

NO ACTION LETTER ON SUSTAINABILITY-RELATED DISCLOSURES FOR BENCHMARKS

**Opinion of the European Securities and Markets Authority
of 29 April 2020**

on appropriate supervisory and enforcement practices in respect of the new disclosure requirements in Regulation (EU) 2016/1011 of the European Parliament and of the Council relating to sustainability-related disclosures for benchmarks

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC ⁽¹⁾, and in particular Article 9a(3) and 44(1) thereof,

THE EUROPEAN SECURITIES AND MARKETS AUTHORITY BOARD OF SUPERVISORS
HAS ADOPTED THIS OPINION:

- (1) The European Securities and Markets Authority (ESMA) is issuing this No Action Letter to the competent authorities designated in accordance with Article 40(1) of Regulation (EU) 2016/1011 of the European Parliament and of the Council ⁽²⁾ in relation to the new disclosure requirements set out in Articles 13(1)(d) and 27(2a) thereof to promote consistent, efficient and effective supervisory and enforcement practices, as well as the common, uniform and consistent application of Union law.
- (2) These new disclosure requirements will apply on 30 April 2020. On 27 April 2020, ESMA provided the competent authorities and the Commission with a detailed account of the issues it considers exist because of the absence of the delegated acts supplementing these new disclosure requirements. In particular, ESMA explained that until the delegated acts supplementing these new disclosure requirements apply, there are significant issues due to legitimate doubts concerning the legal consequences of Regulation (EU) 2016/1011 and its proper application, as referred to in point (b) of Article 9a(1) of Regulation (EU) No 1095/2010.
- (3) The new disclosure requirements set out in Articles 13(1)(d) and 27(2a) of Regulation (EU) 2016/1011 aim to increase the comparability of benchmarks with regard to ESG factors and are key for users of benchmarks to make well-informed choices. The delegated acts ensure these objectives may be achieved by setting out the minimum content of the ESG factors to be disclosed as well as the standard formats for the presentation of that information. Otherwise, the obligations to explain how the key elements of the methodologies 'reflect ESG factors' (Article 13(1)(d)) or, similarly, how the 'ESG factors are reflected' in each benchmark

¹ OJ L 331, 15.12.2010, p. 84.

² Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1.).

or family of benchmarks (Article 27(2a)), give rise to legal uncertainty for the administrators as they cannot adequately determine their content. Indeed, the description of the empowerment to adopt the delegated acts in Article 27(2b) of Regulation (EU) 2016/1011 acknowledges that those delegated acts are needed to 'ensure the technical feasibility of compliance with Article 27(2a)'. Therefore, without the delegated acts, there is no specific selection of ESG factors or appropriate level of transparency specified by the new requirements. This gives rise to significant issues due to legitimate doubts on the legal consequences and proper application of these requirements.

- (4) On 29 April 2020, ESMA provided the Commission with an opinion on the action it considers appropriate³. ESMA explained that if the date of application of the new disclosure requirements had been aligned with the date of application of the delegated acts, these significant issues would not have arisen. In these circumstances, ESMA provided its opinion that the delegated acts should be adopted by the Commission without delay, in order to ensure the objectives of these requirements are achieved, to provide administrators with clarity on how to apply these requirements and to provide competent authorities with clarity on how to supervise compliance with these requirements. This is without prejudice to the right of scrutiny of the delegated acts by the European Parliament and of the Council ⁽⁴⁾ and the need to set an application date which provides administrators with a sufficient time period to adapt their practices to comply with them.
- (5) These significant issues raise serious difficulties for competent authorities to supervise and enforce the new disclosure requirements. From a legal perspective, neither ESMA nor the competent authorities possess any power to allow the disapplication of applicable Union law. In view of these exceptional circumstances, ESMA considers that it is necessary for competent authorities to address the absence of the delegated acts supplementing Articles 13(1)(d) and 27(2a) of Regulation (EU) 2016/1011 through consistent risk-based supervisory and enforcement practices. ESMA is of the opinion that, until the delegated acts apply, competent authorities should not prioritise any supervisory or enforcement action in relation to the following requirements: (i) Article 13(1)(d); and (ii) the obligation in Article 27(2a) for the benchmark statement to contain explanations of how ESG factors are reflected in each benchmark or family of benchmarks provided and published.
- (6) This Opinion will be published on ESMA's website.

Done at Paris, 29 April 2020

For the Board of Supervisors
The Chair
Steven Maijor

³ In accordance with Article 9a(2) of Regulation (EU) No 1095/2010.

⁴ In accordance with Article 49(6) of Regulation (EU) 2016/1011.