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| 23 April 2020 |

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| Response form for the Joint Consultation Paper concerning ESG disclosures |
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| Date: 23 April 2020  ESMA 34-45-904 |

Responding to this paper

The European Supervisory Authorities (ESAs) invite comments on all matters in this consultation paper on ESG disclosures under Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial sector (hereinafter “SFDR”) and in particular on the specific questions summarised in Section 3 of the consultation paper under “Questions to stakeholders”.

Comments are most helpful if they:

1. contain a clear rationale; and
2. describe any alternatives the ESAs should consider.

When describing alternative approaches the ESAs encourage stakeholders to consider how the approach would achieve the aims of SFDR.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESA\_QUESTION\_ESG\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESA\_ESG\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESA\_ESG\_ABCD\_RESPONSEFORM.
5. The consultation paper is available on the websites of the three ESAs and the Joint Committee. Comments on this consultation paper can be sent using the response form, via the [ESMA website](https://www.esma.europa.eu/press-news/consultations) under the heading ‘Your input - Consultations’ by 1 September 2020.
6. Contributions not provided in the template for comments, or after the deadline will not be processed.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise in the respective field in the template for comments. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESAs rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESAs Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the ESAs is based on Regulation (EU) 2018/1725[[1]](#footnote-2). Further information on data protection can be found under the [Legal notice](http://www.eba.europa.eu/legal-notice) section of the EBA website and under the [Legal notice](https://eiopa.europa.eu/Pages/Links/Legal-notice.aspx) section of the EIOPA website and under the [Legal notice](https://www.esma.europa.eu/legal-notice) section of the ESMA website.

# General information about respondent

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| --- | --- |
| Name of the company / organisation | SILA Advisory - SILAAdvisory.com |
| Activity | Advise on Business and Human Rights Policy and Practice |
| Are you representing an association? |  |
| Country/Region | Europe |

# Introduction

Please make your introductory comments below, if any:

<ESA\_COMMENT\_ESG\_1>

Thank you for the opportunity to respond to the proposed ESG disclosures under Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial sector. Our comments are limited to the area of social, employee and respect for human rights disclosures on Adverse Impacts as reflected in Table 1.

As a general statement, the disclosure rules and template provided to financial market participants regarding adverse impacts should closely align to the Taxonomy requirements on minimum safeguards and the guidance published on the topic in March 2020 by the Technical Expert Group on Sustainable Finance. That is, the practical link between adverse impacts on social, employees and human rights and carrying out due diligence in compliance with minimum safeguards as described in the OECD GL and the UNGPs should be acknowledged and reflected in the Table. Indeed, reflecting the existing guidance from the OECD GL and the UNGPs in the Table on adverse impacts would create alignment between what companies or issuers are to disclose regarding minimum safeguards and what investors are to disclose regarding adverse impacts on social, employees and human rights. 

Currently, the template and proposed disclosures are not geared towards capturing the key requirements of the minimum safeguards as reflected in the UN Guiding Principles on Business and Human Rights (UNGPs), the OECD Guidelines for Multinational Enterprises (OECD GL) and the ILO Fundamental Conventions.

The current proposal for disclosure on adverse impacts would leave regulators and the public without any indication whatsoever as to whether companies and financial market participants are applying the minimum safeguards in a meaningful way. Adverse impacts indicators should reflect the extent to which companies and therefore financial market participants are complying with the minimum safeguards under the Taxonomy Regulation. Our main criticisms and recommendations of the proposal on minimum disclosures is as follows:

1. The proposed disclosure should not arbitrarily skew attention to a select few pre-determined human rights and labour issues: This proposal creates an explicit list of human rights issues (such as trafficking, forced and child labour), which appear to be a selection of the ILO Fundamental Conventions. It is unclear why issues such as Freedom of Association and the Right to Collective Bargaining have been eliminated. Moreover, listing select human rights issues for all financial market participants pushes these to the fore to the detriment of managing severe human rights risks that are identified through the due diligence processes themselves as required by the UNGPs and the OECD GL.

Both the UNGPs and the OECD GL focus on due diligence procedures, which require an assessment and prioritisation of salient human rights risks, require actions to address the identified risks, tracking of results and communication of those actions and results. When adverse impacts do occur, companies are expected to engage in legitimate remedial processes.

Importantly, human rights due diligence as laid out in both the UNGPs is the process of assessing potential and actual adverse impacts of the company’s activity, which avoids pre-determining which negative human rights impacts may be prioritised. Indeed, meaningful indicators would reflect the capacity of the company or investor to adeptly identify the salient human rights risks across its activities.

When the UN Special Representative of the Secretary-General on Business and Human Rights, Professor John Ruggie, was pursuing the UN Guiding Principles, he produced a 2008 report assessing which human rights were impacted by company activities. [That report](https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-scope-patterns-of-alleged-abuse-Apr-2008.pdf) demonstrated that impacts on people were well beyond labour rights. Forced labour and child labour are certainly egregious human rights abuses, however, the Table unfortunately lists specifically certain labour rights (trafficking, child labour and forced or compulsory labour). Identifying these human rights issues skews focus on these, which is neither consistent with the standards referenced in the Taxonomy Regulation, nor is it even moderately reflective of the actual harms in which companies may be involved. Indeed, some company activities will have serious human rights risks that do not relate whatsoever to forced or child labour. Yet the proposed disclosure does not require such information to be shared.

1. The Proposed minimum disclosure is meaningless unless it reflects the human rights policy and human rights due diligence as laid out in the UNGPs and OECD GL. Neither the disclosure on human rights policy, nor the disclosure on due diligence reference the UNGPs or the OECD GL. As a result, these disclosures lose all meaning and are not geared towards compliance with the EU Taxonomy Regulation. The UNGPs delineate the characteristics of a meaningful human rights policy. The simple existence of a human rights policy has no relationship whatsoever to that policy reflecting the minimum safeguard standards (UNGPs and OECD GL). Similarly with the proposed disclosure on “due diligence”. Human Rights Due Diligence is a term of art delineated in UNGP 17-21 and mirrored in the OECD GL. Unless the proposed disclosure references human rights due diligence as understood in these standards, the disclosure is meaningless. Furthermore, human rights due diligence processes are often carried out on specific activities. It is common that companies carry out these processes very unevenly across the business.

The existence of “*a* due diligence process” as reflected in line 24 of Table 1 does not differentiate between those companies that have put in place a bespoke human rights due diligence process for one activity and those that have instituted human rights due diligence processes across all of the company’s activities. The disclosure thus would not assist the market to make informed decisions. What would be most useful is to ask for disclosure indicating the *extent* to which human rights due diligence processes are applied across the enterprise. This would require more than one single indicator. The indicators would at the very least cover the four steps of human rights due diligence: 1. Assessment of human rights risks; 2. Embedding; 3. Tracking Performance; and 4. Communicating (see UNGPs).

1. Table 1 fails to reflect the UNGP and OECD expectation that companies engage in remediation processes when adverse human rights impacts occur. UNGP Principle 22 and the OECD GL National Contact Point process reflect the expectation that companies engage in legitimate processes to remediate adverse human rights impacts that occur. Table 1 does nothing to help identify whether investors are favouring companies that do indeed remediate harms done. Line 28 reflects an outdated approach to tallying the human rights incidents without regard to the behaviour of the company to remediate such. Line 28 therefore offers partial data, and not data that would be meaningful to understand whether minimum safeguards are indeed being implemented. The UNGPs and OECD GL are standards of conduct, not result. This characteristic should be reflected in the disclosure proposal for financial market participants.
2. The UNGPs expect that companies communicate to stakeholders and those impacted how they are managing the potential and actual human rights impacts of their activities. UNGP Principle 21 lays out what is expected of companies in terms of communication and disclosure. It is therefore significant whether information from companies is forthcoming, irrespective of the EU NFDR. While financial market participants are expected to engage in their own due diligence procedures when information is not fully disclosed by companies, the availability of information from companies is an important criteria on which the market can judge the maturity of compliance with minimum safeguards. Therefore Table 1 should also ask financial market participants to communicate the level of disclosure among the investee companies.

<ESA\_COMMENT\_ESG\_1>

* : Do you agree with the approach proposed in Chapter II and Annex I – where the indicators in Table 1 always lead to principal adverse impacts irrespective of the value of the metrics, requiring consistent disclosure, and the indicators in Table 2 and 3 are subject to an “opt-in” regime for disclosure??

<ESA\_QUESTION\_ESG\_1>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_1>

* : Does the approach laid out in Chapter II and Annex I, take sufficiently into account the size, nature, and scale of financial market participants activities and the type of products they make available?

<ESA\_QUESTION\_ESG\_2>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_2>

* : If you do not agree with the approach in Chapter II and Annex I, is there another way to ensure sufficiently comparable disclosure against key indicators?

<ESA\_QUESTION\_ESG\_3>

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<ESA\_QUESTION\_ESG\_3>

* : Do you have any views on the reporting template provided in Table 1 of Annex I?

<ESA\_QUESTION\_ESG\_4>

Yes. See introductory comments above. The indicators on Social, Employee, Respect for Human Rights do not provide meaningful disclosure for the minimum safeguards. We suggest that these be edited to more closely reflect the March 2020 TEG report. In short, the disclosure proposal should

1. not presuppose what are the salient human rights issues;
2. not provide a partial list of issues reflected in the ILO Fundamental Conventions;
3. reflect whether investors and investees have *meaningful* human rights policies and widespread human rights due diligence processes designed in line with the UNGPs and OECD GL;
4. reflect whether entities and investors engage in remediation processes when adverse impacts occur;
5. reflect whether and how entities communicate and report on their management of human rights potential and actual impacts.

In sum, the disclosure should communicate the *level of maturity* of entities and investors in their approach to following the UNGPs, OECD GL and ILO Fundamental Conventions.

<ESA\_QUESTION\_ESG\_4>

* : Do you agree with the indicators? Would you recommend any other indicators? Do you see merit in including forward-looking indicators such as emission reduction pathways, or scope 4 emissions (saving other companies´ GHG emissions)?

<ESA\_QUESTION\_ESG\_5>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_5>

* : In addition to the proposed indicators on carbon emissions in Annex I, do you see merit in also requesting a) a relative measure of carbon emissions relative to the EU 2030 climate and energy framework target and b) a relative measure of carbon emissions relative to the prevailing carbon price?

<ESA\_QUESTION\_ESG\_6>

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<ESA\_QUESTION\_ESG\_6>

* : The ESAs saw merit in requiring measurement of both (1) the share of the investments in companies without a particular issue required by the indicator and (2) the share of all companies in the investments without that issue. Do you have any feedback on this proposal?

<ESA\_QUESTION\_ESG\_7>

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<ESA\_QUESTION\_ESG\_7>

* : **Would you see merit in including more advanced indicators or metrics to allow financial market participants to capture activities by investee companies to reduce GHG emissions? If yes, how would such advanced metrics capture adverse impacts?**

<ESA\_QUESTION\_ESG\_8>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_8>

* : Do you agree with the goal of trying to deliver indicators for social and employee matters, respect for human rights, anti-corruption and anti-bribery matters at the same time as the environmental indicators?

<ESA\_QUESTION\_ESG\_9>

The most important consideration is that the indicators are meaningful and help the market make meaningful choices. Given the above criticisms of the indicators on social, employee and human rights topics, there is likely an argument to take more time to develop a more meaningful approach. The timing should also be coordinated with the outcome of the changes to the Non-Financial Disclosure Regulation and the progress of the development of criteria for the Taxonomy.

<ESA\_QUESTION\_ESG\_9>

* : Do you agree with the proposal that financial market participants should provide a historical comparison of principal adverse impact disclosures up to ten years? If not, what timespan would you suggest?

<ESA\_QUESTION\_ESG\_10>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_10>

* : Are there any ways to discourage potential “window dressing” techniques in the principal adverse impact reporting? Should the ESAs consider harmonising the methodology and timing of reporting across the reference period, e.g. on what dates the composition of investments must be taken into account? If not, what alternative would you suggest to curtail window dressing techniques?

<ESA\_QUESTION\_ESG\_11>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_11>

* : Do you agree with the approach to have mandatory (1) pre-contractual and (2) periodic templates for financial products?

<ESA\_QUESTION\_ESG\_12>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_12>

* : If the ESAs develop such pre-contractual and periodic templates, what elements should the ESAs include and how should they be formatted?

<ESA\_QUESTION\_ESG\_13>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_13>

* : If you do not agree with harmonised reporting templates for financial products, please suggest what other approach you would propose that would ensure comparability between products.

<ESA\_QUESTION\_ESG\_14>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_14>

* : Do you agree with the balance of information between pre-contractual and website information requirements? Apart from the items listed under Questions 25 and 26, is there anything you would add or subtract from these proposals?

<ESA\_QUESTION\_ESG\_15>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_15>

* : Do you think the differences between Article 8 and Article 9 products are sufficiently well captured by the proposed provisions? If not, please suggest how the disclosures could be further distinguished.

<ESA\_QUESTION\_ESG\_16>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_16>

* : Do the graphical and narrative descriptions of investment proportions capture indirect investments sufficiently?

<ESA\_QUESTION\_ESG\_17>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_17>

* : The draft RTS require in Article 15(2) that for Article 8 products graphical representations illustrate the proportion of investments screened against the environmental or social characteristics of the financial product. However, as characteristics can widely vary from product to product do you think using the same graphical representation for very different types of products could be misleading to end-investors? If yes, how should such graphic representation be adapted?

<ESA\_QUESTION\_ESG\_18>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_18>

* : Do you agree with always disclosing exposure to solid fossil-fuel sectors? Are there other sectors that should be captured in such a way, such as nuclear energy?

<ESA\_QUESTION\_ESG\_19>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_19>

* : Do the product disclosure rules take sufficient account of the differences between products, such as multi-option products or portfolio management products?

<ESA\_QUESTION\_ESG\_20>

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<ESA\_QUESTION\_ESG\_20>

* : While Article 8 SFDR suggests investee companies should have “good governance practices”, Article 2(17) SFDR includes specific details for good governance practices for sustainable investment investee companies including “sound management structures, employee relations, remuneration of staff and tax compliance”. Should the requirements in the RTS for good governance practices for Article 8 products also capture these elements, bearing in mind Article 8 products may not be undertaking sustainable investments?

<ESA\_QUESTION\_ESG\_21>

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<ESA\_QUESTION\_ESG\_21>

* : What are your views on the preliminary proposals on “do not significantly harm” principle disclosures in line with the new empowerment under the taxonomy regulation, which can be found in Recital (33), Articles 16(2), 25, 34(3), 35(3), 38 and 45 in the draft RTS?

<ESA\_QUESTION\_ESG\_22>

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<ESA\_QUESTION\_ESG\_22>

* : Do you see merit in the ESAs defining widely used ESG investment strategies (such as best-in-class, best-in-universe, exclusions, etc.) and giving financial market participants an opportunity to disclose the use of such strategies, where relevant? If yes, how would you define such widely used strategies?

<ESA\_QUESTION\_ESG\_23>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_23>

* : Do you agree with the approach on the disclosure of financial products’ top investments in periodic disclosures as currently set out in Articles 39 and 46 of the draft RTS?

<ESA\_QUESTION\_ESG\_24>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_24>

* : For each of the following four elements, please indicate whether you believe it is better to include the item in the pre-contractual or the website disclosures for financial products? Please explain your reasoning.

1. an indication of any commitment of a minimum reduction rate of the investments (sometimes referred to as the "investable universe") considered prior to the application of the investment strategy - in the draft RTS below it is in the pre-contractual disclosure Articles 17(b) and 26(b);
2. a short description of the policy to assess good governance practices of the investee companies - in the draft RTS below it is in pre-contractual disclosure Articles 17(c) and 26(c);
3. a description of the limitations to (1) methodologies and (2) data sources and how such limitations do not affect the attainment of any environmental or social characteristics or sustainable investment objective of the financial product - in the draft RTS below it is in the website disclosure under Article 34(1)(k) and Article 35(1)(k); and
4. a reference to whether data sources are external or internal and in what proportions - not currently reflected in the draft RTS but could complement the pre-contractual disclosures under Article 17.

<ESA\_QUESTION\_ESG\_25>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_25>

* : Is it better to include a separate section on information on how the use of derivatives meets each of the environmental or social characteristics or sustainable investment objectives promoted by the financial product, as in the below draft RTS under Article 19 and article 28, or would it be better to integrate this section with the graphical and narrative explanation of the investment proportions under Article 15(2) and 24(2)?

<ESA\_QUESTION\_ESG\_26>

TYPE YOUR TEXT HERE

<ESA\_QUESTION\_ESG\_26>

* : Do you have any views regarding the preliminary impact assessments? Can you provide more granular examples of costs associated with the policy options?

<ESA\_QUESTION\_ESG\_27>

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<ESA\_QUESTION\_ESG\_27>

1. Regulation (EU) 2018/1725 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39. [↑](#footnote-ref-2)