

# YPOG Briefing:

## SFDR disclosures and legacy funds

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### I. Background

The Sustainable Finance Disclosure Regulation (Regulation (EU) 2019/2088, "**SFDR**") requires financial market participants, including VC and PE fund managers, to disclose certain sustainability-related information on their website, in pre-contractual documents and in periodic reports. So far, it has been the understanding that these obligations only apply to investment funds which were marketed after the SFDR coming into effect on March 10, 2021.

In a Q&A statement by the European Commission ("**Commission**") issued on May 25, 2022 ([Question 6](#), page 6), however, the Commission took the view that the fund/product-related part of the website disclosures and the periodic reports also apply to "legacy funds", i.e., investment funds which had their final closing before March 10, 2021. Accordingly, such legacy funds would now need to be assessed in light of the SFDR. Depending on the outcome, for all funds qualifying as Art. 8 or Art. 9 SFDR funds (see below under II.) certain information would need to be disclosed on the website and in the periodic reports.

This statement came unexpected for most market participants. Not only was it difficult to comprehend the reasoning and benefit of disclosing information on legacy funds – doing so would also entail a lot of work for VC and PE fund managers. The initial reaction shared among market participants was hence to wait and observe whether and to which extent this opinion would continue to be upheld by the Commission. While the Commission has not commented on it so far, the German regulator (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "**BaFin**") recently went out and supported this position in a separate Q&A, published on September 5, 2022 ([Question 4](#)) – although noting, however, that the Commission's approach was surprising for market participants.

While the position taken by the Commission and BaFin remains controversial, the "wait and see" approach taken so far by market participants is no longer an option.

### II. Which funds are affected?

The obligations only apply to funds that either promote environmental or social characteristics (Art. 8 SFDR products) or that have sustainable investment as their objective (Art. 9 SFDR products), i.e. not for Art. 6 SFDR funds.

Whether a fund qualifies as an Art. 8 or Art. 9 SFDR product needs to be assessed on a case-by-case basis, as no general assumption can be made without considering the specific circumstances.

As a rule of thumb, however, a fund will typically qualify as an Art. 8 SFDR product if the limited partnership agreement ("**LPA**") foresees (binding) investment exclusions/restrictions.

### III. What this means and recommended action

1. All legacy funds must be qualified according to the SFDR. The documents and records of the funds must be examined and evaluated. For those legacy funds that have not been marketed for more than ten years, i.e., since March 10, 2011, generalized information is sufficient.
2. If needed, the necessary sustainability information must be gathered from portfolio companies. In the case of "only" investment exclusions in the LPA, this should often not be relevant, as the portfolio companies' adherence to the excluded business activities is (mostly) known or can be easily assessed through an informal process.
3. The necessary information must be disclosed on the fund manager's website and in the periodic reports. Special templates should be used for the presentation of the periodic reports. The preparation of the periodic reports may be difficult in the absence of pre-contractual SFDR disclosures to serve as a reference for the periodic reports. Therefore, it could be advisable to prepare pre-contractual SFDR disclosures for all legacy funds for internal use only, in order to easily comply with the correlating reporting obligations.

We expect most legacy funds to be subsumed under Art. 8 SFDR due to existing investment exclusions in their respective LPA. In this case, the information to be published is primarily limited to the investment strategy of the fund and whether and how the fund's investment exclusions have been met.

While BaFin did note that it will take into account on a case-by-case basis the circumstances of the Commission's decision and the time required for implementation, we recommend implementing these obligations as soon as possible.

We will report on further developments and are available for any questions you may have.

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