

European Commission
DG FISMA
Rue de Spa 2
1000 Brussels
Belgium

18 November 2021

Dear Sirs,

We refer to our [letter of 24 September 2021](#) and to the [Joint ESAs' Final Report](#) on draft Regulatory Technical Standards with regard to the content and presentation of disclosures pursuant to Article 8(4), 9(6) and 11(5) of Regulation (EU) 2019/2088 (the "Final Report").

Our letter of 24 September

We attach a copy of our letter for convenience. We would be very grateful for a response please.

Pending such a response, it appears to us that the Joint ESAs have in their Final Report made it even clearer that, in their view, not every product subject to Article 8 SFDR on the basis of an environmental characteristic must gather data and report periodically on the extent of Taxonomy Regulation alignment, but rather only those which have committed to make at least one (or a minimum proportion of - see below) sustainable investment(s) as defined in Article 2(17) SFDR.

We would welcome the European Commission's confirmation that this is correct, and that this policy will be carried forward in the legislative proposal presented to the European Parliament and Council.

A "minimum proportion"

We refer to the new template pre-contractual and periodic disclosures in the annexes to the Final Report. These have changed somewhat compared to the consultation drafts.

We believe that certain of the changes create significant new legal risk for closed-end funds, which build up portfolios over time of illiquid investments (such as most private equity, venture capital and infrastructure funds) compared to open-ended funds.

Specifically, we refer to the following features of the templates (our emphases shown using highlighting).

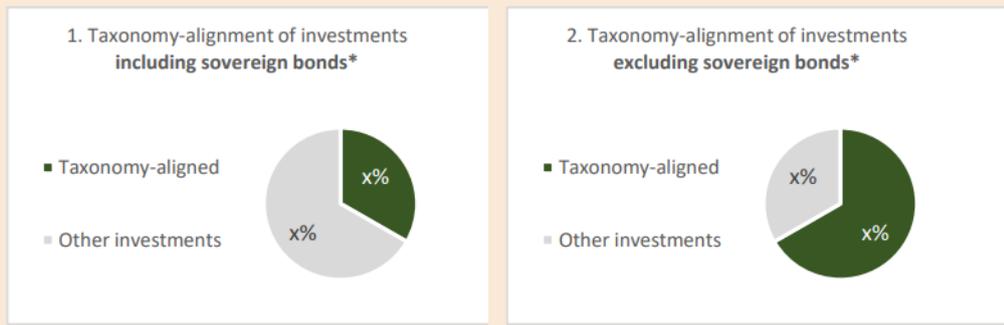
Does this financial product have a sustainable investment objective? *[tick and fill in as relevant, the percentage figure represents the minimum commitment to sustainable investments]*

Yes **No**

<input type="checkbox"/> It will make a minimum of sustainable investments with an environmental objective: ___% <ul style="list-style-type: none"> <input type="checkbox"/> in economic activities that qualify as environmentally sustainable under the EU Taxonomy <input type="checkbox"/> in economic activities that do not qualify as environmentally sustainable under the EU Taxonomy <input type="checkbox"/> It will make a minimum of sustainable investments with a social objective: ___%	<input type="checkbox"/> It promotes Environmental/Social (E/S) characteristics and while it does not have as its objective a sustainable investment, it will have a minimum proportion of ___% of sustainable investments <ul style="list-style-type: none"> <input type="checkbox"/> with an environmental objective in economic activities that qualify as environmentally sustainable under the EU Taxonomy <input type="checkbox"/> with an environmental objective in economic activities that do not qualify as environmentally sustainable under the EU Taxonomy <input type="checkbox"/> with a social objective <input type="checkbox"/> It promotes E/S characteristics, but will not make any sustainable investments
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The two graphs below show in green the **minimum percentage of investments** that are aligned with the EU Taxonomy. As there is no appropriate methodology to determine the Taxonomy-alignment of sovereign bonds*, the first graph shows the Taxonomy-alignment in relation to all the investments of the financial product including sovereign bonds, while the second graph shows the Taxonomy-alignment only in relation to the investments of the financial product other than sovereign bonds.



* For the purpose of these graphs, 'sovereign bonds' consist of all sovereign exposures

The requirement to present “minimum proportions” creates significant legal risk for closed-end funds, which will build up their portfolios over time (months or years), and then realise the portfolios and return capital to investors (rather than re-invest) since:

- at the beginning of the life of the fund it will be unclear what proportion of investments it will be possible to make which exhibit the relevant features or qualify for the relevant conditions;

- during the investment phase of the fund (typically several years) the proportions will change as capital is deployed into illiquid opportunities and, later in the fund's life, will change again as investments are liquidated and capital returned; and
- it will either not be possible, or not commercially practical or in investors' best interests, to readjust relevant proportions, for example by selling investments, since such positions will be illiquid.

Use of the template will therefore carry legal risk for financial market participants in relation to which they may face investor claims that the fund has been mis-sold.

We propose that, for products where asset allocation cannot be precisely specified in advance, the relevant sections of the templates should be recharacterized as "expectations based on currently available information". In our view, setting a clear expectation and then requiring ongoing, template-based disclosure against this expectation meets the policy objectives of the SFDR disclosure regime and will not mislead investors into assuming that asset allocation can be precisely fixed in advance.

If this is not done, we anticipate that financial market participants will need to qualify the templates using extensive rubrics and disclaimers. Failure to do that would risk misleading investors, because an alternative asset manager of a "blind pool" fund will not be able to guarantee that it will achieve the expected asset allocation.

It is also not clear how the relevant proportions are to be measured; for example, whether by number or (as presumably intended) value of investments actually made from time to time. In any case, it will need to be clear that the proportion is the expectation over the life of the product, rather than at any particular point in time, given that the early investments made may be from the portion allocated to investments which do not qualify as sustainable and/or the investments realised first may be those that do qualify as sustainable.

Moreover, in relation to the minima to be specified in respect of an Article 9 product, we do not think it necessarily follows that total investments broken down between sustainable investments with an environmental objective versus sustainable investments with a social objective will necessarily total 100%. Certain investments may meet both objectives and it will not be possible in advance to know what proportion (by value) will fall into the social category and how many will fall into the environmental category, even if all investments must fall into one category or the other.

We invite the European Commission to make these changes before putting forward its legislative proposals to the co-legislators.

Yours faithfully,

Martin Bresson
Director of Public Affairs

Enclosure:

- Invest Europe letter to the European Commission on the interaction between SFDR and the Taxonomy Regulation, dated 24 September 2021