2022) of any consideration of PAIs by those disclosing under entity-level PAI disclosure rules, the question arises as to whether compliance with such product-level PAI disclosure rules could automatically bring the product in scope of Article 8 transparency rules. While not specifically addressed in the Q&A, it appears that compliance with product-level PAI disclosure rules has the potential to bring a product in scope of Article 8 transparency rules unless such compliance does not simultaneously meet the threshold for "promotion" of a sustainable characteristic;
- **binding elements:** the Q&A reiterates the requirement set out in the draft SFDR Level 2 rules (as adopted by the ESA in February 2021) that products in scope of Article 8 transparency rules must only disclose on those elements of their environmental or social strategy which are binding during the whole holding period.

#### 4. Article 9 (dark-green product) transparency rules

A product with the objective of investing in sustainable investments is in scope of Article 9 transparency rules.

##### *Sustainable Investments*

The Q&A clarifies that, to be in scope of Article 9 transparency rules, a product's underlying assets must qualify as sustainable investments under SFDR (including Taxonomy-aligned sustainable investments) or, if held to comply with product-specific rules (e.g. for hedging or liquidity purposes), must meet minimum environmental or social safeguards. As indicated in the section above on Article 8 transparency rules, a product with a sustainable investment objective, the underlying assets of which do not qualify as sustainable investments under SFDR (including Taxonomy-aligned sustainable investments), is subject to Article 8 transparency rules.

##### *Carbon Emission Reduction Objective*

SFDR and the draft SFDR Level 2 rules require products in scope of Article 9 transparency rules and with the objective of reducing carbon emissions to disclose (i) how they align with the Paris Agreement objectives and (ii) that measurement of performance in meeting the product's objective is by reference to an EU Climate Benchmark (where available). An EU Climate Benchmark being a benchmark which qualifies under the EU Benchmarks Regulation (as amended) for use of the EU Climate Transition Benchmark or EU Paris-aligned Benchmark label.

The Q&A clarifies that the objective of a reduction in carbon emissions "includes" the objective of a low carbon emission exposure in view of achieving the long-term global warming objectives of the Paris Agreement. In addition, where an EU Climate Benchmark exists, the Q&A states that a product must be "tracking" these and where one does not exist, disclosures must include a detailed explanation of how the product continually achieves the objective of reducing carbon emissions in view of achieving the Paris Agreement objectives. EFAMA has asked the Commission for further clarification of these answers, including whether SFDR requires products with carbon emission reduction objectives to align with the Paris Agreement objectives and if such alignment is sought, whether the product is required to replicate an EU Climate Benchmark, where available.



## 5. Application of transparency rules to portfolios and dedicated funds

Article 8 and 9 transparency rules apply to MiFID portfolios without distinction as to the form of mandate under which the portfolio is managed. As a result, compliance with the product-level transparency rules, in particular the requirement for website disclosures in respect of the portfolio, could conflict with a portfolio manager's client confidentiality obligations.

The Q&A clarifies that entities disclosing pursuant to SFDR must ensure compliance with EU and national data protection law, and where relevant, ensure confidentiality owed to clients. In that regard, where a portfolio manager makes use of standardised product solutions, the Commission acknowledges that transparency at the level of the solution may be a way for in-scope products to comply with Article 8 and/or 9 transparency rules.

### Next steps

While a response to EFAMA's recent clarificatory requests would certainly be welcome, the Commission's near-term focus is likely to be on avoiding any further delays to the application of SFDR Level 2 rules. As indicated above, the scheduled effective date of these rules was recently pushed back by six months from 1 January to 1 July 2022, following a delay by the ESA in adopting draft Level 2 rules for the SFDR Taxonomy-related disclosure requirements. However, once draft Level 2 rules have been finalised by the ESA, the Commission has committed to *"work intensively to ensure the earliest possible adoption of the [SFDR Level 2 rules]"* ahead of their application from 1 July 2022.

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## Money Market Funds: Stress Testing & Daily Reporting Updates

### ESMA Stress Testing Guidelines

On 19 August 2021, the Central Bank published a [notice of intention](#) in relation to the ESMA Guidelines on stress test scenarios under the MMF Regulation (**MMFR**) (the **Guidelines**). The Guidelines apply to competent authorities, MMFs and managers of MMFs, as defined under MMFR, and establish common reference parameters for the stress test scenarios to be included in the stress tests conducted by MMFs/MMF managers in accordance with Article 28 MMFR. The notice of intention confirms that, while the Central Bank will in due course incorporate provision for compliance with the Guidelines in the Central Bank UCITS Regulations and AIF Rulebook, all managers of MMFs should, in the interim, adhere to the Guidelines from their application date of 29 August 2021.

### MMF Daily Reporting

The Central Bank has revised its MMFR Reporting Guidance which has been *"comprehensively updated to address the new Daily Reporting requirements to the CBI. The new Daily Reporting requirements supersedes the reporting of MMF characteristics that was previously sent via email. The new Daily Reporting will be an XML report, submitted via the ONR System."* While originally set to take effect from 1 October, the Central Bank recently agreed to extend the deadline for filing the new MMF Daily Reporting Schema to 1 December 2021.

The latest [MMFR Reporting Guidance](#) is available on the Central Bank website, as are the [Guidelines](#) on the ESMA website.

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## Central Bank Beneficial Ownership Register Updates

On 20 August 2021, the Central Bank notified industry of various upcoming changes to the beneficial ownership register it currently operates for ICAVs and unit trusts. The changes are:

- From 1 September 2021, ILPs and CCFs are required to file beneficial ownership details within six-months of authorisation;
- No earlier than Q4 2021, ICAVs, unit trusts, ILPs and CCFs will be required to submit or resubmit beneficial ownership information to include the following additional/amended information:

- PPSNs for beneficial owners. The Central Bank confirms that *"a process will be outlined to provide for beneficial owners who do not have a PPSN and the Central Bank will issue guidance to in-scope entities and/or their service providers concerning the collection and storage of personal data necessary to submit beneficial ownership returns."*
- CBI reference number (as applicable to non-PPSN holders)
- Date the individual left the beneficial ownership register of the relevant entity (as applicable)
- Amendment to wording of PCF question

### Next Steps

In-scope entities must ensure that PPSNs or CBI reference numbers (as applicable to non-PPSN holders) are available for beneficial owners, in advance of further communications from the Central Bank in relation to collection of this data, no earlier than Q4 2021. In-scope entities should also consider their data protection obligations and consider reviewing their data protection privacy statement to reflect the use of PPSNs for the Central Bank's beneficial ownership register.

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## Sustainable Finance: New UCITS, AIFMD and MiFID Delegated acts

On 2 August 2021, the Commission published several delegated acts to incorporate sustainability concepts under SFDR into various EU governing regimes, including UCITS, AIFMD and MiFID regimes.

### UCITS and AIFMD Delegated Acts

[Commission Delegated Directive 2021/1270](#) amends UCITS Directive 2010/43 and [Commission Delegated Regulation 2021/1255](#) amends AIFMD Delegated Regulation 231/2013 as regards the integration of sustainability risks and sustainability factors.

#### Timeline

The UCITS Delegated Directive must be transposed by 31 July 2022 and applicable from 1 August 2022 and the AIFMD Delegated Regulation entered into force on 22 August 2021 and is applicable from 1 August 2022.

#### Requirements

The UCITS and AIFMD delegated acts:

- clarify that processes, systems and internal controls must reflect sustainability risks, and that technical capacity and knowledge is necessary to analyse those risks;
- clarify that the rules regarding the integration of sustainability risks also apply, on a proportionate basis, to internally managed investment companies;
- require the identification of conflicts of interest to include the identification of conflicts of interest that may arise as a result of the integration of sustainability risks in processes, systems and internal controls; and
- oblige managers and SMICs, that consider principal adverse impacts of investment decisions on sustainability factors under SFDR, to disclose how their due diligence policies take those principal adverse impacts into account.

### MiFID Delegated Acts

1. [Commission Delegated Regulation 2021/1253](#) amends MiFID Delegated Regulation 2017/565 to integrate sustainability factors, risks and preferences into the organisational requirements and operating conditions of investment firms.

#### Timeline

The Delegated Regulation entered into force on 22 August 2021 and is applicable from 2 August 2022.

## Requirements

### The Delegate Regulation:

- clarifies that processes, systems and internal controls must reflect sustainability risks, and that technical capacity and knowledge is necessary to analyse those risks;
- requires the identification of conflicts of interest to include the identification of conflicts of interest that may arise as a result of the integration of sustainability risks in processes, systems and internal controls;
- clarifies that recommendations to clients and potential clients must reflect both the financial objectives and any sustainability preferences expressed by those clients;
- clarifies that, to avoid mis-selling, investment firms providing investment advice should first assess a client's or potential client's other investment objectives, time horizon and individual circumstances, before asking for his or her potential sustainability preferences;
- requires investment firms, when providing investment advice and portfolio management services, to explain the distinction between:
  - on the one hand (1) financial instruments that pursue, fully or in part, sustainable investments in economic activities that qualify as environmentally sustainable under the Taxonomy Regulation, (2) sustainable investments as defined in SFDR, and (3) financial instruments that consider principal adverse impacts on sustainability factors that might be eligible for recommendation as meeting individual sustainability preferences of clients, and,
  - on the other hand, other financial instruments without those specific features that should not be eligible for recommendation to the clients or potential clients that have individual sustainability preferences.
- to prevent mis-selling and greenwashing, provides that investment firms should not recommend or decide to trade financial instruments as meeting individual sustainability preferences where those financial instruments do not meet those preferences. Investment firms should explain to their clients or potential clients the reasons for not doing so and keep records of those reasons;

2. [Commission Delegated Directive 2021/1269](#) amends MiFID Delegated Directive 2017/593 to integrate sustainability factors into the product governance obligations.

## Timeline

The Delegated Directive must be transposed by 21 August 2022 and applied from 22 November 2022.

## Requirements

### The Delegated Directive:

- requires investment firms manufacturing and distributing financial instruments to consider sustainability factors in the product approval process of each financial instrument and in the other product governance and oversight arrangements for each financial instrument that is intended to be distributed to clients seeking financial instruments with a sustainability-related profile;
- requires investment firms manufacturing and distributing financial instruments to specify to which group of clients with sustainability related objectives the financial instrument is supposed to be distributed; and
- to ensure that financial instruments with sustainability factors remain easily available also for clients that do not have sustainability preferences, does not require investment firms to identify groups of clients with whose needs, characteristics and objectives the financial instrument with sustainability factors is not compatible.



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