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Introduction

General

The use of environmental, social and corporate governance, or "ESG", factors in the investment decision-making process is rapidly increasing in prominence among private investment fund advisers in the United States and globally. The increased focus on ESG has been driven primarily by investor demand for ESG strategies, investor requests about the incorporation of ESG for all investment managers regardless of strategy as part of the due diligence process, and increased scrutiny by U.S. regulators (particularly the U.S. Securities and Exchange Commission (the "SEC") and the U.S. Department of Labor (the "DOL")). Many investors are conducting increased diligence on manager ESG policies and procedures (both at the time of selection and during ongoing diligence meetings) and some also request specific side letter representations and ESG reporting.

The U.S. regulatory focus on ESG has been exhibited through, among other things, the SEC's Division of Examinations' recent risk alert and annual examination focus areas for 2020 and 2021. Perhaps most notably, in the first quarter of 2021, a Climate and ESG Task Force was established within the SEC's Enforcement Division. The press release announcing the establishment of the Task Force (available here: https://www.sec.gov/news/press-release/2021-42) identified a number of objectives including analysing "disclosure and compliance issues relating to investment advisers' and funds' ESG strategies". In addition, in May 2021, the Biden administration issued an Executive Order (available here: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/) requiring the development of a comprehensive, government-wide strategy regarding various climate issues, including, through the measurement, assessment, mitigation, and disclosure of climate-related financial risk.

Certain SEC commissioners have also indicated their focus on the consistency and accuracy of ESG-related disclosures, and in particular the tendency of certain managers to overstate the role of ESG within their firms (often referred to as "greenwashing"), in speeches or other public statements on a number of occasions. For example, in remarks before the European Parliament Committee on Economic and Monetary Affairs in September 2021 (available here: https://www.sec.gov/news/speech/gensler-remarks-european-parliament-090121), SEC Chair Gary Gensler noted that "[m]any funds these days brand themselves as 'green,' 'sustainable,' 'low-carbon,' and so on", and that he has "directed staff to review current practices and consider recommendations about whether fund managers should disclose the criteria and underlying data they use to market themselves as such".

In this chapter, we will discuss the key steps that a private fund adviser can take to integrate ESG in its investment process, as well as compliance considerations relating to the implementation of ESG by SEC-registered investment advisers ("Registered Advisers") and related considerations for investor communications. We will also discuss ESG considerations for private fund advisers raising capital from ERISA plans, for both plan asset and non-plan asset funds.

Background

There is no one generally accepted definition of ESG or one way to approach ESG as an investment manager. 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 takes into account a broad range of considerations as part of the investment process, which can be referred to as the ESG-integration model. In this model, a manager includes ESG factors as part of its investment and risk management process, although, depending on the manager, these factors may not be dispositive. Environmental factors include, among others, considerations relating to climate change, greenhouse gas emissions and carbon footprint, as well as an issuer's use of renewable energy or engagement in sustainable initiatives. Social factors include, among others, 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 others, 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. For the purposes of this chapter, we focus on this method of ESG implementation by a manager. However, managers also may use positive or negative screens with respect to certain types of investments or engage in economically targeted investing (i.e., impact investing). Impact investing focuses on making investments targeting specific social or environmental effects (e.g., increasing affordable housing or combatting climate change).

Developing ESG Policies and Procedures

A manager considering ESG integration within its investment process can first begin by engaging with the various stakeholders within the firm, including portfolio management, operations/finance, investor relations/business development

and legal/compliance team members to determine the appropriate approach for its firm. At this stage, managers need to consider factors such as its size, culture and resources in order to ensure that the approaches identified will be practical and can be implemented within the firm. Once the manager has identified its overall approach, the adviser can begin to develop an ESG policy and related procedures. Due to the increased scrutiny by both investors (including pension funds, endowments, sovereign wealth funds and foundations) and U.S. and global regulators, ESG policies that are merely aspirational without providing specific, actionable steps are not sufficient. Instead, 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 managers will vary in their approaches to ESG integration, it is crucial to include the firm's definition of and approach to ESG. For example, a manager that considers ESG factors in addition to other economic factors in identifying investment opportunities will have a very different ESG policy than a manager that is instead pursuing specific ESG-related goals in its investments. Similarly, a manager that 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 a manager that is primarily investing in publicly traded, large capitalisation companies in the energy sector.

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. A manager can begin by reviewing its current investment and research process in light of ESG factors and formalising and enhancing certain practices, as needed. A manager 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. Managers 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 a manager to evaluate the use of its resources, both in terms of personnel and cost, and the culture within the firm. There is currently no requirement for issuers in the United States to have specific ESG disclosure and, accordingly, 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 a manager that 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, a manager should pay close attention to this when engaging service providers to provide ESG scoring. A manager can also seek to develop its own ESG scoring metrics, which will require additional internal resources and expertise. Finally, a manager 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. 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.

Engagement with Management

Incorporating ESG factors into the investment process leads to the potential for an increase in corporate engagement, 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 managers to identify the types of engagement that they will utilise, if any, in their compliance policies and procedures. If a manager 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 a manager 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 manager 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. The types and breadth of questions may differ depending on a number of factors, including the level of investment by the client account, anticipated holding period, type of issuer, sector and geography.

Proxy Voting

A Registered Adviser is required to adopt and implement written proxy voting policies and procedures that are reasonably designed to ensure that the adviser votes client securities in the best interest of its clients. An adviser may vote proxies in a manner that reflects ESG principles, including with respect to corporate governance matters. However, it should first consider whether its proxy voting policies need to be amended to reflect how the adviser intends to incorporate ESG factors into its voting process. As with any policy, it is important for an adviser to make sure that its proxy voting actions are consistent with its written policy and that it does not begin diverting from its policy until an amended policy reflecting current intentions is adopted. In addition, if the adviser uses a third-party proxy advisory firm, the adviser needs to conduct due diligence to, among other things, confirm that it approves of the ESG factors used in the firm's voting process and understands the role these criteria play in making voting recommendations. The adviser should also seek to satisfy itself 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 its 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.

Additional U.S. Compliance Considerations for Registered Advisers

SEC Exam Focus Areas and Enforcement Division Task Force

As noted above, the SEC has recently demonstrated an increased focus on ESG. This has been displayed in part by the annual Examination Priorities issued by the Division of Examinations for both 2020 (available here: https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf) and 2021 (available here: https://www.sec.gov/files/2021-exam-priorities.pdf). As part of the Division of Examinations' focus on Registered Adviser compliance programmes, the Division of Examinations noted that it would focus on the consistency and sufficiency of Registered Advisers' disclosures to clients regarding ESG and seek to determine whether advisers' actual practices and procedures match those disclosures. The Division of Examinations also stated that it would review fund marketing and advertising for false or misleading statements relating to ESG, and review proxy voting policies and procedures and actual votes for inconsistencies.

Shortly following the release of the 2021 Examination Priorities, the SEC announced the creation of the Climate and ESG Task Force within the Enforcement Division, which is expected to work closely with other SEC Divisions and Offices (see the press release announcing the establishment of the Task Force, available here: https://www.sec.gov/news/press-release/2021-42).

Division of Examinations' Risk Alert and Guidance

The Division of Examinations also released an ESG-focused risk alert in April 2021 (available here: https://www.sec.gov/files/esg-risk-alert.pdf) (the "Risk Alert"). The Risk Alert suggests that it was prompted by, among other things, the rapid growth in investor demand for investment vehicles that incorporate ESG factors into the investment process, the lack of standardised and precise ESG definitions, and the resulting confusion that can result among investors. The Risk Alert provides examples of deficiencies, as well as effective practices, related to ESG investing observed by the Division of Examinations in its examinations of advisers and funds, and is described as intended in part to assist advisers in developing and enhancing their ESG-related compliance practices. The Division of Examinations noted the following observations of common deficiencies in the Risk Alert:

- Portfolio management practices that were inconsistent with disclosures about ESG approaches in various documents prepared by the adviser.
- Inadequate controls for maintaining, monitoring and updating clients' ESG-related investing guidelines, mandates and restrictions based on an adviser's current practices.
- Inconsistent proxy voting policies and procedures compared with disclosure provided to clients.
- Unsubstantiated or otherwise potentially misleading claims regarding ESG approaches and the performance of ESG-oriented strategies.
- Inadequate controls to ensure that ESG-related disclosures and marketing materials are consistent with an adviser's practices.
- Compliance programmes that did not adequately address relevant ESG issues, such as investing analyses, decision-making processes, or compliance review and oversight.

One common deficiency that the Risk Alert identified was lack of adherence to a global ESG framework, such as the UN Principles for Responsible Investment, when an adviser claimed such adherence in its disclosures to investors. This serves to illustrate a primary lesson of the Risk Alert, which is that advisers that disclose that they are engaged in ESG investing (whether through ESG integration or via a dedicated strategy) need ESG policies, procedures and practices that are (i) tailored to their business, (ii) accurately, clearly and consistently disclosed across all documents and filings, including, without limitation, Form ADV Part 2A, fund offering documents, advisory agreements, marketing materials, side letters, due diligence questionnaires and request for proposal ("RFP") responses, and (iii) demonstrable and consistently followed by all firm personnel, and maintained, monitored and amended as needed by effective compliance personnel.

The Risk Alert did include some observations of effective compliance practices relating to ESG investing, including tailored and precise disclosure, detailed ESG policies and procedures, and advisory compliance personnel that are knowledgeable about ESG practices. Examples of practices of effective compliance personnel identified in the Risk Alert include providing meaningful reviews of the adviser's public disclosures and marketing materials, testing the adequacy of existing ESG policies and procedures and determining whether enhanced or new ESG-related policies and procedures are necessary, assessing whether the adviser's portfolio management processes conform to its stated ESG investing practices, and testing the sufficiency of documentation related to ESG factors taken into account in investment decisions.

In addition to observations of ESG-related deficiencies and effective practices, the Risk Alert also identifies three general focus areas by the Division of Examinations during examinations of Registered Advisers that disclose that they engage in ESG investing (whether through a dedicated product or more generally as part of an adviser's overall investment process), which are portfolio management, performance advertising and marketing, and compliance programmes (e.g., policies and procedures and compliance oversight).

Disclosure of ESG Practices

Consistent with a private fund adviser's fiduciary duty to its clients and the requirement that all material information be disclosed to investors in connection with the offering of private fund interests, an adviser will need to ensure that full and fair disclosure regarding its ESG policy, procedures and practices is included in its Form ADV Part 2A (as further discussed below) and fund offering documents as well as other documents such as advisory agreements, marketing materials, side letters, due diligence questionnaires and RFP responses, as applicable. Further, advisers should consider and identify any material risks and conflicts of interest that may arise from the use of ESG factors in the investment process and provide full and fair disclosure of those risks and conflicts to investors. If an adviser is seeking

to incorporate ESG into the investment strategy for an existing fund, it should also consider whether the integration of ESG represents a material change in the strategy or could be considered adverse to existing clients, in which case the adviser should consider seeking the consent of the applicable clients or offering investors the opportunity to withdraw from the fund prior to the implementation of that change.

A Registered Adviser is required to submit a publicly filed Form ADV in order to register with the SEC and must amend its Form ADV at least annually. Preparation of an adviser's annual amendment presents an opportunity for the firm to review its current disclosure, including those items that may be particularly affected by ESG-related considerations. In particular, Item 5 (Expenses), Item 8 (Methods of Analysis, Investment Strategies and Risk of Loss) and Item 17 (Proxy Voting) should be reviewed to ensure that the disclosure is accurate and specific.

Investor Communications – Marketing Materials, Side Letters, Reporting

In addition to an adviser's more formal disclosures, such as those made in Form ADV Part 2A or a fund's offering documents, an adviser that includes ESG factors in its investment process will likely also make additional disclosures regarding ESG in marketing materials, investor reporting (either generally or in response to specific side letter requests), due diligence questionnaires and responses to RFPs. Advisers may also receive other requests relating to requirements or practices specific to certain U.S. states or non-U.S. jurisdictions (e.g., the EU Sustainable Finance Disclosure Regulation). As noted above, an adviser needs to ensure that its ESG-related disclosures are consistent and accurate across all of these documents and disclosures and be careful to avoid "greenwashing". It is important for firms to take a holistic approach to ESG by involving and educating different groups throughout the firm (e.g., the investment team, investor relations team and compliance team) regarding the firm's ESG policies, procedures and practices. For example, to the extent a manager has dedicated investor relations professionals, these individuals will often be the direct recipients of investor requests relating to ESG and will need the knowledge and training to appropriately, accurately and consistently respond to such requests, as applicable, and may also need to coordinate with other areas of the firm to address such requests. Similarly, as side letter requests relating to ESG continue to become more specific and tailored, an adviser may also need to provide additional reporting requested in such side letters. In addition, if an adviser that does not currently have an ESG-dedicated fund or ESG policies and procedures receives a side letter request relating to ESG, it will need to consider whether it needs to develop ESG policy and procedures or enhance its existing policies and procedures before granting the side letter request.

ERISA Considerations

For the past 25 years, 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 whether there was a republican or democratic administration.

The Trump administration addressed ESG investing in two regulations, "Financial Factors in Selecting Plan Investments" (85 Fed. Reg. 72846 (Nov. 13, 2020)), and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" (85 Fed. Reg. 81658 (Dec. 16, 2020)) (collectively, the "2020 Rules"). The 2020 Rules sought to ensure that plan fiduciaries do not subordinate the interests of participants and beneficiaries in their retirement income or financial benefits under the plan to any non-pecuniary objective or promote non-pecuniary benefits or goals. This could have required ERISA fiduciaries to analyse a fund's or investment manager's prospectus, marketing materials and investment strategy for any non-pecuniary factors being used in the investment process and confirm that proxy voting decisions and other exercises of shareholder rights would be made solely in the interest of providing plan benefits to participants and beneficiaries. In March 2021, however, the Biden administration announced a non-enforcement policy regarding these regulations, and in October 2021, the DOL released a Proposed Regulation entitled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" (the "Proposed Rule"), which would replace the Trump administration's regulations.

If finalised as proposed, the Proposed Rule would generally treat ESG factors as material to an investment's value/risk-return and allow 401(k) plan investment menus to include options that incorporate climate change and other ESG considerations. The Proposed Rule states that a fiduciary making an investment decision may often be required to evaluate ESG factors in its risk-return analysis. While the 2020 Rules acknowledge that ESG factors could be pecuniary, this represents a clear acknowledgment that ESG factors have material risk/return implications and should provide greater comfort to investment advisers who consider ESG factors when investing ERISA plan assets. The Proposed Rule would also make it easier for 401(k) plans to include ESG funds in the plan's list of available investments but would require disclosure of the ESG-themed nature of such funds to the plan participants. If adopted, the Proposed Rule could result in ERISA plan fiduciaries allocating significantly more plan assets to ESG-dedicated funds and vehicles that intend to broadly implement ESG integration.

Conclusion

The growing popularity and investor demand related to ESG has brought it into the focus of the U.S. government and U.S. regulators, exhibited by, among other things, the Division of Examinations' inclusion of ESG in its Examination Priorities for both 2020 and 2021, the Risk Alert released by the Division of Examinations in April 2021, the Enforcement Division's creation of a Climate and ESG Task Force, and the Biden administration's Executive Order on climate-related financial risk. Accordingly, managers seeking to launch a new fund that incorporates ESG into its investment strategy as well as managers seeking to incorporate ESG into the investment strategy for an existing fund should not do so without careful planning and consideration. Such advisers will need to (i) develop an ESG policy and ESG procedures that are tailored to their business and accurately reflect how ESG is incorporated into the investment process, (ii) ensure that their ESG policy and procedures, and related risks and conflicts, are accurately, clearly and consistently disclosed across all documents and filings, as applicable, and (iii) be able to demonstrate that their ESG policy and procedures are consistently followed by all firm personnel, and amended as needed. Further, it will be important for such advisers to stay apprised of developments relating to ESG as further guidance, rules and regulations are released, both in the United States and globally.

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John has particular expertise with the fiduciary aspects of ERISA. He regularly assists clients in developing investment products for the pension plan market, tailoring investment products for specific plan investors and analysing the fiduciary duties, and prohibited transaction risks imposed by these investment structures, specific investment agreements or potential transactions on money managers.

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