

European ESG rules: SFDR

Key actions for non-EU managers by 10 March 2021

The EU Sustainable Finance Disclosures Regulation (SFDR) applies from **10 March 2021** and forms part of the EU's package of measures relating to Environmental, Social and Governance (ESG) issues. This note answers certain key questions on why non-EU EU managers may need to comply with these rules.

1. We are not a European manager. Is this relevant to us?

Potentially. The new rules will apply to non-EU investment managers in two main ways:

- directly to non-EU investment managers which market AIFs (alternative investment funds – for example hedge funds and private equity funds) into the EU under AIFMD national private placement rules. See questions 2 to 9 below; and
- indirectly to non-EU investment managers providing portfolio management and/or investment advice services to EU firms that are themselves subject to the new rules. See questions 10 and 11 below.

2. We don't have ESG strategies. Is this relevant to us?

Yes – where a manager is subject to these rules (see 1 above), at least some disclosures are required even where the strategy is not “ESG”.

3. We are a non-EU manager and we market funds in the EU. What do we need to know?

A non-EU investment manager (known as a non-EU alternative investment fund manager (**non-EU AIFM**)) is in scope of SFDR in respect of each fund which it has registered or notified under AIFMD for private placement marketing in the EU.

4. We sell our funds in the EU via reverse enquiry only. Are we caught?

No. SFDR does not apply to a non-EU AIFM which sells funds in the EU in response to reverse enquiry only.

Where a non-EU AIFM has some funds which are registered/notified for private placement marketing in the EU and some which it sells via reverse enquiry only, it only needs to comply with the SFDR for those funds which are registered/notified for private placement marketing in the EU.

5. We are caught as a result of AIFMD marketing. Which rules apply to us?

A non-EU AIFM is only required to make fund-level disclosures in respect of funds that it has registered/notified for marketing in the EU.

Marketing a fund in the EU does not cause the non-EU AIFM to have to comply with provisions of SFDR concerning the policies and procedures of the manager, for example, the requirement to publish on their website information about the manager's policies on the integration of sustainability risks in their investment decision-making process.

The content of the fund-level disclosures depends on whether or not the fund has an ESG focus.

6. What do you mean by “ESG focus”?

In brief, ESG-focussed funds are those which (i) have sustainable investment as an objective (known as “SFDR Article 9” or “dark green” funds) or (ii) promote environmental or social sustainability (known as “SFDR Article 8” or “light green” funds). The SFDR has quite nuanced definitions for these terms and we can help you analyse whether your fund falls into these categories. As a preliminary matter, managers therefore need to establish the correct categorisation of all in-scope funds.

7. The fund does not have an ESG focus – what do we need to do?

By **10 March 2021**, for each fund registered/notified for marketing in the EU, the AIFMD Article 23 disclosures (usually contained in the PPM or a separate wrapper) will need to be updated to include:

- the manner in which **sustainability risks** are integrated into its investment decisions
- the results of the manager’s assessment of the likely impacts of sustainability risks on the returns of the fund

The SFDR defines “**sustainability risk**” as an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment. It is about sustainability as a risk to financial value, rather than ethical or moral values.

If the manager deems that sustainability risks are not relevant to the fund, it must instead provide a clear and concise explanation of the reasons why.

Certain other negative and technical disclosures are also required.

8. The fund does have an ESG focus – what do we need to do?

In addition to complying with the rules for non-ESG focused funds (see question 7 above) managers will also need to provide further pre-contractual disclosures relating to how environmental or social characteristics are met or how the sustainable investment objective is obtained. This includes details of benchmarks used (if relevant).

In addition, certain fund-specific detailed information must be posted on the manager’s website.

Further details must also be included in the fund’s AIFMD annual report.

In addition, if the fund has an environmental focus then from 1 January 2022 or 1 January 2023 (depending on the precise objective) further detailed disclosures will need to be made under the parallel EU Framework Regulation (known as the Taxonomy). See our note providing [key details of the Framework Regulation](#).

9. The fund is registered in the UK. Will these rules apply?

Currently uncertain. The UK left the EU on 31 January 2020 under a Withdrawal Agreement that provides for a transitional period to 31 December 2020. SFDR and the Framework Regulation will consequently not directly apply in the UK. Although it is possible that measures could be taken which would cause the SFDR to become law in the UK by March 2021 the working assumption for most firms is that the SFDR will not apply. The UK is however expected to introduce its own ESG regime in due course.

10. How might the SFDR apply to a non-EU manager indirectly?

Where a non-EU manager is a delegate of a European (or potentially UK) manager or other entity that is directly subject to the SFDR, the European entity may seek contractual commitments from the non-EU delegates to enable the European entity to comply with its own obligations.

Such commitments may include: (1) the provision of information and data by the non-EU manager for the purposes of the European manager complying with its disclosure requirements; and (2) certain duties and responsibilities from the non-EU investment manager as may be required by the European manager’s policies and procedures, driven by SFDR and the Framework Regulation.

Similarly, there may be instances where investors in funds and/or segregated accounts managed by the non-EU investment manager are themselves (directly or indirectly) subject to SFDR and the Framework Regulation. In such instances, those investors may for the purpose of fulfilling their own SFDR and Framework Regulation obligations require commitments from the non-EU investment manager to provide information and/or carry out certain duties and responsibilities.

11. Are our European affiliates caught by these rules?

A European (or potentially UK) affiliate of a non-EU manager acting as a delegate or providing advice is likely to be directly in scope of the SFDR. This is the case even if the arrangements are intra-group. Please refer to our other resources for more detail.

12. We are a non-European manager but have a European cross border or third country licence. Is there more?

Non-EU investment managers that are registered under any third country licensing regime in the EU (e.g. so as to act as AIFM of a European fund) should check whether additional SFDR obligations are imposed on it as a result of such licence.

How Simmons & Simmons can help

Simmons & Simmons would be pleased to assist with scoping, advising on decision-making, advising on application, project plans and drafting disclosures.

In addition, we have prepared a set of templates that clients can use as the basis for document updates.

Simmons & Simmons resources

Other Simmons & Simmons resources are available [here](#).

Please see also our [Sustainable Financing and ESG Investment feature](#).

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