

## Practice Update

# SEC Intensifies Focus on ESG Disclosures and Policies, Practices, and Procedures

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On March 3, 2021, the Securities and Exchange Commission's (the SEC) Division of Examinations (the Division) announced its [Examination Priorities for 2021](#), which included an enhanced focus on climate-related risks. The next day, the SEC [announced](#) the creation of a twenty-two-member Climate and Environmental, Social, and Governance (ESG) Task Force in the Division of Enforcement. On the heels of these announcements, on March 15, 2021, Allison Herren Lee, Acting Chair of the SEC, delivered a [speech](#) at the Center for American Progress addressing the SEC's increased focus on ESG based on investor demands. Shortly thereafter on April 9, 2021, the Division issued a [Risk Alert](#) (the Risk Alert) identifying certain observations of deficiencies and internal control weaknesses from examinations of investment advisers and funds regarding ESG investing, as well as observations of effective practices from such examinations. The timing of these announcements coupled with the launch of the Climate and ESG Task Force strongly suggests that investment advisers, registered investment companies, and private funds offering ESG products and services should conduct a thorough review of their compliance programs to help ensure that their policies and practices are consistent with the disclosures that they provide to investors.

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## Increased Focus on ESG

In the last decade, there has been an unprecedented shift in investor focus on ESG-related risks and effects in investment decision-making. Now more than ever, investors are demanding disclosures on ESG-related issues, and the SEC has responded accordingly. While it appears likely that the SEC will prioritize ESG disclosures and compliance, the SEC has not yet adopted, or incorporated into its disclosure rules, a standardized disclosure framework for ESG information. However, following the launch of the Climate and ESG Task Force, the SEC issued a public statement welcoming the public's input on climate change disclosures, which included questions to the public about a potential standardized disclosure framework.

Still, regardless of whether a standardized disclosure framework is put into place, the SEC expects to see investment advisers and advisers to private funds (each, an Adviser) providing accurate disclosures of ESG investing strategies and adopting and implementing policies, procedures, and practices that are consistent with their ESG-related disclosures. As such, Advisers that purport to engage in ESG investing can expect that during examinations, the Division's staff (the Staff) will focus on, among other matters, each of the following:

- *Portfolio Management*: Whether the Adviser's practices related to ESG are consistent with the Adviser's written policies, procedures, and disclosures regarding ESG investing approaches including, but not limited to, the Adviser's (i) use of ESG terminology and (ii) due diligence and other processes for selecting, investing in, and monitoring investments
- *Proxy Voting*: Whether the Adviser's public ESG-related proxy voting claims are consistent with internal ESG disclosures and marketing materials
- *Regulatory Filings and Marketing Materials*: Whether the Adviser's regulatory filings and marketing materials, including all performance

advertising with respect to client/investor-facing documents, website(s), reports to sponsors of global ESG frameworks, client presentations, responses to due diligence questionnaires, and requests for proposals, as applicable, are consistent with actual practices and performance results, are timely updated, and contain material disclosures required in order to avoid being misleading

- *Compliance Programs:* Whether the Adviser's written policies and procedures sufficiently address the Adviser's ESG investing analysis, decision-making processes, and appropriate compliance oversight and review of its ESG investing practices, and whether the implementation of the same is consistent and include appropriate disclosures

## Examination Observations

In the Risk Alert, the Staff highlighted deficiencies that it commonly observed during recent examinations, including (i) potentially misleading statements regarding ESG investing processes and adherence to global ESG frameworks, (ii) a lack of policies and procedures regarding ESG investing despite claims to the contrary; (iii) policies and procedures that did not appear reasonably designed to prevent violations of the law, or that were not implemented at all, (iv) weak or unclear documentation of ESG-related investment decisions, and (v) compliance programs that did not appear to be reasonably designed to prevent inaccurate ESG-related disclosures and marketing materials.

Additionally, the Division noted effective practices observed during recent examinations that may help to address compliance issues, including:

- *Disclosures:* Simple, clear, and prominent disclosures regarding the Adviser's ESG-related practices that were precise, tailored to the Adviser's specific approaches to ESG investing, and which were consistent with the Adviser's

actual practices, including explanations regarding how investments were evaluated using goals established under global ESG frameworks

- *Compliance Policies and Procedures:* Written policies and procedures that addressed ESG investing and covered key aspects of the Adviser's relevant practices, including investment policies and procedures that address ESG investing and specific documentation to be completed at various stages of the investment process (e.g., research, due diligence, selection, and monitoring)
- *Compliance Personnel:* Integrated compliance personnel knowledgeable about the Adviser's specific ESG-related practices with involvement and oversight of the Adviser's marketing materials and other client/investor-facing documents and public disclosures in order to help ensure continuity and avoid misleading statements

## Conclusion

In light of the foregoing, Advisers that engage in ESG-related investing should expect heightened scrutiny of ESG disclosures, policies, practices, and procedures. Such Advisers should consider whether their current ESG disclosures are sufficient and accurate and, in doing so, review and amend their policies and procedures to ensure that their approaches to ESG investing are adequately addressed, are implemented consistently throughout the firm where relevant, and are subject to appropriate oversight by compliance personnel. Finally, Adviser's should consider updating their recordkeeping policies and procedures to provide for the documentation and maintenance of records relating to important stages of the ESG investing process.

For additional information please contact Paul Foley, Chair of Akerman's Investment Management Practice.

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