



Matheson

**Sustainable Finance Factsheet:**  
ESG Related Changes to UCITS  
Directive and the AIFMD



## January 2021

The European Commission (“**Commission**”) **Action Plan on Financing Sustainable Growth** (“**Action Plan**”) sets out objectives and key actions to promote a reorientation of private capital flows towards sustainable investments. The impact assessment underpinning the various legislative initiatives proposed by the Commission under the Action Plan demonstrated the need to clarify that sustainability factors should be taken into account by UCITS management companies and alternative investment fund managers (“**AIFMs**”) as part of their duties towards investors. This note focuses on the elements of the Action Plan related to amendments to measures adopted under the UCITS Directive and the Alternative Investment Fund Managers Directive (“**AIFMD**”) (known as “level 2” measures) relating to the integration of sustainability factors.

On 8 June 2020, the Commission published draft amendments to the UCITS and AIFMD regimes. The proposed amendments focus on the integration of sustainability risks and factors into existing organisational rules and conduct of business rules and will apply to all UCITS management companies, self-managed UCITS (“**SMICs**”) and EU AIFMs. On the same date, the Commission also published amendments to the Markets in Financial Instruments Directive (“**MiFID**”) regime and in relation to insurance business, which are beyond the scope of this note.

The proposed delegated acts amending the UCITS and AIFMD regimes (the “**Draft Delegated Acts**”) are as follows:

- AIFMD: **Draft delegated regulation** to amend the AIFMD Delegated Regulation (EU) 231/2013 (“**AIFMD Level 2**”);
- UCITS: **Draft delegated directive** to amend UCITS Commission Directive (2010/43/EU) (“**UCITS Organisation Directive**”).

The amendments will require UCITS management companies / SMICs / AIFMs to assess not only all relevant financial risks on an ongoing basis, but also all relevant sustainability risks as referred to in the Sustainable Finance Disclosures Regulation (“**SFDR**”) that could cause an actual or potential material negative impact on the value of an investment.

## TIMING

The Draft Delegated Acts were subject to a public consultation which closed on 6 July 2020. The next steps are for the Draft Delegated Acts to be submitted to the Council of the EU and the European Parliament for agreement and published in the Official Journal of the EU (“**OJ**”). The delegated acts will enter into force twenty days after their publication in the OJ. The UCITS draft delegated directive will need to be transposed into national laws within 12 months of its entry into force. The AIFMD draft delegated regulation will be directly effective 12 months after its entry into force and therefore will not need to be transposed into national law.

## KEY CHANGES

The Draft Delegated Acts do not propose new organisational or conduct rules and will amend existing organisational / governance rules under the UCITS and AIFMD regimes. The amendments will generally require that UCITS management companies, SMICs and AIFMs expressly take into account sustainability risks as part of compliance with the existing rules.

A detailed summary of the changes proposed and the documents impacted are set out in the chart below.



SUSTAINABLE FINANCE FACTSHEET:  
ESG RELATED CHANGES TO UCITS DIRECTIVE AND THE AIFMD

	EXISTING REQUIREMENT	AMENDED REQUIREMENT	DOCUMENT(S) IMPACTED	ACTION REQUIRED
<b>Procedures and Organisation</b>	General organisational requirements require documented decision-making procedures, organisational structures, reporting lines, internal control mechanisms and record-keeping.	Sustainability risks must be taken into account in implementing these organisational requirements. UCITS: New paragraph in article 4(1) of the UCITS Organisation Directive. AIFMD: New paragraph in article 57(1) AIFMD Level 2.	Business Plan / Programme of Activity Management Company / SMIC / AIFM Policies Management Company / SMIC / AIFM agenda	Business Plan / Programme of Activity to be updated Review of policies to be undertaken to determine if any of the policies need to be updated to reflect the fact that sustainability risk is considered as part of the organisation structure and reporting of the management company / SMIC / AIFM. Review of board agenda in terms of ensuring sustainability risk is adequately addressed. Review of reporting required.
<b>Resources</b>	Requirement to employ sufficient personnel, with skills, knowledge and expertise to discharge their responsibility.	Requirement to retain the necessary resources and expertise required for the effective integration of sustainability risks. UCITS: New paragraph in article 5 UCITS Organisation Directive. AIFMD: New paragraph 3 article 22 AIFMD Level 2.	Business Plan / Programme of Activity	Management company / SMIC / AIFM will need to consider their current resources and assess whether they have the necessary skill, expertise and knowledge required for the assessment of sustainability risks. Senior management as a whole within the relevant entity should be responsible for sustainability matters (see new article 9(2)(g) of the UCITS Organisation Directive and new article 60(2)(i) AIFMD Level 2). Consider updating prospectus and Business Plan / Programme of Activity to reflect new resources and new responsibility of senior management.

SUSTAINABLE FINANCE FACTSHEET:  
ESG RELATED CHANGES TO UCITS DIRECTIVE AND THE AIFMD



	EXISTING REQUIREMENT	AMENDED REQUIREMENT	DOCUMENT(S) IMPACTED	ACTION REQUIRED
<b>Control by Senior Management and Supervisory Function</b>	Requirement for a firm's senior management to be responsible for various key organisational matters.	Senior management to ensure the integration of sustainability risks into all identified key organisational matters. UCITS: New article 9(2)(g) UCITS Organisation Directive AIFMD: New article 60(2)(i) AIFMD Level 2.	Investment policy as defined in the constitutional document and offering documents. Fund / sub-fund approval committee procedure. Valuation Policy. Risk Management Framework Policy. Remuneration Policy.	Management company / SMIC / AIFM should consider what internal reporting structures and review mechanisms are in place to ensure that senior management can be satisfied on an ongoing basis that sustainability risks are integrated into the risk management framework, including how sustainability risks are integrated into the investment policy of the relevant funds.
<b>Conflicts of Interest</b>	Requirement to identify conflicts of interest.	Management company / SMIC / AIFM must identify conflicts of interest which arise as a result of the integration of sustainability risks in processes, systems and controls. UCITS: New article 17(3) UCITS Organisation Directive. AIFMD: New paragraph article 30 AIFMD Level 2.	Conflicts of Interest Policy. Conflicts of Interest Register.	Management company / SMIC / AIFM to review and update existing conflicts of interests policies and registers to ensure that any potential conflicts related to sustainability risks are captured eg, conflicts arising from the risk of greenwashing or the mis-selling of investment strategies. Consider amending prospectus of the funds to disclose the new conflict of interests policy.



EXISTING REQUIREMENT	AMENDED REQUIREMENT	DOCUMENT(S) IMPACTED	ACTION REQUIRED
<b>Due Diligence</b> Requirement to apply due diligence when selecting and monitoring investments, and on selection of third parties for the purpose of risk management activities.	Management company / SMIC / AIFM must assess all relevant sustainability risks when conducting due diligence on investments.  In addition, for managers in-scope of the “principal adverse impact” rules under article 4 of the SFR ie, those with an average of more than 500 employees and those who choose voluntarily to comply with the principal adverse impact reporting obligation under the SFDR, the manager must take into account principal adverse impact of investments on sustainability factors as part of its investment due diligence.  UCITS: New paragraphs 5 and 6 article 23 UCITS Organisation Directive.  AIFMD: New paragraphs 5 and 6 article 18 AIFMD Level 2.		Management company / SMIC / AIFM to review and update investment due diligence processes to take into account sustainability risks (and, where applicable, to do so in a way which is aligned with principal adverse impact policies).
<b>Risk Management Policy</b> Requirement for risk management policy to include procedures necessary to enable the Management Company / AIFM to assess for each fund it manages the exposure of that fund to market, liquidity and counterparty risks and the exposure to all other risks, including operational risks, that may be material.	Sustainability risks added to the list of risks to be assessed.  UCITS: Amended article 38(1) UCITS Organisation Directive.  AIFMD: Amended article 40(2) AIFMD Level 2.	Risk Management Policy	Management company / SMIC / AIFM to review and update risk management policy to take into account sustainability risks.

Please get in touch with your usual Asset Management and Investment Funds Department contact or any of the contacts listed in this publication should you require further information in relation to the material referred to in this update.

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