

CSSF Provides Practical Guidance on SFDR

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On 2 December 2022, the Luxembourg financial regulator, the *Commission de Surveillance du Secteur Financier* (“CSSF”), published an [FAQ](#) paper which aims to provide further clarity to fund managers on selected aspects of Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial sector (“SFDR”).

The CSSF reserves the right to adapt its approach to any matter covered by the Q&A at any time and emphasizes that the FAQ paper should be read in conjunction with the SFDR Q&As provided by the European Commission and clarifications issued by the European Supervisory Authorities (“ESAs”).

Updates of SFDR Disclosure in Prospectuses/Issuing Documents and Impact on Marketing Filing Process?

The CSSF clarified that changes to the Article 8 or 9 SFDR pre-contractual templates in relation to (i) figures such as minimum committed percentages, (ii) the binding elements of the investment strategy and/or (iii) benchmark can be considered as “material” for purposes of CSSF Circular 14/591 (“CSSF Circular”, governing certain regulated open-ended funds like UCITS and so-called Part II Funds) and the CSSF will assess any changes on a case-by-case basis. The purpose of the CSSF Circular is to determine the procedure to follow whenever a fund in scope makes changes, where such a change is considered “material” to prospectus information necessary for investors to be able to make an informed judgement of the investment proposed to them. The CSSF Circular imposes a 1-month prior free redemption period for investors whenever a material change is implemented.

By contrast the mere introduction of the templates in order to comply with the applicable legal and regulatory requirements would not be considered “material” for the purposes of the CSSF Circular.

The term “material” as defined in the CSSF Circular is not synonymous to the term “material” used in Article 32(7) AIFMD for AIFMD marketing passport purposes. It remains unclear whether conclusions should be drawn from the CSSF’s latest guidance for regulated and unregulated alternative investment funds. Arguments against the application of the above guidance to the marketing of unregulated funds could be that the CSSF Circular expressly refers to the fact that most of the in-scope funds are marketed to retail and therefore require special protection. Also, the consequences of a “materiality” under CSSF Circular (1-month free redemption) and the AIFMD passporting (1-month prior notice to the home state regulator, if planned) are very different.

Website Disclosures within Responsibility of the AIFM and Not the Portfolio Manager

The CSSF emphasizes that the AIFM of the relevant fund is responsible for the website disclosures pursuant to Article 10 SFDR even where the portfolio management has been delegated to a third party.

If the website disclosures are not made available on the AIFM’s website, the CSSF requires a cross references from the AIFM’s website to the relevant website where all relevant information pursuant to Article 10 SFDR is made available.

Pre-contractual Disclosures

The CSSF states that minimum thresholds of investments in the pre-contractual disclosure are to be treated as binding commitments of the investment strategy of the fund. Such minimum thresholds are for example the minimum thresholds of investments to meet the environmental or social characteristics promoted by funds disclosing under Article 8 SFDR or the degree of Taxonomy alignment of funds disclosing under Articles 8 and 9 SFDR.

Funds Disclosing under Article 9 SFDR to Meet Sustainable Requirements at All Times

For funds within scope of Article 9 SFDR, the CSSF clarifies that investments have to meet the sustainable investments requirement at all times during its lifecycle; investments should meet the sustainable investment qualification (i) at the date of the actual investments and (ii) on an ongoing basis during the lifecycle of the fund.

In our view, the question is different from the questions as to the meaning of “sustainable investments” as such – which were raised in the ESAs’ recent submission to the European Commission. The ESAs asked whether the term “sustainable investment” includes not only investments which actively contribute to an environmental or social objective but also investments which do not contribute to such objective and do not (yet) operate in a sustainable manner (but for which the AIFM has a transition plan to make them sustainable in due course). If investments which do not contribute to such objectives and do not yet operate in a sustainable manner are deemed to be sustainable investments, they could also qualify as eligible investments for funds disclosing under Article 9 SFDR. The CSSF would then have to, at a minimum, clarify its position under the FAQ paper if it does not want to become an outlier.

Exclusion Policies as Means to Implement Environmental or Social Characteristics

The CSSF clarifies that an exclusion policy is only sufficient to bring a fund within the scope of Article 8 SFDR if it stands for a certain environmental or social characteristic and if the detailed exclusion strategy allows investors to understand how the environmental and/or social characteristics are being met. This position is more nuanced than the previous statement by the European Commission in its July 2021 Q&A paper, where the European Commission simply made reference to an exclusion policy being sufficient to bring a fund within the scope of Article 8 SFDR.

For funds disclosing under Article 9 SFDR, the CSSF also clarifies they must make sustainable investments only, and therefore the CSSF considers an exclusion strategy not to be sufficient alone. It expects an inclusion strategy setting out the positive investment selection process. An exclusion strategy can only be used in addition to the positive selection process.

Periodic Disclosures

With respect to the periodic disclosure requirement for funds qualifying under Article 8 or 9 SFDR the CSSF confirms—in line with previous guidance provided by the ESAs—that annual reports of funds issued as from 1 January 2023 need to be annexed by the template periodic disclosure provided in Commission Delegated Regulation (EU) 2022/1288 (SFDR RTS).

The FAQ paper provides some helpful and practical clarifications to the application of the SFDR for Luxembourg based fund managers, but raises some further questions. It is

in particular unfortunate that it is unclear how to deal with passive breaches in practice. We will keep you posted about any further clarification by the EU regulators.

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Please do not hesitate to contact us with any questions.



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