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U.S. Legal and Compliance Issues Relating to ESG for Private Fund Advisers


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Introduction

General

Environmental, social and corporate governance ("ESG") matters continue to be prominent in a variety of financial service sectors, including among private investment fund advisers in the United States (the "U.S.") and globally. In addition to the increased demand by investors for ESG strategies and investor diligence requests for enhanced ESG policies and procedures, various regulatory bodies, including the U.S. Securities and Exchange Commission (the "SEC") and the U.S. Department of Labor (the "DOL"), continue to focus on the industry's use of ESG and the prevention of "greenwashing".

The U.S. regulatory focus on ESG has continued to increase over the course of 2023; however, the SEC rules proposed during 2022 related to investment advisers have yet to be finalised. In the first quarter of 2023, the SEC's Division of Examinations noted its commitment to ESG in its 2023 Exam Priorities. The press release announcing these priorities (available here: https://www.sec.gov/news/press-release/2023-24) identifies a number of objectives including focusing on "whether ESG products are appropriately labelled and whether recommendations of such products for retail investors are made in the investors' best interests".

The proposed SEC rules for investment advisers are designed to promote consistent disclosure for fund investors, and would require advisers to categorise certain types of ESG strategies, and provide more specific ESG disclosure in Form ADV.

The SEC continues to indicate its focus on the consistency and accuracy of ESG-related disclosures, and, in particular, on ensuring that companies' climate-related disclosures to investors are not materially false or misleading. However, notably, certain states in the U.S. have passed "anti" ESG legislation at the state level, including certain measures that have impacted investment advisers to private funds.

In this chapter, we discuss the current landscape in the U.S. with respect to regulatory and enforcement matters for both SEC-registered investment advisers ("Registered Advisers") and other advisers, including steps that a private fund adviser can take to implement ESG within both its investment process and its compliance procedures. We also discuss ESG considerations for private fund advisers raising capital from Employee Retirement Income Security Act of 1974 ("ERISA") plans, for both plan asset and non-plan asset funds.

Background

While there continues to be a focus on harmonising various ESG standards, there is not one generally accepted definition of ESG globally, or one way to approach ESG as an investment adviser. Accordingly, ESG investing can be implemented by private fund advisers in various ways. The prevailing modern approach to ESG investing involves a multi-faceted analysis that considers a broad range of considerations as part of the investment process, which can be referred to as the ESG-integration model. In this approach, an adviser includes ESG factors as part of its investment and risk management process, although, depending on the adviser, these factors may not be dispositive and are often considered alongside many factors, including financial metrics.

Environmental factors include, among other things, considerations relating to climate change, greenhouse gas emissions and carbon footprint, as well as a company's use of renewable energy or engagement in sustainable initiatives. Social factors include, among other things, considerations relating to employee health and safety, diversity and inclusion, ethical supply chain sourcing, privacy and data security, and human rights.

Corporate governance factors include, among other things, considerations relating to board independence and diversity, executive compensation, shareholder rights, business ethics and separation between an issuer's CEO and the chairman of its board of directors. For the purposes of this chapter, we focus primarily on the integration method of ESG implementation by an investment adviser in connection with various policies and procedures. However, advisers may also pursue ESG-dedicated strategies (including those related to energy transition and conservation of natural resources) and, accordingly, may need to review the detail and breadth of their policies and procedures in such instances to ensure they are appropriate in light of this focus. Additionally, those advisers with multiple business lines (e.g., a commingled fund that utilises an ESG integration approach and a separately managed account that has a dedicated ESG focus) should ensure that their policies and procedures account for the different approaches of these client accounts and that the disclosure for each is accurate, clear and matches their actual practices.

U.S. Compliance Considerations for Investment Advisers

SEC Examination Priorities

As noted above, throughout 2023, the SEC's Division of Examinations has continued to demonstrate its focus on ESG. This has been displayed in part by including ESG as a focus in its annual Examination Priorities issued for 2023, the fourth year in a row (available here: https://www.sec.gov/files/2023-exam-priorities.pdf). The Division of Examinations noted its continued focus on ESG-related advisory services, fund offerings and strategies incorporating ESG criteria, including whether funds are operating in accordance with the disclosures provided to investors.

In addition to the Division of Examination's focus on ESG, the SEC's Climate and ESG Task Force has brought several high-profile ESG-related enforcement actions focused on the advisory space since its creation.

Proposed rules for investment advisers

On May 25, 2022, the SEC proposed amendments to rules and regulatory filings that would require registered investment companies and business development companies (collectively, "Registered Funds"), as well as Registered Advisers and SEC exempt reporting advisers ("Exempt Reporting Advisers"; collectively, "Advisers"), to provide additional disclosure information regarding the incorporation of ESG factors into their investment processes (as applicable) (the "Proposal"). For the purposes of this chapter, we focus on the applicability of the proposed rules to Advisers rather than to Registered Funds. The SEC's proposed amendments to Part 1 of Form ADV would impact both Registered Advisers and Exempt Reporting Advisers. The changes to Part 2A of Form ADV would affect Registered Advisers only.

If adopted as proposed, Advisers who consider ESG factors in their investment processes would be required to disclose additional information regarding their strategies, with the amount and specificity of required disclosure dependent on how important ESG factors are to the particular strategy. For Advisers who consider ESG factors in their investment processes, the Proposal specifies different disclosure requirements for three categories of ESG strategies: (i) "ESG Integration" strategies that consider ESG factors alongside non-ESG factors in making investment decisions (in these strategies, ESG is considered but is generally not dispositive compared to other factors in the investment process); (ii) "ESG-Focused" strategies that use one or more ESG factor(s) as a significant or main consideration in the investment selection process or in engaging with companies; and (iii) "ESG Impact" strategies, which are ESG-Focused strategies that seek to achieve a specific ESG impact (e.g., portfolio investments that drive measurable ESG outcomes).

Advisers would be required to indicate on their Form ADV Part 1 whether they consider any ESG factors as part of one or more significant investment strategies or methods of analysis, in the advisory services provided to private funds, or separately managed accounts. The Proposal then further requires the private funds/managed accounts to be classified as either ESG Integration, ESG-Focused or ESG Impact (based on the definitions described above). Further, Advisers would be required to identify which component(s) of ESG they consider (e.g., environmental, social or governance); whether they use any ESG consultants or service providers and if they follow any ESG frameworks in connection with providing advisory services (including the name of the service provider, consultant or ESG framework).

Registered Advisers who consider ESG factors as part of their investment process would also be required to describe, in their Form ADV Part 2A, the ESG factors they consider, and how they incorporate these factors when advising clients with respect to investments, including additional disclosure regarding their ESG Integration, ESG Focused and/or ESG Impact strategies. In particular, if a Registered Adviser utilises an ESG Impact strategy, additional disclosure would be required regarding the objective(s) the adviser is seeking to achieve and how it is seeking to achieve such objective(s) (including how it measures progress toward the stated impact, disclosing the key performance indicators analysed, the time horizon used to analyse progress, and the relationship between the impact the Registered Adviser is seeking to achieve and financial return(s)).

If a Registered Adviser uses a specific criterion or methodology for evaluating, selecting, or excluding investments, the Registered Adviser must describe that criterion and/or methodology and how it is used for each applicable significant investment strategy or method of analysis. This includes any use of internal or external scoring/ESG ratings, frameworks, inclusionary or exclusionary screens, or ESG indices. Furthermore, the Proposal would require enhanced disclosure in Part 2A, to the extent that a Registered Adviser has specific voting policies or procedures to include one or more ESG considerations when voting client securities. While the Proposal does not address Advisers' disclosure obligations related to ESG in the offering documents for private funds, Advisers should consider whether their use of ESG is material to their investment strategy for a particular private fund and, accordingly, whether disclosure should be added or expanded in the governing documents and other materials.

In addition to the proposed changes to Form ADV, the Proposal reiterates the SEC's ongoing focus on Registered Advisers' compliance policies and procedures related to ESG. Specifically, Registered Advisers' compliance policies and procedures should address the accuracy and sufficiency of ESG disclosures made to clients, investors and regulators, and ensure portfolios are managed consistently with such policies and disclosures. Advisers should expect that investor communications, including marketing materials, will continue to be scrutinised by regulators in connection with statements regarding ESG. Accordingly, Advisers should carefully review any such statements to ensure that they are not overstating their focus on ESG factors and that all statements are consistent with their policies and procedures.

Enforcement actions

As noted above, the SEC created the Climate and ESG Task Force within the Enforcement Division in 2021.

The SEC has shown a commitment to holding investment advisers accountable when they fail to accurately describe the incorporation of ESG factors in their respective investment selection processes. For example, the SEC recently charged an institutional investment adviser for misstatements and omissions regarding the role of ESG considerations in making investment decisions for certain mutual funds that it managed. The SEC Order (available here: https://www.sec.gov/litigation/admin/2022/ia-6032.pdf) states that the adviser "represented or implied in various statements that all investments in the funds had undergone an ESG quality review, even though that was not always the case".

Furthermore, for certain mutual funds it advised, and numerous investments held by certain funds, the adviser did not assign an ESG quality review score as of the time of investment. A key takeaway for Advisers from this action is that they must remain mindful of how they describe their incorporation of ESG factors into their investment selection process and ensure that they continue to follow and document this process (as required under their policies and procedures).

Furthermore, the SEC has emphasised the importance of Advisers following their established policies and procedures for ESG investments. In an SEC action in November of 2022, the SEC charged an investment adviser for failures with respect to its policies and procedures related to two of its mutual funds and one separately managed account strategy marketed as ESG investments. According to the SEC's Order (available here:

https://www.sec.gov/files/litigation/admin/2022/ia-6189.pdf), the adviser consistently failed to follow its established policies and procedures. For example, the SEC Order states that the adviser's policies required its personnel to complete an ESG questionnaire for every company it planned to include in each product's investment portfolio prior to the selection; however, personnel completed many of the ESG questionnaires after the securities had already been selected for inclusion and that personnel relied on previous ESG research, often conducted in a different manner than required in the adviser's policies and procedures. A key takeaway for Advisers is that if they establish policies and procedures for ESG investments, they should be able to closely follow such policies and procedures and be able to document adherence to the same.

In addition to the Proposal and the enforcement actions described above, the SEC's Division of Examinations has also increased its scrutiny of Registered Advisers' ESG practices during its periodic examinations of those Advisers. If a Registered Adviser has implemented an ESG policy or otherwise communicated (including in its marketing materials) that it either focuses on ESG for certain client accounts or integrates ESG within its investment process, that adviser should be prepared to provide SEC exam staff with additional information regarding ESG in the course of an examination. In particular, Registered Advisers should be prepared to describe their ESG process, including any ESG scoring (whether proprietary or utilisation of a third-party), their compliance with any applicable ESG frameworks, their incorporation of ESG in connection with proxy voting and engagement with issuers, and their compliance with ESG-specific side letter obligations. In addition, Registered Advisers should be prepared to provide the back-up material in relation to any disclosure that has been provided to investors regarding ESG.

Anti-ESG state legislation

During 2023, a number of U.S. states passed "anti-ESG" legislation, which presents a challenge for Advisers that are trying to balance requests by certain investors (often non-U.S. investors) that they provide more detail regarding their incorporation of ESG factors into the investment process and other investors (e.g., state pension funds) that may be prohibited under these legislative and executive actions from investing in ESG products.

Generally, most of the recent anti-ESG legislation, rules and proposed legislation center around barring state investment funds from considering ESG factors and criteria in their investment decisions. For example, in New Hampshire, the governor issued an executive order in April 2023 discouraging state investment funds from investing in other funds that primarily follow ESG criteria. Recently, the New Hampshire legislature passed legislation that stated: "all investments and their management shall be governed by the fiduciary duty to maximise benefits for the state or the beneficiaries of the state's trust funds managed by the treasurer. The treasurer shall report on a quarterly basis to the office of legislative budget assistant regarding compliance with the duty to make investment decisions based upon the fiduciary duty to maximise short or long term financial benefits for the state. The report shall note the existence of any investment funds that may have mixed, rather than pure, fiduciary interest investment motivations". Additionally, in May 2023, Florida's legislature passed legislation barring state and local entities from considering ESG factors in their investment decisions. Similarly, in March 2023, the Kentucky legislature passed legislation banning public pension funds from considering ESG factors and considerations in the public pension funds' investment decisions.

Missouri took a different approach in that they required broker-dealers to obtain consent from customers in connection with making discretionary investment decisions for customers that incorporated a social or other nonfinancial objective. These types of objectives included international, domestic, or industry agreements relating to environmental or social goals; corporate governance structures based on social characteristics; or social or environmental goals. In part, Missouri required that the written consent from customers contain language noting that the customer acknowledged and understood that "incorporating a social objective or non-financial objective into investment decisions and recommendations/solicitations will result in investments and recommendations/solicitations that are not solely focused on maximising a financial return for me or my account".

In general, much of the state-level anti-ESG legislation is based on the view that only pecuniary or financial returns should be considered with respect to investment decisions, and does not recognise ESG considerations as being relevant in connection with evaluating financial returns for a company.

ESG policies and procedures

In light of the current regulatory environment in the U.S., all Advisers who consider ESG factors in their investment process, and particularly those that implement dedicated ESG strategies, should consider preparing an ESG policy and related procedures, or modifying existing ESG policies and procedures. For those Advisers who have yet to implement a policy or are looking to enhance an existing policy, it is important to first understand how ESG is utilised from a portfolio management perspective. ESG, unlike some other compliance procedures that often start with the compliance team, is one that requires significant involvement from a firm's investment team. In addition to the investment team, an Adviser considering ESG integration within its investment process should engage with the other stakeholders within the firm, including operations/finance, investor relations/business development and legal/compliance team members to determine the appropriate approach for the firm.

Advisers should consider various factors such as size of the investment and other teams responsible for implementation, culture, and resources in order to ensure that the approaches identified will be practical and can be implemented and monitored within the firm or with the assistance of third parties. Once an Adviser has identified its overall approach to ESG, it can begin to develop an ESG policy and related procedures. It is recommended that policies include specific details regarding the processes that will be utilised to integrate ESG into the investment process and should be tailored and designed based on the Adviser's size, investment philosophy and strategy.

Because there is no generally accepted definition of ESG and Advisers will vary in their approaches to ESG integration, it is crucial to include the firm's definition of, and approach to, ESG. For example, an Adviser who considers ESG factors in addition to other economic factors in identifying investment opportunities will have a very different ESG policy than an Adviser who is instead pursuing an ESG Impact strategy. Similarly, an Adviser who advises private equity funds and is heavily involved with the management of a portfolio company, or takes control positions, will also have a very different ESG policy than an Adviser who is primarily investing in publicly traded, large-capitalisation companies in the energy sector. Additionally, an Adviser who has multiple investment strategies or manages certain products that pursue dedicated ESG strategies should consider whether its policies and procedures need to specify the actions taken with respect to different parts of its business so that it is clear which policies are applicable to each client account/strategy.

Investment process

An important part of implementing ESG by a private fund adviser and developing an ESG policy is determining how ESG factors will be incorporated into the investment process. An Adviser can begin by reviewing its current investment and research process in light of ESG factors and formalising and enhancing certain practices, as needed. An Adviser should also memorialise the steps taken to reflect ESG considerations in its investment process, including, for example, by separating out the consideration of ESG factors in research notes, investment memoranda or investment committee meeting minutes. Advisers may need to consider the different processes applicable to new investments and the monitoring of existing investments.

Determining the appropriate documentation to be used in the investment process will require an Adviser to evaluate the use of its resources, both in terms of personnel and cost, and the culture within the firm. It can be time-consuming and difficult to consistently identify information relating to relevant ESG factors for each portfolio company in which a private fund adviser may wish to invest client assets. This can be particularly challenging for an Adviser who invests client assets in private companies, which typically have less information available for evaluation than public companies. An Adviser will need to determine whether it will attempt to gather this data internally, or whether it will utilise a third-party service provider (such as one that provides ESG scoring of companies), or both. If using ESG scoring, it is important to note that there are many different approaches as to how scores are determined. Accordingly, an Adviser should pay close attention to this when engaging service providers to provide ESG scoring. An Adviser can also seek to develop its own ESG scoring metrics, which will require additional internal resources and expertise. Finally, an Adviser will have to consider whether ESG scores are dispositive in the investment decision-making process, or if they will be included among other factors.

An Adviser will also need to determine how expenses related to ESG diligence and service providers will be allocated among the Adviser and its clients. Advisers should document their rationale for these determinations, as expense allocations continue to be an area of focus for the SEC, including under the recently finalised private fund rules. Advisers should also review their clients' governing documents to determine whether additional disclosure regarding these expenses is warranted and what expenses can properly be borne by clients. Additionally, Registered Advisers will need to determine how to disclose fees and expenses related to ESG diligence and service providers in connection with the quarterly statement rule set forth in the recently finalised private fund rules.

An Adviser utilising third-party service providers or ESG consultants should ensure that they have conducted appropriate due diligence regarding the provider. Some of the key items to discuss with any provider, particularly those providing ESG scores, are how the information regarding ESG is gathered, the level of transparency that the Adviser will have regarding the composition of an ESG score, and how often the information is updated. Any policies and procedures that the Adviser has adopted should include information regarding the due diligence process and also how the Adviser has determined that the provider or consultant's ESG approach is consistent with the approach utilised by the Adviser or if there are gaps or differences, and how those are being addressed and disclosed (as applicable) to clients.

Additionally, there are a number of third-party frameworks that exist other than in connection with particular regulatory obligations. Some of these frameworks require adherence to particular principles or goals and may require reporting (including reports that are publicly available). As noted above, Advisers may need to include information about frameworks to which they adhere in their Form ADV in the future, and during SEC examinations, SEC exam staff will often ask for information regarding any applicable frameworks, including the relevant bases for adherence to the framework and copies of any applicable reporting. Advisers should ensure that they have a good faith basis and documentation regarding their compliance with any obligations, guidelines or principles required in connection with adherence to any framework.

If reports are required, Advisers should also ensure that the disclosure included in any report is materially accurate in all respects and consistent with the other disclosure documents that have been provided to clients of the Adviser. If an Adviser has made explicit statements regarding goals to reduce carbon emissions by a particular date, then the Adviser should ensure that it is clear about how it is measuring its progress (including any applicable key performance indicators) and how it is monitoring emissions in connection with both the manager's activities and clients' investment portfolios.

Engagement with management

Incorporating ESG factors into the investment process often leads to an increase in corporate engagement with issuers, including through meetings with and/or letters to issuers' management teams and boards of directors relating to ESG issues, or through more formal actions, such as shareholder resolutions or proxy contests seeking to achieve ESG-related goals. There is no "one-size-fits-all" approach to this engagement, and Advisers will often seek to be consistent with how they already engage with management on other material issues. However, it is important for Advisers to identify the types of engagement they will utilise, if any, in their compliance policies and procedures. If an Adviser intends to be more active with respect to U.S. listed issuers, it will need to consider a variety of additional legal issues, including those related to material, non-public information, regulatory filing requirements (including Schedule 13D filings) and compliance with U.S. proxy rules.

Even if an Adviser does not plan to engage with management on a more formal level (as described above), as part of implementing ESG considerations in its investment process, the Adviser should consider incorporating questions related to ESG factors into its standard due diligence process when meeting with portfolio company management teams and/or investor relations personnel.

Proxy voting

A Registered Adviser is required to adopt and implement written proxy voting policies and procedures which are reasonably designed to ensure that they vote client securities in the best interest of their clients. A Registered Adviser may vote proxies in a manner that reflects ESG principles, including with respect to corporate governance matters. However, they should first consider whether their proxy voting policies need to be amended to reflect how the Registered Adviser intends to incorporate ESG factors into its voting process.

As with any policy, it is important for the Registered Adviser to make sure that their proxy voting actions are consistent with their written policy and that they do not begin to diverge from any policy until an amended policy reflecting current intentions is adopted. In addition, if the Registered Adviser uses a third-party proxy advisory firm, they should conduct due diligence to, among other things, confirm that they approve of the ESG factors used in the proxy advisory firm's voting process, and understand the role these criteria play in making voting recommendations. The Registered Adviser should also seek to satisfy themselves regarding the proxy advisory firm's ability to consistently obtain current and accurate information regarding ESG factors.

Monitoring and review by the Adviser's compliance/legal team(s)

Once an Adviser has developed and implemented their ESG policy and procedures, it is important that the Adviser's compliance/legal team(s) continue to monitor the effectiveness of, and internal compliance with, the policy and procedures. This will require the Adviser to have compliance/legal staff responsible for, among other things, reviewing investment memoranda and related back-up materials regarding the firm's consideration of ESG factors, reviewing support for proxy votes and checking actual votes for consistency, reviewing investor reporting and other disclosures to ensure accuracy and consistency with the policy and procedures, and ensuring that investment and other personnel within the firm are maintaining sufficient documentation regarding the consideration of ESG factors in the investment decision-making process. Due to the regulatory focus as indicated by both the Proposal and recent examination and enforcement trends, it is important for legal and compliance to review the day-to-day ESG process and make sure that the appropriate documentation is maintained.

ERISA & Pension Plan Considerations

ESG continues to be on the front line of the political battle between *laissez-faire* politicians and politicians who believe the government has a responsibility and authority to protect its citizens. In this environment, the DOL has struggled to interpret the conditions imposed by ERISA's duties of prudence and loyalty on investments producing collateral benefits, including ESG-type benefits. The DOL's guidance has vacillated depending on the administration in office.

The Trump administration addressed ESG investing in two regulations (the "2020 Rules") that sought to ensure that ERISA plan fiduciaries do not subordinate the interests of participants in their retirement income to any non-pecuniary objective or promote non-pecuniary benefits or goals. The Biden administration revoked the 2020 Rules, and on December 1, 2022, the DOL published a new regulation entitled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" (the "Prudence and Loyalty Rule"). The Prudence and Loyalty Rule generally became effective January 30, 2023, and is the latest regulatory action in the long history of DOL guidance regarding the exercise of shareholder rights.

The Prudence and Loyalty Rule permits fiduciaries under ERISA to consider ESG factors when selecting plan investments, and states that a prudent fiduciary may consider any factors material to risk return analysis, and provides that such factors may include "the economic effects of climate change and other environmental, social, or governance factors". The Prudence and Loyalty Rule continues to prohibit a fiduciary from sacrificing investment return or increasing investment risk to promote non-financial goals. Whether any specific factor is relevant to the risk return analysis is to be determined by the fiduciary, and requires a prudent analysis of the facts and circumstances. The Prudence and Loyalty Rule states that ESG factors may be relevant to the risk return analysis.

Under the Prudence and Loyalty Rule, an ERISA fiduciary may utilise non-financial factors as a tiebreaker if the fiduciary concludes two investments "equally serve the financial interests of the plan", in which case the fiduciary may make the investment selection based on collateral benefits.

The Prudence and Loyalty Rule reaffirms that proxy voting and exercising shareholder rights are fiduciary activities. In the Prudence and Loyalty Rule, the DOL reaffirmed its longstanding view that "proxies should be voted as part of the process of managing the plan's investment in company stock unless a responsible plan fiduciary determines voting proxies may not be in the plan's best interest (e.g., in cases when voting proxies may involve exceptional costs or unusual requirements, such as in the case of voting proxies on shares of certain foreign corporations)".

The Prudence and Loyalty Rule acknowledges that an ERISA fiduciary may adopt a practice of following the recommendations of a proxy advisory firm or other service provider, but only after a determination that such provider's proxy voting guidelines are consistent with the fiduciary's obligations regarding shareholder rights under ERISA. The Prudence and Loyalty Rule also requires managers of ERISA plan asset funds to reconcile any conflicting investment policy statements from different investors, to the extent possible. With regard to voting proxies, the manager of an ERISA plan asset fund may impose its own proxy voting policy that is consistent with ERISA and require plans participating in the plan asset fund to accept that proxy voting policy before being allowed to invest. Pension plans established by U.S. states and governmental entities are not subject to ERISA, and are more easily swayed by political winds. Certain States (including California, Hawaii, New Jersey, New York, Maine, and Massachusetts) have embraced ESG, particularly with regard to climate change and firearms. Many of these states have adopted legislation or policies that require a review of the fossil fuel companies in the states' portfolios, and divestiture or carbon-neutrality by specified dates. Other states (including Florida, Kentucky, and Texas) have rejected ESG, and some of these states have adopted legislation that prohibits investment by their pension plans in or through companies that have policies that restrict investments in fossil fuel or civilian firearm companies. These divergent policies make it extremely difficult for an investment Adviser to manage assets for two state plans that are on opposite sides of the political spectrum, or for a state that changes its ESG outlook in a subsequent election. Investment managers with investments from state plans should continue to monitor legislation adopted by various states and consider any impacts on the policies and procedures adopted by the manager (as described above).

Conclusion

Both regulators and certain investors continue to focus on Advisers' use of ESG in connection with their advisory activities. In anticipation of the SEC's adoption of final rules, Advisers seeking to launch a new fund that incorporates ESG into its investment strategy, as well as those seeking to incorporate ESG into the investment strategy for an existing fund, should not do so without careful planning and consideration.

It is increasingly important that Advisers: (i) develop ESG policies and procedures tailored to their strategies; (ii) ensure that the implementation of these policies and procedures is monitored by appropriate personnel (and that firm-wide compliance is appropriately documented); and (iii) review and update various disclosure documents and marketing materials to ensure that accurate, clear and consistent disclosure is being provided to all clients and investors. Furthermore, it continues to be important for Advisers to stay apprised of developments relating to ESG both in the U.S. and globally, including whether different disclosures will need to be prepared based on the requirements of different jurisdictions and whether certain clients (e.g., state pension plans) may have competing ESG objectives.

ESG continues to be an important component of both the federal and state regulatory agenda. At the federal level, the SEC remains focused on ensuring private fund Advisers' ESG disclosures are appropriate and do not mislead investors. Conversely, at the state level, several states have been actively attempting to curtail the use of ESG factors as part of investment advisers' investment strategies. Advisers should continue to review their disclosures and policies and procedures given the continuously changing ESG landscape at both the state and federal level in the U.S.

Debra Franzese is a partner in the Investment Management Group who focuses on providing practical and results-oriented legal and regulatory advice. She works with sponsors and managers of various private investment funds and other pooled investment vehicles, including hedge funds, private equity funds, funds of funds, commodity pools, co-investment vehicles and various "hybrid" funds. In particular, Debbie focuses on fund formation and structuring, the offering of interests by private investment funds, and the negotiation and documentation of such investments. She has significant experience advising clients regarding regulatory and compliance matters, including the availability of exemptions from registration for both U.S. and non-U.S. investment advisers, the development of compliance policies and procedures, the completion of regulatory filings, and assistance with regulatory examinations. Debbie also represents investment advisers in connection with seed-capital investments and side letters and represents funds of funds and other institutional investors in connection with their investments in private funds. Debbie was instrumental in the formation of the Firm's ESG practice, spearheading a task force dedicated to staying at the forefront of the ESG issues affecting investment managers. Debbie also completed a Sustainable Capitalism & ESG course through UC Berkeley School of Law in Spring 2021.

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