

**OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY
of 29 April 2020
on appropriate action in respect of the new disclosure requirements in Regulation
(EU) 2016/1011 of the European Parliament and of the Council relating to the
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(2) 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 Opinion to the Commission to provide it with a detailed account of the issues that it considers are raised by the absence of the delegated acts supplementing the new disclosure requirements set out in Articles 13(1)(d) and 27(2a) of Regulation (EU) 2016/1011 of the European Parliament and of the Council ⁽²⁾. ESMA is also issuing this Opinion to set out the action it considers appropriate and the urgency of the issue.
- (2) ESMA considers that until the delegated acts supplementing the new requirements set out in Articles 13(1)(d) and 27(2a) of Regulation (EU) 2016/1011 apply, those new requirements raise 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) In particular, Article 13(1)(d) of Regulation (EU) 2016/1011 requires administrators to include, by 30 April 2020, an explanation of how the key elements of their methodologies reflect environmental, social and governance (ESG) factors for each benchmark or family of benchmarks, with the exception of interest rate and foreign exchange benchmarks.
- (4) Article 13(2a) of Regulation (EU) 2016/1011 empowers the Commission to adopt delegated acts to supplement Articles 13(1)(d) by laying down the minimum content of the explanation as well as the standard format to be used.

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.).

- (5) Article 27(2a) of Regulation (EU) 2016/1011 includes a similar obligation on administrators to include, by 30 April 2020, explanations within their benchmark statements of how ESG factors are reflected in each benchmark or family of benchmarks provided and published.
- (6) Article 27(2b) of Regulation (EU) 2016/1011 empowers the Commission to adopt delegated acts to supplement Article 27(2a) by further specifying the explanations in the benchmark statement as well as the standard format to be used for references to ESG factors to enable market participants to make well-informed choices and to ensure the technical feasibility of compliance with Article 27(2a).
- (7) However, these delegated acts have not yet been adopted. On 8 April 2020, the Commission published the draft delegated acts with the consultation period open until 6 May 2020 ⁽³⁾. Following their adoption by the Commission, the delegated acts will be subject to a scrutiny period by the European Parliament and by the Council before they enter into force ⁽⁴⁾.
- (8) 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 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)'.
- (9) 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 legitimate doubts on their legal consequences and proper application. The range of potential approaches by administrators will cause the sustainability-related aspects of benchmarks to be incomparable by users of benchmarks, preventing them from being able to choose appropriately amongst benchmarks in relation to ESG factors for investment purposes. This risks generating a fragmented approach to sustainability-related disclosures for benchmarks in the Union, which is contrary to the objectives of the new disclosure requirements.
- (10) Furthermore, administrators will also need to adjust their disclosure practices to ensure compliance with the delegated acts once they apply. This places an additional burden on administrators, which is likely to involve additional compliance costs.

³ The delegated acts of the Commission under consultation are available here: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives>.

⁴ Pursuant to Article 49(6) of Regulation (EU) 2016/1011.

(11) These significant issues raise serious difficulties for competent authorities to supervise and enforce the new disclosure requirements. If the date of application of Article 13(1)(d), as well as the obligation for the benchmark statement to contain explanations of how ESG factors are reflected in each benchmark or family of benchmarks in Article 27(2a), of Regulation (EU) 2016/1011, had been aligned with the date of application of the delegated acts, these significant issues would not have arisen. In the circumstances, to ensure that the objectives of these requirements are achieved, to provide administrators with clarity on how to apply those requirements and to provide competent authorities with clarity on how to supervise compliance with those requirements, ESMA considers that the Commission should adopt the delegated acts without delay. This is without prejudice to the right of scrutiny of the delegated acts by the European Parliament and of the Council ⁽⁵⁾ and the need to set an application date which provides administrators with a sufficient time period to adapt their practices to comply with them.

(12) This Opinion will be published on ESMA's website.

Done at Paris, 29 April 2020

For the Board of Supervisors
The Chair
Steven Maijor

⁵ In accordance with Article 49(6) of Regulation (EU) 2016/1011.