SEC TAKES FIRST STEP TOWARD STANDARDIZED ESG DISCLOSURES FOR FUNDS AND INVESTMENT ADVISERS

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U.S. Asset Management and Investment Funds Alert

UPDATE: Since this alert was published, the proposals have been printed in the Federal Register, and the comment period will close on 16 August 2022.

EXECUTIVE SUMMARY

On 25 May 2022, the U.S. Securities and Exchange Commission (the SEC) proposed amendments to existing rules and reporting forms[1] (the Proposed Amendments) designed to promote consistent, comparable, and reliable information for investors concerning the incorporation of environmental, social, and governance (ESG) factors in investment funds and strategies. If adopted, the Proposed Amendments would modify disclosure requirements that apply to all investment companies and business development companies registered under the Investment Company Act of 1940, as amended (the 1940 Act), as well as investment advisers registered under the Investment Advisers Act of 1940, as amended (the Advisers Act), and certain advisers exempt from registration.

At the same meeting, the SEC also voted to propose amendments to rule 35d-1 (the Names Rule) under the 1940 Act to expand the scope of names covered by that rule, including names that indicate ESG-related investment strategies.[2] The Proposed Amendments also come hot on the heels of the SEC's recently proposed climate-related disclosure rules for public operating companies,[3] which were announced on 21 March 2022, and a series of SEC staff risk alerts,[4] press releases,[5] commissioner speeches[6] and reports,[7] other public statements,[8] and enforcement activity[9] that together demonstrate an intense focus on "greenwashing"[10] and other potentially misleading claims regarding the extent to which ESG factors are employed in investment products marketed to U.S. investors.

In the proposing release, the SEC suggested that the absence of a common disclosure framework for ESG products frustrates investor attempts to compare different ESG strategies, and also makes it difficult for investors to find relevant ESG disclosures and determine whether a fund or adviser supports ESG-related claims with "concrete and specific measures" taken to address ESG goals and portfolio allocation. Similarly, the SEC stated its view that the current lack of "consistent, comparable and decision-useful data" makes it difficult for investors to make informed investment decisions regarding ESG matters and may lead to potential greenwashing. Citing the need to address these issues, the SEC voted to propose amendments to existing forms for registered funds and investment advisers, including:

- Disclosure requirements in prospectuses on Forms N-1A and N-2;
- Disclosure requirements for UITs on Forms N-8B2 and S-6;

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- Regulatory reporting on Form N-CEN;
- Disclosure requirements on Form ADV Part 2A; and
- Regulatory reporting on Form ADV Part 1A.

The comment period for the Proposed Amendments is 60 days after publication in the Federal Register.[11] If adopted, registered funds and advisers would be required to comply with the Proposed Amendments within one year of the publication of the final rules.

ESG DISCLOSURE AND REPORTING FOR REGISTERED FUNDS

The proposed ESG-related disclosure and reporting requirements for registered funds focus on prospectuses, annual shareholder reports, and Form N-CEN. The specific disclosures and level of detail required would depend on the extent to which a fund considers ESG factors in its investment processes. To facilitate this framework, the SEC proposed a new fund taxonomy consisting of three categories of ESG funds, each with accompanying disclosure requirements.

> Integration Funds. The SEC defines "Integration Funds" as funds that consider one or more ESG factors alongside other, non-ESG factors in their investment decision-making process, but where such ESG factors are not dispositive in the funds' investment decisions. For such funds, ESG factors would generally not be given greater weight or consideration than other non-ESG factors in the investment selection process.

> ESG-Focused Funds. The SEC defines "ESG-Focused Funds" as funds that consider one or more ESG factors as significant or primary factors in selecting investments or in engagement with portfolio companies. ESG-Focused Funds include, for example, funds that apply inclusionary or exclusionary screens, funds that focus on ESG-related engagement with issuers, and funds that track an ESG-focused index. The category also includes any fund that markets itself as having an ESG focus.

> Impact Funds. The SEC defines "Impact Funds" as a subset of ESG-Focused Funds that seek to achieve one or more specific ESG impacts (e.g., advancing the availability of clean water, sustainable management of timberland).

Prospectus Disclosures

Under the Proposed Amendments, a fund engaged in ESG investing would be required to provide certain additional information about the fund's implementation of ESG factors in its principal investment strategies

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through a layered disclosure framework. As proposed, open-end funds would provide a concise description of this information in the fund's summary prospectus and a more detailed description in the fund's statutory prospectus. For closed-end funds, disclosure of summary information would be provided as part of the prospectus's general description of the fund, with the more detailed disclosure presented later in the prospectus.[12]

- *Integration Fund Disclosure.* Integration Funds would be required to explain how they incorporate ESG factors into their investment selection processes and how such ESG factors are considered alongside other factors. In addition to this general requirement, an Integration Fund that considers greenhouse gas (GHG) emissions would also be required to disclose additional information about how the fund considers GHG emissions, including the methodology and data sources the fund may use as part of its consideration of GHG emissions.
- *ESG-Focused Fund Disclosure.* ESG-Focused Funds would be required to provide more detailed disclosure than Integration Funds, including in a standardized "ESG Strategy Overview Table" in the fund's prospectus. Part of the table would consist of a "check-box" format for funds to indicate which common ESG strategies the fund employs (i.e., tracks an index, applies a screen, seeks to achieve a specific impact, proxy voting, engagement, other), while the rest would require brief narrative descriptions of the ESG factor or factors that are the focus of the fund's strategy, how the fund incorporates these ESG factors into its investment decisions, and how the fund votes proxies or otherwise engages with portfolio companies on ESG issues. These disclosures would be complemented by more detailed descriptions later in the prospectus that would address, among other things, any internal methodology or third-party data provider (if applicable) used in selecting investments, identification of indices the fund tracks (if applicable), and the participation of the fund and (as relevant) the fund's adviser in any third-party ESG frameworks (e.g., UN PRI, UN SDG).
- *Impact Fund Disclosure.* In addition to the disclosure requirements applicable to ESG-Focused Funds, Impact Funds would be required to disclose in their investment objectives the ESG impact the fund seeks to generate with its investments, as well as (1) how the fund measures progress toward the stated impact, (2) the time horizon used to measure that progress, and (3) the relationship between the impact the fund is seeking to achieve and the fund's financial returns.

The SEC explicitly cautioned funds to avoid excessive or overly-detailed ESG disclosure that could misrepresent the role and scope of ESG factors in the fund's investment selection process.

Annual Shareholder Report Disclosures

In addition to the proposed prospectus disclosure requirements, the SEC proposed amendments that would require funds to include additional ESG-related information in annual shareholder reports. For registered investment companies, the proposed disclosure would be included in the management's discussion of fund performance (MDFP) section, and for BDCs, in the management discussion and analysis (MD&A) section. These disclosures would include:

- For Impact Funds, a summary of progress towards achieving stated ESG impacts;
- For ESG-Focused Funds that use proxy voting as a significant means of implementing an ESG strategy, information regarding how the fund voted proxies on particular ESG-related voting matters;

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- For ESG-Focused Funds that use ESG engagement as a significant means of implementing an ESG strategy, information regarding the fund's participation in ESG engagement meetings; and
- For certain ESG-Focused Funds that consider environmental factors, GHG emissions metrics.

Importantly, all ESG-Focused Funds, including BDCs, would be required to disclose the carbon footprint and the weighted average carbon intensity (WACI) in their annual shareholder reports unless the fund affirmatively states that it does not consider issuers' GHG emissions as part of its investment strategy in the ESG Strategy Overview Table in the fund's prospectus (discussed above). Consequently, funds would need to pay particular attention to ensuring consistency between statements regarding GHG emissions made in fund prospectuses and annual shareholder reports.

XBRL Tagging

If adopted, the Proposed Amendments would also require all ESG-related disclosure information in fund registration statements and annual shareholder reports to be tagged using Inline eXtensible Business Reporting Language (Inline XBRL), which is a structured, machine-readable data language.

ESG DISCLOSURE AND REPORTING FOR INVESTMENT ADVISERS

As proposed, investment advisers that consider ESG factors as part of their advisory business would be required to include specific disclosures regarding their ESG strategies (similar to those for registered funds discussed above) in their Form ADV. Below we address key aspects of each proposal.

Form ADV Brochure

The proposed ESG-related disclosure and reporting requirements for investment advisers are imposed primarily through amendments to Form ADV, Part 2A (the Brochure). The Proposed Amendments require investment advisers to disclose with specificity their ESG investing approach by strategy, as well as certain relationships with related persons, and any ESG-related impacts on proxy voting. The specific disclosure requirements are as follows:

- *ESG Strategy Disclosure.* As proposed, new sub-Item 8.D would require advisers to describe the ESG factor(s) considered for each significant investment strategy or method of analysis, including whether and how the adviser incorporates a particular ESG factor and/or a combination of factors into its management of the strategy. In addition, similar to registered funds, the proposed disclosure must explain whether and how the adviser employs integration and/or ESG-focused strategies, and if ESG-focused, whether and how the adviser also employs ESG impact strategies. If an adviser considers different ESG factors for different strategies, separate disclosures would be required for each strategy.
- *ESG Criteria/Methodology.* Proposed sub-Item 8.D would also require advisers to describe any criteria or methodology used to evaluate, select, or exclude investments based on the consideration of ESG factors, including any: (1) internal methodology or third-party framework, (2) inclusionary or exclusionary screen, and/or (3) index, including the name and a description of how the index utilizes ESG factors.[13]
- *Relationships with Related Persons.* Advisers would be required to describe in Item 10.C of the Brochure any material relationship or arrangement with any related person that is an ESG consultant or other

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service provider. The proposed form amendments would not define or otherwise provide guidance regarding the scope or application of the term “ESG consultants or other service providers”.[14]

- *Proxy Voting.* If an adviser has specific proxy voting policies and procedures to include one or more ESG considerations when voting client securities, the adviser would be required to describe in Item 17 of the Brochure which ESG factors are considered and how they are considered. To the extent this information is previously disclosed in the Brochure (e.g., in Item 8), a cross reference would also satisfy this requirement.

Currently, investment advisers must update their Brochure promptly if any information therein becomes materially inaccurate. As such, changes to an adviser's ESG approach for a particular strategy (e.g., the particular ESG factor(s) considered and extent to which they are considered) could necessitate other-than-annual amendments to the Brochure (and corresponding re-delivery of the Brochure to existing clients).

Wrap Fee Brochure

The SEC also proposed corresponding updates to the specialized brochure delivered to wrap fee clients, which would require advisers that consider ESG factors in their wrap fee programs to provide a description of which factors the adviser considers and how they are incorporated under each program.

Advisers sponsoring wrap fee programs would be required to disclose if ESG factors are considered when selecting, reviewing, or recommending portfolio managers within the wrap fee programs they sponsor, including any criteria or methodology used to assess portfolio managers' applications of the ESG factors in their portfolio management and whether the adviser (or a third party) reviews such application. Advisers would also be required to affirmatively disclose if they (or a third party) do not assess portfolio managers' application of the relevant ESG factors into their portfolio management and/or that such application may not be calculated, compiled, assessed, or presented on a uniform and consistent basis.

If the adviser itself acts as a portfolio manager for a wrap fee program, it would also be required to respond to new sub-Item 8.D discussed above.

Form ADV Part 1A

The proposed form amendments would also add new reporting requirements to Form ADV Part 1A. As proposed, the amendments would expand current reporting with respect to advisory services provided to separately managed account (SMA) clients and private fund[15] to include the following:

- *ESG Data for SMAs.*[16] Advisers must indicate using “Yes”/“No” responses whether ESG factors are considered when managing SMA client accounts and, if yes, the type of strategy (i.e., integration, ESG-focused, impact) and the specific factors considered (i.e., environmental, social, and/or governance). Advisers would also be required to disclose whether they follow any third-party ESG frameworks (e.g., UN PRI) in connection with their advisory services, and list any such frameworks by name.

- *ESG Data for Private Funds.* Similar to the proposed reporting for SMA clients (and the information proposed to be collected on Form N-CEN), advisers and exempt reporting advisers would be required to disclose information about the use of ESG factors in managing each reported private fund, including the type of strategy and specific factors considered.

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- *ESG-Related Activities and Related Persons*. Advisers and exempt reporting advisers would also be required to disclose whether they conduct other business activities as, or have related persons that are, ESG consultants or other ESG service providers.

The ESG-related information reported in Form ADV Part 1A would be provided in an adviser's annual update and would not require updates on an other-than-annual basis.

As noted by the SEC, the proposed amendments to Part 1A are primarily designed to collect information regarding advisers' use of ESG factors in their advisory business and better facilitate the SEC's risk monitoring initiatives with respect to ESG. This reporting, together with the proposed Brochure disclosure, will significantly increase advisers' public disclosure regarding ESG considerations, which may facilitate greater scrutiny of advisers' investment processes and potentially more ESG-related enforcement activity.

Compliance Policies and Procedures and Marketing

In the proposing release, the SEC also reaffirmed the position recently taken by the SEC and its staff in various public statements that the existing compliance regime established by Rule 206(4)-7 under the Advisers Act and Rule 38a-1 under the 1940 Act impose certain obligations on investment advisers and registered funds that incorporate ESG factors. Specifically, the SEC highlighted that advisers' and funds' compliance policies and procedures should, among other things, address the accuracy of ESG disclosures made to clients, investors, and regulators and be reasonably designed to ensure portfolios are managed consistently with the ESG-related investment objectives disclosed by the adviser and/or fund.

With respect to marketing activities, the SEC also noted that Rule 206(4)-1 (the Marketing Rule) and Rule 206(4)-8 under the Advisers Act are designed to prevent false or misleading advertisements by advisers, and that these rules clearly prohibit greenwashing by investment advisers. For example, it would generally be materially misleading for an adviser to materially overstate in an advertisement the extent to which it utilizes or considers ESG factors in managing client portfolios.

"GREENWASHING" REMAINS A RISK FOR PRIVATE FUNDS AND ADVISORY SERVICES

It is noteworthy that the Proposed Amendments do not impose any direct, specific disclosure obligations on private funds or managers of private funds. However, the ESG-related claims of private fund sponsors will continue to be subject to scrutiny under the general antifraud standards of the Advisers Act, as well as the Marketing Rule, which was recently amended to extend to communications made by investment advisers regarding private funds they manage. As demonstrated by recent enforcement activity, the SEC currently has the tools to bring enforcement against all investment advisers for "greenwashing," and will likely continue to do so before and after any final rule and form amendments with respect to ESG disclosures. Additionally, many investment advisers manage the same or substantially similar investment strategies for registered funds, private funds, separate account clients, CITs, AIFs, UCITS, and other non-U.S. funds. These advisers must take care to describe the same investment strategy consistently across different product types, and in Form ADV Brochures. Consequently, the specific requirements applicable to registered funds that implement Integration or ESG-focused

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investment strategies will likely influence the marketing practices of many private fund managers and investment advisers generally, even in the absence of explicit regulation.

Additionally, the ESG disclosure practices of all investment advisers will continue to be subject to regulatory scrutiny. During recent SEC examinations, the SEC staff has highlighted instances of unsubstantiated claims regarding ESG investing, misrepresentations regarding the adherence to global ESG frameworks, and a lack of policies and procedures related to ESG investing analyses, decision-making processes, or compliance review. Specifically, the staff has observed portfolio management practices that differed from public-facing disclosure materials, such as Form ADV Brochures. In addition, the staff observed a lack of controls around the implementation and monitoring of clients' negative screens as well as inconsistencies. We anticipate that efforts by the SEC and its staff to identify and take action regarding these practices will only expand during the pendency of the Proposed Amendments.

COMPARING THE PROPOSED AMENDMENTS TO GLOBAL STANDARDS

While the Proposed Amendments do not define ESG (or any of its individual factors), they do provide a new taxonomy of fund types pursuant to which additional disclosures would be required. Given this taxonomy—and Commissioner Peirce's official statement that the Proposed Amendments represent “coercion through disclosure”—it may be tempting to see resemblances between the Proposed Amendments and other ESG regimes, most prominently the European Union's Sustainable Finance Disclosure Regulation (SFDR). The SEC's new taxonomy of “Integration” and “ESG-Focused” Funds does bear some resemblance to the SFDR's Article 8 and Article 9 categorization of funds. And, like SFDR, the Proposed Amendments would impact the disclosure requirements of both funds and investment advisers.

It remains to be seen, however, whether the enhanced disclosure regime under the Proposed Amendments will result, as commenters have observed with regard to SFDR, in the de facto regulation of ESG investing through disclosure requirements.

Among other differences, SFDR focuses exclusively on sustainability, and sustainability risks in particular, whereas the Proposed Amendments cover all three ESG factors—albeit with “E” receiving pride of place—and focus on the description of the adviser's incorporation of ESG factors in its investment decision-making process rather than on risk factors.

NEXT STEPS

The Proposed Amendments impose several new and standardized disclosure requirements for registered funds, and while the amendments to Form ADV Part 2A afford investment advisers a greater degree of freedom to describe their ESG investment processes, they also represent a significant new disclosure obligation. Nearly all U.S. funds and advisers will be affected by the Proposed Amendments to some degree, and will need to consider how to approach these new requirements. This is particularly true for registered funds with investment strategies that do not fit neatly into the SEC's proposed disclosure framework.

Please see below a summary of the proposed disclosure requirements for registered funds (in prospectuses and annual shareholder reports) and for investment advisers (in the Form ADV Brochure):

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	Registered Funds			Investment Advisers
	Summary Prospectus[17]	**Statutory Prospectus[18]**	**Annual Report**	**ADV Part 2A**
Integration Fund/Strategy	Summarize "in a few sentences" how the fund incorporates ESG factors into its investment process, and which factors are considered.	Describe how the fund incorporates ESG factors into its investment selection process, including which ESG factors it considers. Funds that consider GHG emissions as a factor must specifically describe the methodology used to assess portfolio company GHG emissions.	No disclosure required.	For each strategy, describe how ESG factors are incorporated, and which factors are considered. Explain whether and how ESG factors are considered alongside other non-ESG factors. Describe any criteria or methodology used to evaluate, select, or exclude investments based on the consideration of ESG factors (i.e., internal or third-party methodology, screens, or indices).
ESG-Focused Fund/Strategy	Provide key information about the consideration of ESG factors in a standardized "Strategy Overview" table describing: (i) an overview of the fund's ESG strategy, (ii) how the fund incorporates ESG factors in its	Describe how the fund incorporates ESG into its investment selection process, including: (i) the index methodology for any index the fund tracks, (ii) any internal methodology used, (iii) the scoring or rating system of	If proxy voting is a significant means of implementing the fund's ESG strategy, disclose certain information regarding how the fund voted proxies on ESG issues. If engagement with issuers on ESG issues through	For each strategy, describe how ESG factors are incorporated, and which factors are considered. Explain whether and how the strategy focuses on one or more ESG factors. Describe any criteria or methodology used

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	investment decisions, and (iii) how the fund votes proxies and/or engages with companies about ESG issues.	any third-party used by the fund, (iv) the factors applied by any inclusionary or exclusionary screen, (v) a description of any third-party ESG framework used, and (vi) a description of the objectives of any engagement activities, whether by voting proxies or otherwise.	means other than proxy voting is a significant means of implementing a fund's ESG strategy, disclose certain information about engagement activities. If the fund considers environmental factors, disclose the aggregated GHG emissions of the portfolio.	to evaluate, select, or exclude investments based on the consideration of ESG factors (i.e., internal or third-party methodology, screens, or indices).
Impact Fund/Strategy	Include all disclosures required for ESG-Focused Funds. Include in the fund's investment objective the ESG impact(s) the fund seeks to generate with its investments. Disclose (i) how the fund measures progress toward the stated impact(s), (ii) the time horizon used to measure that progress, and (iii) the relationship between the impact(s) sought and the fund's financial return.	Include all disclosures required for ESG-Focused Funds.	Include all disclosures required for ESG-Focused Funds. Additionally, discuss the fund's progress toward achieving its impact(s) during the reporting period in both qualitative and quantitative terms, including the key factors that materially affected the fund's ability to achieve its impact(s).	Include all disclosures required for ESG-Focused Strategies. Additionally, provide an overview of the impact(s) the adviser seeks to achieve and how it seeks to achieve those impact(s) (including how progress is measured, the key performance indicators analyzed, the time horizon, and the relationship between the impact(s) sought and financial returns).

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FOOTNOTES

[1] See U.S. SEC. & EXCH. COMM'N, ENHANCED DISCLOSURES BY CERTAIN INVESTMENT ADVISERS AND INVESTMENT COMPANIES ABOUT ENVIRONMENTAL, SOCIAL, AND GOVERNANCE INVESTMENT PRACTICES (May 25, 2022).

[2] For additional information on the SEC's proposed amendments to the Names Rule, please refer to our 26 May 2022 client alert, A Fund By Any Other Name: SEC Proposes Names Rule Amendments.

[3] For additional information and guidance on these proposals, please refer to our 23 March 2022 client alert, SEC Issues Climate-Related Risk Disclosure Rule Proposal.

[4] The Division of Examinations' Review of ESG Investing, Division of Examinations Risk Alert (Apr. 9, 2021), https://www.sec.gov/files/esg-risk-alert.pdf (highlighting observations from exams of investment advisers, registered investment companies, and private funds offering ESG products and services).

[5] Press Release, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

[6] Gary Gensler, Chairman, SEC, Remarks Before the Asset Management Advisory Committee (July 7, 2021), https://www.sec.gov/news/public-statement/gensler-amac-2021-07-07.

[7] Asset Management Advisory Committee, SEC, Recommendations for ESG (July 7, 2021), https://www.sec.gov/files/spotlight/amac/recommendations-esg.pdf

[8] Division of Examinations, SEC, 2022 Examination Priorities (Mar. 30, 2022), https://www.sec.gov/files/2022-exam-priorities.pdf (stating that the Division of Examinations will continue focusing on ESG-related advisory services and investment products in 2022 with particular focus on the accuracy of ESG investing approach disclosures and the adoption and implementation of policies, procedures, and practices designed to prevent violations of the federal securities laws in connection with ESG-related disclosures); https://www.sec.gov/oiea/investor-alerts-and-bulletins/environmental-social-and-governance-esg-funds-investor-bulletin

[9] In re BNY Mellon Investment Adviser, Inc., Investment Advisers Act Release No. 6032 (May 23, 2022), https://www.sec.gov/litigation/admin/2022/ia-6032.pdf (settling SEC allegations that it made a series of misstatements and omissions about the investment adviser's ESG quality review process); Patricia Kowsmann et al., U.S. Authorities Probing Deutsche Bank's DWS Over Sustainability Claims, WALL ST. J. (Aug. 25, 2021, 4:23 PM (ET)), https://www.wsj.com/articles/u-s-authorities-probing-deutsche-banks-dws-over-sustainability-claims-11629923018 (reporting that the DWS Group is under investigation by the SEC and federal prosecutors for, among other things, false ESG claims relating to product capabilities).

[10] "Greenwashing" generally describes the practice of making exaggerated claims about the ESG qualities of an investment product or strategy, or the extent to which an investment product or strategy takes into account ESG factors, in order to attract business.

[11] As of the date of this alert, the Proposed Amendments have not been published in the Federal Register.

[12] In addition to registered open-end and closed-end funds, the Proposed Amendments would capture Unit

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Investment Trusts (UITs) that select securities based on one or more ESG factors and require, to a lesser extent, similar disclosures.

[13] A hyperlink to any such framework, criterion, or index may be included in the response.

[14] However, the SEC noted in the proposing release that an ESG consultant or other ESG service provider may include ESG index providers and ESG scoring providers.

[15] For purposes of reporting on Form ADV, “private fund” means an issuer that would be an investment company as defined in section 3 of the Investment Company Act of 1940 but for section 3(c)(1) or 3(c)(7).

[16] Because exempt reporting advisers are not currently required to complete Item 5 of Part 1A, they would not be required to complete the ESG-related reporting in Item 5.

[17] For closed-end funds (which do not utilize a summary prospectus), this information must be disclosed as part of the general description of the fund.

[18] For closed-end funds, this disclosure must appear later in the prospectus.

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