Guidance on SFDR by the German Regulator BaFin

9 September 2022

On 5 September 2022, the German Federal Financial Services Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "BaFin") published a Q&A paper providing guidance on the interpretation of certain aspects of the Sustainable Finance Disclosure Regulation (Regulation (EU) 2019/2088, "SFDR"). This Q&A paper takes into consideration, and in part seems to divert from, previous guidance issued by the European Commission in July 2021 and May 2022. It will form the basis for BaFin's administrative practice in relation to both German funds and EU or non-EU funds marketed in Germany going forward.

BaFin plans to update the list of questions and answers on a regular basis. Key aspects of the Q&A paper are the following:

"Promote" under Article 8 SFDR. BaFin responds to the discussion within the industry of how to interpret the term "promote" that defines the scope of article 8 SFDR. According to BaFin "promotion" under article 8 SFDR is not to be understood as "advertisement" but rather in the sense of "supporting" or "pursuing" environmental or social characteristics if so communicated to the investor.

Taxonomy Alignment. BaFin confirms that according to its understanding of the Commission's response on taxonomy alignment, a financial market participant that offers a financial product referred to in article 8 SFDR by promoting environmental characteristics but that has not committed to investing in any environmentally sustainable economic activities is not obliged to assess taxonomy alignment or to collect (or use best efforts to collect) corresponding data. According to BaFin, financial market participants must disclose the actual degree of taxonomy alignment, which can be "zero"; such disclosure can be based on the fact that no data is collected. In other words, for financial products that do not invest in any environmentally sustainable economic activities, there should not be an obligation to collect corresponding data. BaFin does not see any substantial risk with respect to "greenwashing" in this regard.

Legacy Funds. With respect to legacy funds (i.e. those funds which have not been marketed after 10 March 2021, the application date of the SFDR) the Commission previously confirmed that periodic reporting of such funds must comply with article 11 SFDR and that such funds must also comply with the rules on information given on environmental or social characteristics and sustainable investment objectives on websites in article 10 SFDR. BaFin clarifies that in its view such obligations can only apply to those legacy funds that made ESG disclosure on a website, in contractual terms and conditions, in pre-contractual information or in advertising materials during the marketing period if and to the extent that such sustainability-related disclosure made in the past meet the requirements under article 8 or 9 SFDR, respectively. The question is whether that could mean that most such legacy funds, if at all, would meet the requirements of article 8 but not of article 9 SFDR in light of the fact that the latter article requires investing 100% in sustainable investments that meet the exact definition of article 2 (17) SFDR, and it is unlikely that legacy funds met such requirements at a time when such definition was not yet known.

BaFin also makes clear that in its view, legacy funds do not have to make pre-contractual disclosures under article 6 and 7 SFDR.

The Q&A paper provides some helpful clarifications to the application of the SFDR. However, it is important to note that BaFin's interpretation can be superseded by any conflicting guidance issued by the European Commission or the Joint Committee of European Supervisory Authorities.

* * *

Please do not hesitate to contact us with any questions.

FRANKFURT

Patricia Volhard
pvolhard@debevoise.com

Jin-Hyuk Jang
jhjang@debevoise.com

Jan Schoberwalter
jschoberwalter@debevoise.com

LONDON

John Young
jyoung@debevoise.com

Eric Olmesdahl
eolmesdahl@debevoise.com