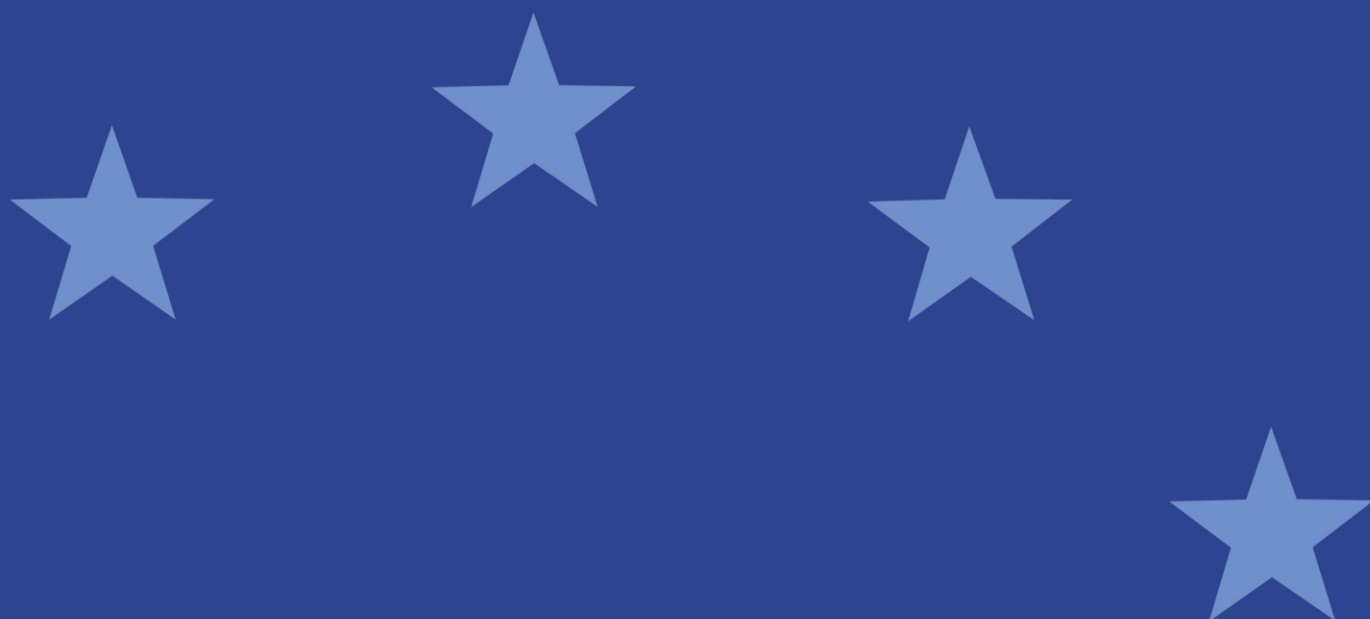


Response form for the Joint Consultation Paper concerning ESG disclosures





JOINT COMMITTEE OF THE EUROPEAN
SUPERVISORY AUTHORITIES

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:

- contain a clear rationale; and
- 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:

- Insert your responses to the questions in the Consultation Paper in the present response form.
- 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.
- 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.
- 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.
- 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](#) under the heading ‘Your input - Consultations’ by **1 September 2020**.
- 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) 2018/1725¹. Further information on data protection can be found under the [Legal notice](#) section of the EBA website and under the [Legal notice](#) section of the EIOPA website and under the [Legal notice](#) section of the ESMA website.

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.

General information about respondent

Name of the company / organisation	Financial Markets Law Committee (FMLC).
Activity	Choose an item.
Are you representing an association?	<input type="checkbox"/>
Country/Region	UK

Introduction

Please make your introductory comments below, if any:

<ESA_COMMENT_ESG_1>

Global convergence on standards

The FMLC notes that international standards on sustainability-related disclosure requirements are not aligned or convergent, which creates uncertainty in relation to reporting obligations vis-à-vis cross-border investment activities. The lack of a common global reporting standard for non-financial information gives rise to different and sometimes conflicting requests for information from a range of stakeholders—including regulators across jurisdictions, investors, shareholders, NGOs and rating agencies. The SFDR will add another layer of disclosure requests. Greater global convergence on reporting requirements is desirable.

In the aftermath of the global financial crisis, the FMLC initiated a series of seven panel discussions and seminars to examine the inter-jurisdictional aspects of countries' implementation of certain G20 commitments in the field of financial services regulation and the possibility that divergent implementation may give rise to uncertainty in the legal framework of the global financial markets. A discussion paper was published by the FMLC providing examples of inconsistencies.² To avoid the emergence of overlaps, inconsistencies and conflicts between respective national rules, the FMLC would again recommend further work in bilateral and multilateral forums to align E.U. and—at least—U.S. standards in the area of sustainable finance.

Convergence on standards in E.U. legislation

In the E.U., different disclosure obligations under the SFDR, Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (the “**Non-Financial Reporting Directive**” or the “**NFRD**”); and Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (the “**Taxonomy Regulation**”) will add to the current fragmentation. The draft RTS in the Consultation paper also diverges, in some areas, from the Taxonomy Regulation, creating uncertainty. Examples of both are listed in the Appendix, below.

In addition, there are requirements in existing E.U. regimes such as those to disclose environmental or social objectives under provided by Article 8 (3)(c)(ii) of Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (the “**PRIPs Regulation**”) and under the principles to make “fair, clear and not misleading” disclosures under Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (the “**UCITS Directive**”), Directive 2011/61/EU on Alternative Investment Fund Managers (the “**AIFMD**”) and Directive 2014/65/EU on markets in financial instruments (“**MiFID II**”). There is a risk that a new mandatory disclosure under the SFDR will cause confusion and overlap.

² FMLC, *Coordination in the Reform Of International Financial Regulation*, (February 2015), available at: http://fmlc.org/wp-content/uploads/2018/03/fmlc_g20_discussion_paper.pdf

http://fmlc.org/wp-content/uploads/2018/03/fmlc_g20_discussion_paper.pdf

The FMLC would therefore urge the ESAs to ensure that the RTS are aligned closely to the objectives set out in the SFDR. In the future, when the E.U. legislation in this area is reviewed, it would be beneficial for the objectives and requirements imposed on financial markets participants by each piece of legislation to be aligned with the others.

<ESA_COMMENT_ESG_1>

Q1 : 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>

Q2 : 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>

Q3 : 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>
TYPE YOUR TEXT HERE
<ESA_QUESTION_ESG_3>

Q4 : Do you have any views on the reporting template provided in Table 1 of Annex I?

<ESA_QUESTION_ESG_4>
TYPE YOUR TEXT HERE
<ESA_QUESTION_ESG_4>

Q5 : 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>

Q6 : 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>
TYPE YOUR TEXT HERE
<ESA_QUESTION_ESG_6>

Q7 : 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>
TYPE YOUR TEXT HERE
<ESA_QUESTION_ESG_7>

Q8 : 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>

Q9 : 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>
TYPE YOUR TEXT HERE
<ESA_QUESTION_ESG_9>

Q10 : 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>

Q11 : 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>

Q12 : 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>

Q13 : 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>

Q14 : 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>

Q15 : 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>

Q16 : 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>

Q17 : 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>

Q18 : 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>

Q19 : 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>

Q20 : 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>

Q21 : 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>

Q22 : 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>

Q23 : 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>

Q24 : 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>

Q25 : 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.

- a) 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);
- b) 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);
- c) 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
- d) 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>
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<ESA_QUESTION_ESG_25>

Q26 : 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>
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<ESA_QUESTION_ESG_26>

Q27 : 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>
TYPE YOUR TEXT HERE
<ESA_QUESTION_ESG_27>

1 September 2020

European Securities and Markets Authority
CS 80910
201-203 rue de Bercy
75589 Paris Cedex 12
France



Dear Sir or Madam

Joint Consultation Paper concerning ESG disclosures

The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

On 22 April 2020, the European Supervisory Authorities (the "ESAs") published a joint consultation (the "**Consultation Paper**") on the proposed regulatory technical standards ("**RTS**") under Regulation (EU) 2019/2088 sustainability-related disclosures in the financial services sector (the "**Sustainable Finance Disclosure Regulation**" or the "**SFDR**"). The SFDR sets out the general outline of the sustainability-related disclosure obligations for asset managers, focusing in particular on: (1) disclosure relating to how sustainability risks are incorporated within the asset manager's investment decision making; (2) disclosure relating to the principal adverse impacts of the investments made by the asset manager on external sustainability factors; and (3) technical disclosures for those financial products which promote environmental or social characteristics or have sustainability as an objective ("**ESG-enhanced products**"). The SFDR does not set out the technical detail on the disclosure requirements, but instead mandates the ESAs to develop RTS providing more granular specifics with regard to the content, methodologies and presentation of some of the disclosures.¹ The Consultation Paper includes the draft RTS and seeks feedback from stakeholders on the proposed measures.

Global convergence on standards

The FMLC notes that international standards on sustainability-related disclosure requirements are not aligned or convergent, which creates uncertainty in relation to reporting obligations vis-à-vis cross-border investment activities. The lack of a common global reporting standard for non-financial information gives rise to different and sometimes conflicting requests for information from a range of stakeholders—including regulators across jurisdictions, investors, shareholders, NGOs and rating agencies. The SFDR will add another layer of disclosure requests. Greater global convergence on reporting requirements is desirable. Convergent international standards elevate the effectiveness of the standards themselves, as well as facilitating efficient cross-border transactions and promoting awareness and compliance.

In the aftermath of the global financial crisis, the FMLC initiated a series of seven panel discussions and seminars to examine the inter-jurisdictional aspects of countries' implementation of certain G20 commitments in the field of financial services regulation and the possibility that divergent implementation may give rise to

¹ Articles 2a, 4(6) and (7), 8(3), 9(5), 10(2) and 11(4) of the SFDR empower the ESAs to deliver, through the Joint Committee, draft RTS with regard to the content, methodologies and presentation of sustainability-related disclosures.

uncertainty in the legal framework of the global financial markets. A discussion paper was published by the FMLC providing examples of inconsistencies.² To avoid the emergence of overlaps, inconsistencies and conflicts between respective national rules, the FMLC would again recommend further work in bilateral and multilateral forums to align E.U. and—at least—U.S. standards in the area of sustainable finance.

Convergence on standards in E.U. legislation

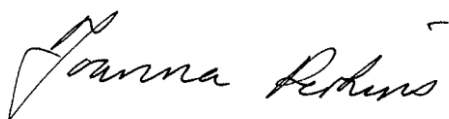
In the E.U., different disclosure obligations under the SFDR, Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (the “**Non-Financial Reporting Directive**” or the “**NFRD**”); and Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (the “**Taxonomy Regulation**”) will add to the current fragmentation. The draft RTS in the Consultation paper also diverges, in some areas, from the Taxonomy Regulation, creating uncertainty. Examples of both are listed in the Appendix, below.

In addition, there are requirements in existing E.U. regimes such as those to disclose environmental or social objectives under provided by Article 8 (3)(c)(ii) of Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (the “**PRIIPs Regulation**”) and under the principles to make “fair, clear and not misleading” disclosures under Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (the “**UCITS Directive**”), Directive 2011/61/EU on Alternative Investment Fund Managers (the “**AIFMD**”) and Directive 2014/65/EU on markets in financial instruments (“**MiFID II**”). There is a risk that a new mandatory disclosure under the SFDR will cause confusion and overlap.

The FMLC would therefore urge the ESAs to ensure that the RTS are aligned closely to the objectives set out in the SFDR. In the future, when the E.U. legislation in this area is reviewed, it would be beneficial for the objectives and requirements imposed on financial markets participants by each piece of legislation to be aligned with the others.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours sincerely,



Joanna Perkins
FMLC Chief Executive³

² FMLC, *Coordination in the Reform Of International Financial Regulation*, (February 2015), available at: http://fmlc.org/wp-content/uploads/2018/03/fmlc_g20_discussion_paper.pdf

³ The FMLC is grateful to Ida Levine (Impact Investing Institute) for her contributions to this letter.

Appendix: Convergence on standards in E.U. legislation

(1) Divergences between the SFDR and the Taxonomy Regulation

	SFDR	NFDR	Taxonomy Regulation
Environmental objective	an environmental objective, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy (Article 2(17))	as regards environmental matters, details of the current and foreseeable impacts of the undertaking's operations on the environment, and, as appropriate, on health and safety, the use of renewable and/or non-renewable energy, greenhouse gas emissions, water use and air pollution. (Recital 7)	(a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems. (Article 9)

(2) Divergences within the SFDR

	Disclosure Regulation re sustainable investments	Disclosure Regulation re products which promote environmental or social characteristics
Good governance practices	“... good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance” (Article 2(17) relied upon for Article 9)	No equivalent detail (Article 8)