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RESPONSIBLE INVESTING: LEGAL AND COMPLIANCE CONSIDERATIONS FOR ASSET MANAGERS

Investor demand for responsible investment strategies has grown substantially in recent years, creating both opportunities and challenges for asset owners and asset managers. The author surveys the field, focusing on the types of responsible investing, the differing regulatory landscapes in the U.S. and Europe, and various topics in compliance and legal considerations arising in connection with responsible investing strategies.

By Vadim Avdeychik *

Whether you call it ESG, SRI, Impact, or Responsible Investing, investing with a purpose for a better tomorrow has attracted the attention of many investors. As a result, asset managers around the globe are looking to accommodate investor appetite for these types of investment strategies.[1] However, before marketing themselves as "Responsible Investors," asset managers need to be aware of the legal and compliance obligations and challenges that are attached to these strategies. Those who ignore building out a robust compliance and legal framework run the risk of reputational damage, regulatory penalties, and not being able to capitalize on investor demand for these strategies.

This article aims to provide an overview of the Responsible Investing landscape. It explores certain regulatory initiatives in the United States and Europe, and the role of non-governmental entities in this area. It analyzes the increasing investor appetite for these strategies. Finally, it discusses certain compliance and legal obligations associated with managing Responsible Investment strategies.

I. WHAT IS THE PROPER TERMINOLOGY?

For purposes of this article, the term "Responsible Investing" is used as an overarching term meant to encapsulate ESG, SRI, Impact, and Responsible Investing investment strategies. In practice, however, each of these generally represents a specific type of investment strategy, employing varying investment screens or goals. As a result, asset managers should take care to ensure that their marketing terminology corresponds to their underlying investment thesis and objective. Below is a brief description of each.

Environmental, Social and Governance ("ESG")

Asset managers pursuing an ESG investment strategy typically employ negative or positive screens that aim to enhance traditional financial analysis by incorporating environmental, social, and governance screens. For example, an asset manager may structure an investment product that will analyze companies based on their corporate governance, or based on their involvement in

[1] Blaine F. Aikin, *ESG Data Getting Better as the Market Matures*, Inv. News (Aug. 21, 2019), https://www.investmentnews.com/article/20190821/BLOG09/190829981/esg-data-getting-better-as-the-market-matures (noting that sustainable funds attracted an estimated $8.9 billion in net flows in the first half of 2019, surpassing their $5.5 billion in flows for all of 2018).

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FORTHCOMING

● ***DIGITAL ASSET REGULATION:*** **HOWEY** ***EVOLVES***

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certain industries or product lines, such as gambling, alcohol, tobacco, coal, or weapons. Similarly, an asset manager may structure an investment product by focusing on companies that display superior: (1) sustainable environmental practices; (2) responsible resource management and energy efficiency; (3) policies regarding social responsibilities; (4) employee welfare, diversity, and inclusion; and (5) governance practices that align the interests of shareholders and management, and emphasize a commitment to ESG integration. In short, ESG investing looks not only to incorporate certain positive or negative screens associated with environmental, social, and governance practices, but ultimately utilize ESG factors in order to enhance traditional financial analysis by identifying risks and opportunities that to date have been beyond traditional financial analysis.

Socially Responsible Investing ("*SRI*")

When it comes to SRI investing, unlike ESG investing, asset managers typically focus on certain areas by eliminating or identifying investments based on specific, prescribed SRI guidelines. Instead of using screens to enhance traditional financial analysis, an asset manager will eliminate companies that are engaged in certain practices. For example, an asset manager may eliminate a company that is engaged in weapons manufacturing, or dealing in alcohol, tobacco, or in manufacturing of other addictive substances. Similarly, an asset manager may structure an investment product that identifies companies that champion certain socially responsible causes.

Impact Investing

When pursuing impact investing, asset managers typically want to ensure that their allocation of capital will bring about certain positive impacts. In essence, the goal of impact investing is to generate a positive, measurable, social or environmental impact alongside a financial return. The Global Impact Investing Network ("GIIN") defines impact investing as investing marked "by an intentional desire to contribute to measurable social or environmental benefit. Impact investors aim to solve problems and address opportunities."[2] Some impact investors have looked to various asset classes in order to deliver impact results. For example, municipalities that issue municipal securities may use the proceeds to address an environmental, social, or community development concern. Thus, utilizing a municipal securities portfolio may provide an investor with a path to meeting its impact goals. Another example of impact investing is "opportunity zones." With the adoption of the Tax Cuts and Jobs Act in December 2017, opportunity zones were introduced to provide tax incentives for long-term investing in designated economically distressed communities.[3] Thus, opportunity zones investments may be structured so that investors may invest in local communities and have their investment provide a community-specific incentive for further long-term impact.

Responsible Investing

The United Nations Principles for Responsible Investment ("PRI") defines Responsible Investing as "an approach to investing that sees investors include [ESG] factors in their decisions about what to invest in and the role they play as owners and creditors."[4] PRI further notes that Responsible Investing "aims to combine better risk management with improved portfolio returns, and to reflect investor and beneficiary values in an investment strategy. It complements traditional financial analysis and portfolio construction techniques."[5] Based on this definition, Responsible Investing appears to combine components of each of SRI and ESG investing.

It is understandable that an investor may be confused by the different terminology described above. And other

[2] GLOB. IMPACT INV. NETWORK, *Core Characteristics of Impact Investing*, https://thegiin.org/characteristics/ (last visited Oct. 15, 2019).

[3] SEC, STAFF STATEMENT ON OPPORTUNITY ZONES: FEDERAL AND STATE SECURITIES LAW CONSIDERATIONS (Jul. 31, 2019), https://www.sec.gov/page/staff-statement-opportunity-zones-federal-and-state-securities-laws-considerations?auHash=R7M33AsyJ7NmnGs29aKCL5nU7niOu-jDhpsWnFKqth4.

[4] PRI, *What is Responsible Investment?*, https://www.unpri.org/download?ac=6998 (last visited Oct. 15, 2019).

[5] *Id.*

terms used may further the confusion: green investing; ethical investing; thematic investing; mission-related investing; and value based investing.[6] In a report published by Pensions Policy Institute ("PPI"), an educational charity that provides non-political, independent comment and analysis on pension policy in the United Kingdom, PPI noted that there is "some confusion among trustees and independent governance committees ('IGC'), advisers, and investment managers, as to the purposes and definition of ESG."[7] In addition, PPI noted that the "confusion arises because of: (1) the conflation of ESG with 'ethics' and (2) a lack of clarity among trustees and IGCs as to whether they are required to take factors into account that will not impact their scheme financially."[8] Due to the confusion surrounding ESG, SRI, Impact, and Responsible Investing, it is paramount that an asset manager uses appropriate terminology consistently in order to ensure that the terminology matches the underlying investment strategy and an investor's mandate.

II. RESPONSIBLE INVESTMENT STRATEGIES SEE INCREASED DEMAND

It is hard to tell when Responsible Investing began to grab investor attention, but it is clear that in recent years Responsible Investment strategies have seen outsized asset allocations.[9] According to a U.S. SIF Foundation report, as of the end of 2017, approximately $12 trillion in total assets under management in the U.S. used one or more sustainable, responsible, or impact investment strategies.[10] The report specifically notes that this figure "continued to grow at a strong pace."[11] Assets in U.S. mutual funds reached $2.6 trillion, up 34% from 2016, with the number of ETFs more than doubling from 25 to 69. With respect to alternative investment vehicles (*e.g.*, private equity and hedge funds), ESG assets under management in 780 alternative investment vehicles totaled $588 billion at the start of 2018.[12] In order to meet this demand, several global asset managers, including Vanguard,[13] DWS,[14] Blackrock,[15] Bain Capital,[16] TPG,[17] and Goldman Sachs,[18] have launched new Responsible Investment products.

In Europe, the growth of assets under management attributable to Responsible Investing is more advanced than in the United States. According to a report published by Schroders, a global asset management firm, "in Europe, 58% of fund investors already see ESG as an important consideration, substantially higher than 21% in the U.S. Furthermore, just 14% of pension fund investors in Europe do not think ESG will ever be an important consideration, yet this rises to 53% for investors in the U.S."[19] In addition, the Schroders report notes that "40.3% of the average European pension fund

[6] U.S. SIF, *SRI Basics*, FORUM SUB. & RES. INV., https://www.ussif.org/sribasics (last visited Oct. 15, 2019).

[7] DANIELA SILCOCK, *ESG: Past, Present and Future*, PENSIONS POL'Y. INST. (2018), HTTPS://WWW.PENSIONSPOLICY INSTITUTE.ORG.UK/MEDIA/2398/20181002-PPI-ESG-PAST-PRESENT-AND-FUTURE-REPORT-FINAL.PDF (last visited Oct. 21, 2019).

[8] *Id.*

[9] Leslie P. Norton, *Money is Pouring Into ESG Funds. It's Good News for Microsoft Stock*, BARRON'S (Oct. 1, 2019), https://www.barrons.com/articles/microsoft-stock-wins-in-the-esg-investing-boom-51569942806 (noting that "for the 80 U.S.-listed ESG ETFs with a combined $16.4 billion in assets, net inflows have been strong year to date, with roughly 55% growth in 2019 versus 5% growth for ETF assets as a whole . . .").

[10] U.S. SIF, *Report on US Sustainable, Responsible and Impact Investing Trends 2018*, U.S. SIF FOUND. REP. (2018).

[11] *Id.*

[12] *Id.*

[13] VANGUARD, *Vanguard Launches Two New ESG Index ETFs* (Sept. 20, 2018), https://institutional.vanguard.com/VGApp/iip/site/institutional/researchcommentary/article/NewsInstInfo092018.

[14] Lara Crigger, *ESG ETF's Launch Biggest in 15 Years*, ETF.COM (Mar. 8, 2019), https://www.etf.com/sections/features-and-news/esg-etfs-launch-biggest-15-years?nopaging=1.

[15] BUSINESSWIRE, *Blackrock Takes Sustainable Investing Mainstream with Range of Low-Cost Sustainable Core ETFs* (Oct. 23, 2018), https://www.businesswire.com/news/home/20181023005702/en/BlackRock-Takes-Sustainable-Investing-Mainstream-Range-Low-Cost.

[16] Felix Salmon, *Impact Investment: Private Equity Puts its Money Where its Mouth Hasn't Been*, EUROMONEY (Sept. 20, 2018), https://www.euromoney.com/article/b1b0tg84d0zwgp/impact-investment-private-equity-puts-its-money-where-its-mouth-hasnt-been.

[17] Gandhi, Brumme & Mehta, *The Rise Fund: TPG Bets Big on Impact*, HARV. BUS. SCH. CASE 318-041 (Aug. 2019).

[18] BUSINESSWIRE, *Goldman Sachs Asset Management Announces Launch of Exchange-Traded Fund to Track JUST Capital's Index* (Jun. 12, 2018), www.businesswire.com/news/home/20180612005943/en/Goldman-Sachs-Asset-Management-Announces-Launch-Exchange-Traded.

[19] SCHRODERS, *European Investors Lead U.S. Counterparts for ESG Adoption* (Jul. 3, 2017), https://schroders.com/en/media-relations/newsroom/all_news_releases/european-investors-lead-us-counterparts-for-esg-adoption/.

investor's portfolio is allocated based on ESG principles, more than double the amount in the U.S."[20]

As demand for Responsible Investing rises globally, so will the demand for regulation and clear guidance as to the obligations of the various market participants, including investors, asset managers, and third-party service providers.

III. REGULATORY LANDSCAPE IN THE UNITED STATES AND EUROPE

For asset managers that are interested in raising assets from U.S. domiciled clients, U.S. regulators have provided little formal regulatory guidance specifically applicable to Responsible Investing. Nonetheless, any asset manager subject to U.S. regulation that is looking to raise assets from U.S. clients should be familiar with the limited guidance available to them.

ERISA

For asset managers that act as fiduciaries to ERISA[21] plan assets, DOL's Field Assistance Bulletin 2018-01 ("FAB 2018") is of particular note.[22] The bulletin was intended to clarify two prior DOL guidance statements — Interpretive Bulletin 2015-01[23] on economically targeted investments and Interpretive Bulletin 2016-01[24] on the exercise of shareholder rights and written statements of investment policy. FAB 2018 notes that ERISA fiduciaries "must not too readily treat ESG factors as economically relevant to the particular investment choice at issue when making a decision." Rather, plan fiduciaries must focus first on economic factors, for example risk and return, instead of sacrificing returns or taking additional risk to promote "collateral social policy goals." Thus, FAB 2018 appears to indicate that plan fiduciaries should engage in a cost-benefit analysis as they consider engaging on ESG issues and reiterated the DOL's long standing position that these factors should serve only as a "tie-breaker" when selecting between otherwise equivalent options. Therefore, in those instances where an asset manager is acting as an ERISA fiduciary, it should take into account FAB 2018 when advising an ERISA plan client on the suitability of a particular Responsible Investment strategy.

Furthermore, on April 10, 2019, the White House issued an Executive Order[25] which calls on the DOL to identify whether there are discernible trends with respect to ERISA plans' investment in the U.S. energy sector. This directive appears to seek information from the DOL on whether consideration of ESG factors by ERISA plans has decreased ERISA plan investment in U.S. energy companies. Collectively, FAB 2018 and the Executive Order appear to signal the current administration's desire to influence the regulatory environment when it comes to ERISA fiduciaries and their consideration of Responsible Investing factors when making investment decisions.

Asset managers that market and manage Responsible Investment strategies also should be aware of the obligations that may arise under the Investment Company Act of 1940 and the Investment Advisers Act of 1940.

Investment Company Act

An asset manager that serves as an investment manager to an investment company registered under the Investment Company Act should be aware of certain rules and regulations that may apply to a fund pursuing a Responsible Investment strategy. For example, section 35(d) of the Investment Company Act, in relevant part, makes it unlawful for any registered investment company to adopt as part of its name or title any word or words that the SEC finds to be materially deceptive or misleading.[26] Rule 35d-1 under the Investment Company Act states that funds with certain types of names must adopt investment policies with respect to 80% of the registered investment company's net assets to avoid violating section 35(d). Unfortunately, there is little Commission or staff guidance as to the application of Rule 35d-1 to registered investment companies pursuing a Responsible Investment strategy. Thus, an asset manager launching a registered investment company that will pursue a Responsible Investing strategy will have to work through the comment/response process with the SEC's Division of

[20] *Id.*

[21] U.S. Department of Labor ("DOL") is responsible for the administration of the Employee Retirement Income Security Act of 1974 ("ERISA"). In general, ERISA applies to asset managers that transact with employee benefit pension plans covered under ERISA.

[22] DOL, Field Assistance Bulletin No. 2018-01 (Apr. 23, 2018), dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01.

[23] DOL, Interpretive Bulletin No. 2015-01, 80 Fed. Reg. 65,135 (codified at 29 C.F.R. § 2509.2015-01 (2015)).

[24] DOL, Interpretive Bulletin No. 2016-01, 81 Fed. Reg. 95,879 (codified at 29 C.F.R. § 2509.2016-01 (2016)).

[25] Exec. Order No. 13868, Promoting Energy Infrastructure and Economic Growth, Sec. 3 C.F.R. (Apr. 10, 2019), 84 Fed. Reg. 15495.

[26] 15 U.S.C. § 80a-34(d).

Investment Management. On certain occasions in the past, SEC staff has requested that a registrant include an 80% policy for a fund that had Responsible Investing in its name.[27] Similar SEC staff comments may apply to funds that include ESG, SRI, or Impact in their names.

Advisers Act

Asset managers that are SEC-registered investment advisers also must ensure that their compliance policies and procedures are consistent with the requirements of the Advisers Act, including policies and procedures relating to Responsible Investing.[28] For example, as the Responsible Investing landscape develops, more and more investors are mandating that an asset manager adopt a policy with respect to Responsible Investing and provide periodic reporting to the investor on the performance of its Responsible Investment strategies.[29] As discussed further below, such policies must be consistent with the asset manager's investment approach and must take into consideration other parts of its business, including those parts that do not pursue a Responsible Investing strategy. For example, while a client pursuing a Responsible Investment strategy will want to ensure that its proxies are voted a specific way on certain shareholder proposals (*e.g.*, climate change risk), a client that is not pursuing a Responsible Investment strategy may choose to abstain from voting on the same proposal or vote against it. Thus, an asset manager needs to anticipate such conflicts and have appropriate policies to deal with them before they arise. Furthermore, when it comes to client reporting, if an asset manager is relying on third-party service providers to provide the necessary data, it is important that the asset manager conducts the necessary due diligence to ensure that such reporting is accurate and can be verified. While we have not seen SEC enforcement actions in this area, we have seen SEC enforcement actions in other areas that can serve as a guidepost for asset managers when considering Responsible Investment policies and procedures.[30] In the AXA enforcement action, the SEC alleged that AXA failed to appropriately disclose and inform clients with respect to a material error in the computer code of a quantitative investment model that was used to manage client assets. Similarly, when executing a Responsible Investment strategy, if an asset manager is relying on in-house or third-party quantitative models or on data used to code such models, it is important to ensure that the models and data used are accurate, and that the compliance policies and procedures are sufficiently tailored to the risks associated with the use of such models and data. Compliance personnel should be working closely with investment personnel on the development, maintenance, and implementation of the models and data.

Public Disclosure

When researching or analyzing potential Responsible Investments, asset managers may analyze disclosure from public (as well as private) companies. However, the SEC, unlike some of its European regulatory counterparts, has generally decided not to require public reporting companies to provide enhanced disclosure on ESG. For example, SEC Chairman Jay Clayton cautioned that issuers should not be required to follow specific ESG frameworks in order to comply with current SEC rules. In his remarks to the SEC's Investor Advisory Committee, Chairman Clayton noted that "[e]ach company, and each sector, has its own circumstances, which may or may not fit within a

[27] SEC Comment Letter, The Alger Funds II Registration Statement on Form N-1A, (Dec. 20, 2016), https://www.sec.gov/Archives/edgar/data/92751/000110465916162938/filename1.htm, (SEC staff comments with respect to the Alger Responsible Investing Fund).

[28] Under Rule 206(4)-7, it is unlawful for an investment adviser registered with the Commission to provide investment advice unless the adviser has adopted and implemented written policies and procedures reasonably designed to prevent violation of the Advisers Act by the adviser or any of its supervised persons.

[29] James Williams & Paul Bryant, *PE Fundraising has Bandwidth to Accommodate ESG-Related Regulation*, PRIVATE EQUITY WIRE (Sept. 9, 2019), https://www.privateequitywire.co.uk/2019/09/09/278498/pe-fundraising-has-bandwidth-accommodate-esg-related-regulation (noting that according to a Coller Capital 2018 ESG report, out of 71 general partners representing 278 private equity funds, 85% had adopted an ESG policy), https://www.privateequitywire.co.uk/category/content-channels/esg-responsible-investing; Susanna Rust, *Pensions Minister Asks Schemes for Copies of ESG Statements*, IPE (Oct. 7, 2019), https://www.ipe.com/countries/uk/pensions-minister-asks-schemes-for-copies-of-esg-statements/www.ipe.com/countries/uk/pensions-minister-asks-schemes-for-copies-of-esg-statements/10033698.fullarticle.

[30] SEC, SEC Charges AXA Rosenberg Entities for Concealing Error in Quantitative Investment Model, Press Release (Feb. 3, 2011), https://www.sec.gov/news/press/2011/2011-37.htm; Jeff Benjamin, *SEC Uses F-Squared Saga to Drive Home Due Diligence Message*, INV. NEWS (Nov. 10, 2016), https://www.investmentnews.com/article/20161110/FREE/161109922/sec-uses-f-squared-saga-to-drive-home-due-diligence-message; SEC, Transamerica Entities to Pay $97 Million to Investors Relating to Errors in Quantitative Investment Models, Press Release (Aug. 27, 2018), https://www.sec.gov/news/press-release/2018-167.

standard framework."[31] The Chairman also addressed ESG as an investment strategy, noting that the SEC does not regulate the merits of any particular strategy: "[w]hat is important is that investors have full and fair disclosure of the material facts about the investment strategy their fiduciary is following so that they are in a position to make informed investment choices."[32] Similarly, at the 18th Annual Institute on Securities Regulation in Europe, William H. Hinman, Director of the SEC's Division of Corporate Finance, discussed the SEC's flexible approach to ESG disclosure for public companies. He noted that current disclosure requirements are largely principles-based and "apply in areas where the disclosure topics may be complex, associated with uncertain risks, and rapidly evolving."[33] Director Hinman further noted that the Commission is evaluating and analyzing corporate ESG disclosure, and comparing information that companies voluntarily provide outside of their SEC filings with their SEC mandated disclosures.[34]

SEC Commissioner Hester Peirce believes that some public reporting companies may be unfairly judged by the ESG community. In her remarks before the American Enterprise Institute,[35] she noted that "the ESG tent seems to house a shifting set of trendy issues of the day, many of which are not material to investors, even if they are the subject of popular discourse."[36] She also posited that "ESG is broad enough to mean just about anything to anyone. The ambiguity and breadth of ESG allows ESG experts great latitude to impose their own judgments, which may be rooted in nothing at all other than their own preferences."[37]

While the SEC has decided not to put forward specific criteria for public reporting companies when it comes to ESG disclosure, the appetite for ESG reporting is growing. For example, in October 2018, two professors along with other signatories, including asset managers and asset owners, petitioned the SEC for a rulemaking to facilitate uniformity in ESG reporting.[38] Furthermore, in April 2019, the U.S. Senate Committee on Banking, Housing, and Urban Affairs held a hearing titled "The Application of Environmental, Social, and Governance Principles in Investing and the Role of Asset Managers, Proxy Advisors, and Other Intermediaries."[39] During the hearing some politicians called for the SEC to act when it comes to ESG reporting; U.S. Senator Sherrod Brown (D-OH) called for the SEC to enhance and standardize ESG disclosure requirements.[40] Similarly, in a House hearing, Congresswoman Carolyn Maloney (D-NY) stated that disclosures with respect to Responsible Investing "often aren't as detailed as they should be" and that they are "difficult to compare across companies." She further noted that the SEC would need to establish disclosure standards that would apply to all public companies in the United States.[41] But others have voiced their concerns over ESG proxy proposals and called on the SEC to review the process.[42]

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[31] Jay Clayton, SEC Chairman, Remarks to the SEC Investor Advisory Committee (Dec. 13, 2018), https://www.sec.gov/news/public-statement/clayton-remarks-investor-advisory-committee-meeting-121318.

[32] *Id.*

[33] William Hinman, Director, Division of Corporation Finance, Remarks at the 18th Annual Institute on Securities Regulation in Europe (Mar. 15, 2019), https://www.sec.gov/news/speech/hinman-applying-principles-based-approach-disclosure-031519.

[34] *Id.*

[35] Hester M. Peirce, SEC Commissioner, Scarlet Letters: Remarks Before the American Enterprise Institute (Jun. 18, 2019), https://www.sec.gov/news/speech/speech-peirce-061819.

[36] *Id.*

[37] *Id.*

[38] Cynthia A. Williams and Jill E. Fisch, Petition for Rulemaking on Environmental, Social, and Governance (ESG) (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf.

[39] Comm. Hearing, U.S. Sen. Comm. Banking, Hous. & Urb. Affairs, The Application of Environmental, Social, and Governance Principles in Investing and the Role of Asset Managers, Proxy Advisors, and Other Intermediaries, (Apr. 2, 2019), https://www.banking.senate.gov/hearings/the-application-of-environmental-social-and-governance-principles-in-investing-and-the-role-of-asset-managers-proxy-advisors-and-other-intermediaries.

[40] Sherrod Brown Sen. OH, Brown Opening Statement at Hearing on Environmental, Social, And Governance Investing Principles, Press Release (Apr. 2, 2019), https://www.brown.senate.gov/newsroom/press/release/brown-opening-statement-at-hearing-on-environmental-social-and-governance-investing-principles.

[41] SIFMA, House Financial Services Subcommittee Hearing on Environmental, Social, and Governance Disclosure (ESG) Proposals (Jul. 10, 2019), https://www.sifma.org/resources/general/house-financial-services-subcommittee-hearing-on-environmental-social-and-governance-disclosure-esg-proposals/.

[42] Comm. Statement, Mike Crapo, U.S. Sen. Comm. Banking, Hous. & Urb. Affairs, Statement at the Hearing on the Application of Environmental, Social, and Governance Principles in Investing and the Role of Asset Managers, Proxy Advisors, and Other Intermediaries (Apr. 2, 2019),

Based on the foregoing, it is unlikely that we will see imminent formal Commission rulemaking with respect to ESG reporting. Nonetheless, certain Responsible Investing bills are making their way through the legislative maze.[43] In addition, recently, the Commission issued its long-awaited guidance on proxy voting responsibilities of investment advisers under Rule 206(4)-6 under the Advisers Act.[44] Asset managers subject to regulation under the Advisers Act should consider what implications this guidance will have on proxy voting responsibilities generally, and specifically, when pursuing Responsible Investing. For example, generally asset managers have one set of proxy voting policies, regardless of the investment strategies that they manage (*e.g.*, fixed income, equities, Responsible Investing). Pursuant to the new proxy voting guidance, asset managers that oversee numerous investment strategies may need to consider whether each of these strategies requires a separate, standalone proxy voting policy.

Unlike the United States, European countries have generally embraced Responsible Investing and this is reflected in their regulatory environment. For example, France was an early regulatory mover. In 2016, it introduced Article 173, a mandatory reporting framework for institutional investors and asset managers to demonstrate how climate change considerations are incorporated into their investment and risk-management processes. Article 173 sets three requirements: (1) providing a general description of the investor's ESG policy; (2) disclosing the resources allocated to ESG analysis; and (3) explaining the methodology and the results of the climate risk analysis.[45] In the United Kingdom, the U.K. government released its Green Finance Strategy in July 2019.[46] The Strategy outlines two objectives: (1) to encourage private sector financial flows with clean, environmentally sustainable and resilient growth and (2) to strengthen the competitiveness of the U.K. financial sector. The Strategy expects that by 2022, all listed companies and large asset owners will disclose environmental and climate change information in line with requirements set by the Task Force on Climate-related Financial Disclosures ("TCFD").[47]

Action Plan on Financing Sustainable Growth

While France and the United Kingdom are just two examples of European countries looking to encourage Responsible Investing by pursuing, among other things, a uniform set of reporting criteria, the EU's Action Plan on Financing Sustainable Growth could potentially have far-reaching effects on Responsible Investing in Europe. Among other things, the Action Plan proposes to: (1) re-orient capital flows toward sustainable investment, in order to achieve sustainable and inclusive growth; (2) manage financial risks stemming from climate change, environmental degradation, and social issues; and (3) foster transparency and long-termism in financial and economic activity.[48] In order to advance the objectives of the Action Plan, the European Commission has set up the Technical Expert Group ("TEG") which has been designated with, among other things, the task of putting forward a taxonomy (classification system) for certain environmental and sustainable activities.[49] On June 18, 2019, TEG published its technical report on EU taxonomy. The report sets out the basis for future EU taxonomy legislation.[50] The TEG report contains:

footnote continued from previous.page…

https://www.banking.senate.gov/imo/media/doc/Crapo%20 Statement%204-2-19.pdf.

[43] Climate Risk Disclosure Act of 2019, H.R. 3623, 116th Cong. (2019-20) (the Climate Change Risk Disclosure Act of 2019 would require public companies to disclose information on their exposure to climate change and risks, and it would also require the SEC to establish specific disclosure rules for certain industries, as well as reporting standards for publicly traded companies' greenhouse gas emissions, fossil fuel related assets, and the social cost of carbon); *see also*, ESG Disclosure Simplification Act of 2019, H.R. 4329, 116th Cong. (2019-20) (the ESG Disclosure Simplification Act of 2019 would require publicly reporting companies to disclose environmental, social, and governance metrics and would also require that the SEC define ESG metrics).

[44] PAUL HASTINGS LLP, *SEC Publishes New Proxy Voting Guidance* (Aug. 27, 2019), https://www.paulhastings.com/publications-items/details/?id=6583b86d-2334-6428-811c-ff00004cbded.

[45] Mara Lemos Stein, *France Gets Climate Risks Disclosures from Invest Firms*, WSJ (Dec. 7, 2017), https://blogs.wsj.com/riskandcompliance/2017/12/07/france-gets-climate-risks-disclosures-from-invest-firms.

[46] HM GOV., Green Finance Strategy: Transforming Finance for a Greener Future, INDUS. STRATEGY (Jul. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820284/190716_BEIS_Green_Finance_Strategy_Accessible_Final.pdf.

[47] *Id.*

[48] EUR. COMM'N., Action Plan: Financing Sustainable Growth, BRUSSELS (Aug. 3, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0097&from=EN. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0097&from=EN.

[49] *Id.*

[50] *Id.*

(1) screening criteria for 67 activities across eight sectors that are viewed as having a substantial effect on climate change mitigation; (2) a methodology and examples for measuring substantial contribution to climate change adaptation; and (3) guidance and studies for investors preparing to use the taxonomy. TEG also published a supplementary report on using the taxonomy, which explains to investors why the taxonomy is needed, what it looks like, and how it is to be used.[51]

In addition to the EU taxonomy, TEG is working on recommendations for the EU Green Bond Standard. On June 18, 2019, TEG published a report on this standard, which aims to increase transparency in the green bond market.[52] TEG also is working on methodologies for EU climate benchmarks and disclosures for benchmarks, and guidance to improve disclosure of climate related information.

The overarching goal of the Action Plan is to ensure that asset managers, investors, and their financial advisers consider Responsible Investment factors in their investment decisions and advisory process. The Action Plan proposes, among other things, that: (1) advisers establish their clients' ESG preferences and take them into account when assessing the range of financial instruments to be recommended; (2) managers of investment products publish written policies regarding the integration of ESG risks into their investment decision-making process; and (3) managers provide disclosures in accordance with a common classification framework for purposes of uniformity in ESG reporting, thus making it easier for investors to compare and understand ESG investment products.[53] The various parts of the Action Plan have not been finalized and will be subject to further negotiation among the European Parliament, the European Council, and the European Commission, but according to the European Council certain parts of the Action Plan, including a uniform taxonomy, should be established by the end of 2021, in order to ensure its full application by the end of 2022.[54]

Non-Governmental Entities

While regulators in Europe and the United States may be an ocean apart when it comes to Responsible Investing, third-party non-government entities ("NGOs") are offering solutions for asset owners and asset managers by providing a set of criteria that can be relied on when pursing Responsible Investing. For example, organizations such as the Global Reporting Initiative,[55] TCFD, and the Sustainability Accounting Standard Board[56] are just a few examples of NGOs that have put forward industry-specific reporting standards. Similarly, the United Nations Development Programme ("UNDP") has launched for comment and consultation a new set of standards to guide private equity managers toward investments that advance the United Nations' Sustainable Development Goals ("SDGs").[57] This initiative is meant to ensure that both asset owners and private equity managers are considering the same set of guidelines when pursuing SDG investments. Time will tell if private equity managers and asset owners will coalesce around this proposed classification framework.

Many welcome the options that NGOs provide to the investment community. However, others are concerned that NGOs may be doing more harm than good. Robert Eccles, a visiting professor of management practice at Saïd Business School and the Sustainability Accounting Standard Board's first chairman, recently noted, "[w]e have to make sure this is not a war of well-meaning NGOs who think they are going to be the one who sets the standards."[58] Only time will tell if any one of these standard-setters will end up as the clear favorite among industry participants. It is also plausible that different segments of the investment community will end up relying on standard-setters that are most applicable to their investment strategy and goals. For example, while an investor seeking to measure impact of a particular investment may look to GIIN, an asset manager looking to offer an index tracking exchange traded fund focusing

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51 *Id.*

52 *Id.*

53 *Id.*

54 COUNCIL OF EUR. UNION, Sustainable Finance: Council Agrees Position on a Unified EU Classification System, EUR. COUNCIL (Sept. 25, 2019), https://www.consilium.europa.eu/en/press/press-releases/2019/09/25/sustainable-finance-council-agrees-position-on-a-unified-eu-classification-system/.

55 Georg Kell, *The Remarkable Rise of ESG*, FORBES (Jul. 11, 2018), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/#4e59308a1695 (noting that "[t]oday, 80% of the world's largest corporations use GRI standards").

56 *Id.*

57 United Nations Development Programme, UNDP Launches Standards to Guide Private Sector in Achieving SDGs, United Nations (Sept. 4, 2019), https://www.undp.org/content/undp/en/home/news-centre/news/2019/UNDP_launches_standards_to_guide_private_sector_in_achieving_SDGs.html.

58 Patrick Temple-West, *Companies Struggle to Digest 'Alphabet Soup' of ESG* Arbiters, FINANCIAL TIMES (Oct. 6, 2019), https://www.ft.com/content/b9bdd50c-f669-3f9c-a5f4-c2cf531a35b5.

on ESG may look to an index structured by Solactive,[59] and a private equity manager looking to pursue a strategy focusing on SDGs will look to the UNDP developed standards. On the one hand, the ability to choose a particular standard-setter provides industry participants with flexibility to select the standards they believe are relevant to their business. On the other hand, the lack of a uniform taxonomy leaves various industry participants feeling like they speak different languages. If Responsible Investing reporting was subject to a framework similar to GAAP or IFRS, would that make it easier for investors to analyze and compare different investments or is Responsible Investing data too qualitative, and thus not comparable in the same way as financial information? The answer most likely lies somewhere in the middle.

IV. COMPLIANCE AND LEGAL CONSIDERATIONS FOR ASSET MANAGERS

There are certain compliance and legal considerations that asset managers must take into consideration before pursuing Responsible Investing.

Greenwashing

Asset managers must ensure that they are not seen as engaging in greenwashing. Greenwashing has been described as shortcuts taken by some asset managers to repurpose their existing funds in a Responsible Investing wrapper, without restructuring the existing portfolios or the underlying investment process. As a result, some asset managers have been excoriated in the media for their perceived greenwashing.[60] However, due to a lack of uniform taxonomy, inconsistent nomenclature, and lack of regulatory guidance, asset managers are often left to formulate their own interpretations when determining what is considered a Responsible Investment, and such determinations may not be in line with the standards that are being used by investors.[61] This is why it is important for an asset manager to use appropriate terminology and agreed-upon classifications when marketing a Responsible Investing strategy. For example, if an investor is seeking to allocate to an impact investment strategy, but an asset manager only offers an ESG strategy, then the asset manager should take care to ensure not only that appropriate terminology is being used to describe the investment strategy but also that the terminology used corresponds to the actual strategy. The manager should also make sure that the actual strategy meets the investor's investment objective and not try to shoehorn an ESG strategy into an impact investor mandate.

Conflicts of Interest

Asset managers must take into account conflicts of interest that can arise as a result of inconsistent internal processes and lack of clear internal communication when it comes to Responsible Investing. Large asset managers tend to have numerous investment groups under the same roof and such groups, at times, may pursue varying investment strategies. It is important for an asset manager to set clear internal processes to ensure that the various investment strategies are not in conflict with each other — or if they are, that a process has been established for dealing with such conflicts. For example, a Responsible Investment group may pursue an investment in the same issuer as the credit group. However, their reasons for the investment may differ**.** On the one hand, the Responsible Investment group may pursue an equity investment in an issuer in an effort to exercise its powers as a shareholder and vote its proxies in order to bring about certain change within such company (*e.g.*, lessen the company's reliance on fossil fuels or divest of certain business lines which are exposed to climate change risk). On the other hand, the credit group may focus on the fundamentals of the credit investment and make its investment decision primarily based on such fundamentals. However, there may come a time where the Responsible Investment group encourages a company to divest of certain units exposed to climate risk, but the credit group may want the company to keep those units because the revenue generated from those units outweighs the potential climate risk. Accordingly, appropriate policies and procedures must be set up at the outset in order to

[59] SOLACTIVE, Environmental, Social and Governance, https://www.solactive.com/indices/esg/ (last visited Oct. 16, 2019).

[60] Susanna Rust, *ESG: Greenwashing Under Scrutiny*, IPE (Jul. 2019), https://www.ipe.com/investment/esg/esg-greenwashing-under-scrutiny/www.ipe.com/investment/esg/esg-greenwashing-under-scrutiny/10031923.fullarticle; Chase Woodruff & David Sirota, *Is Goldman Sachs' New Fund Really Just Greenwashing Stocks?*, GUARDIAN (Sept. 28, 2018), https://www.theguardian.com/business/2018/sep/28/is-goldman-sachs-new-fund-really-just-greenwashing-stocks.

[61] Amin Rajan, *Pragmatism is the Name of the Game in Greenwashing* Fight, Financial Times (Sept. 8, 2019), https://www.ft.com/content/4b7165ee-729d-381d-9a8f-

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ecd1c21d2db1 (asset managers also look to third-party service providers for guidelines on Responsible Investing. It has been reported that the most widely used data comes from MSCI and Sustainalytics. However, a comparison of their respective scores reveal consistency in only about half of their coverage universe).

prevent such conflicts from arising or to deal with such conflicts as they arise. One way of mitigating potential conflicts of interest is to set up an investment committee that evaluates each investment holistically before an investment is funded.

Internal checks should also be in place to ensure that the various investment strategies are consistent with the overall tone of the firm.[62] But if they are not, investors must be appropriately informed regarding any such inconsistencies. For example, if an asset manager adopts a Responsible Investment policy statement, then the manager must ensure that the various investment strategies do not conflict with such a statement. Furthermore, an asset manager must ensure that its proxy voting policy is consistent with its Responsible Investment strategy and with its public statements with respect to Responsible Investing.[63] An asset manager that does not take the necessary steps to address internal inconsistencies, or does not set up a robust internal communication framework, runs the risk of being questioned on its commitment to Responsible Investing,[64] potential claims of misleading marketing,[65] or failure to address perceived or real conflicts of interest when different internal investment groups pursue investments in the same issuer.

Reliance on Third-Party Service Providers

Asset managers must set up an appropriate compliance framework to ensure that, among other things, portfolio components meet the overall investment strategy. As noted above, due to the lack of a uniform taxonomy when it comes to Responsible Investing, asset managers tend to rely on third parties to provide the necessary classifications. Such third parties may provide data or create customized indexes that an asset manager will rely on when making its investment decisions. However, third-party providers can make material errors when aggregating data or setting up a custom index. Such errors can lead to an asset manager making an investment that is inconsistent with a client's Responsible Investing mandate.[66] Thus, asset managers must conduct appropriate due diligence of third-party service providers on the front end and maintain a robust compliance framework throughout the life of the relationship with the provider in order to ensure that errors do not have a material effect on a client account, or if they do that they are cured as soon as possible.

Reporting

Asset managers must ensure that accurate and timely reporting is provided to clients. As noted above, due to the lack of uniform guidelines around Responsible Investing, asset managers may look to various approaches when it comes to measuring Responsible Investing. That is why it is paramount that a reporting taxonomy is agreed to ahead of time in order to ensure that reporting is consistent with investor expectations and is of the type that can be produced in an accurate and timely fashion by the asset manager. It is important to note that if an investor requires reporting based upon a set of classifications with which an asset manager is unfamiliar, the asset manager must take steps to ensure

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[62] Rob Berridge, *Is Your Mutual Fund Company Taking Climate Change Seriously?*, CERES (Jan. 6, 2017), https://www.ceres.org/news-center/blog/your-mutual-fund-company-taking-climate-change-seriously.

[63] Ross Kerber and Tim McLaughlin, *Activists Push Big Index Funds to Back Shareholder Votes on Climate Risk Disclosure*, Ins. J. (Oct. 9, 2019), https://www.insurancejournal.com/news/national/2019/10/09/544982.htm; REUTERS, *Biggest U.S. Index Funds Oppose Most Climate Proposals in Shareholder Votes*, N.Y. TIMES (Oct. 8, 2019), https://www.nytimes.com/reuters/2019/10/08/business/08reuters-usa-funds-index-climatechange.html.

[64] Patrick Greenfield, *World's Top Three Asset Managers Oversee $300bn Fossil Fuel Investments*, GUARDIAN (Oct. 12, 2019), https://www.theguardian.com/environment/2019/oct/12/top-three-asset-managers-fossil-fuel-investments; *see, e.g.*, James Comtois, *Largest Managers Not Doing Enough to Support Climate-Related Proposals 50/50 Climate Project Finds*, PENSIONS & INV. (Mar. 13, 2018), https://www.pionline.com/article/20180313/ONLINE/180319953/largest-managers-not-doing-enough-to-support-climate-related-proposals-50-50-climate-project-finds (stating "four of the largest managers — BlackRock, Vanguard Group, J.P. Morgan Asset Management and T. Rowe Price Group — indicate that climate or environmental issues positively influence their votes on these proposals, yet their voting records on 2-degree scenario proposals — based on the concept of limiting the average global temperature increase to 2 degrees Celsius — at well below 50% suggest otherwise. . ."); *see also*, 50/50 CLIMATE PROJECT, *2018 Asset Manager Climate Scorecard* (Sept. 12,

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2018), https://5050climate.org/news/2018-key-climate-vote-survey/.

[65] Attracta Mooney, *Fund Groups Accused of Being 'Too Cosy' with Company* Bosses, FINANCIAL TIMES (Dec. 15, 2018), https://www.ft.com/content/d5ab2391-bb82-3114-bfbf-48f3c348e9a7.

[66] Annie Massa, Emily Chasan & Rachel Evans, *Vanguard Social-Investing Error Prompts Funds to Check Controls*, BLOOMBERG LP (Aug. 22, 2019), https://news.bloomberglaw.com/securities-law/vanguard-social-investing-error-prompts-funds-to-check-controls.

that the underlying investment strategy can accommodate such reporting classifications, and that such classifications are consistent with the asset manager's overall compliance framework.

Asset managers must be able to demonstrate how they adhere to a particular reporting framework and must also consider any specific obligations that arise from becoming a signatory to a particular initiative or investment mandate. For example, it was reported that one in 10 signatories to a UN-backed responsible investment initiative have been placed on a watch list for failing to show their commitment to PRI.[67] Signatories to PRI commit to six overarching principles designed to show support for ESG considerations and hold companies in which they invest responsible for ESG failures. In addition, PRI supporters must file an annual report showing their progress in supporting PRI principles. In 2018, Fiona Reynolds, PRI's CEO, noted that some signatories have signed on to the PRI initiative "perhaps to win investment mandates" but are "not really committed."[68] As a result, without a real show of commitment to the PRI principles, such signatories face the risk of being delisted within two years. Pursuant to the new PRI policy, PRI signatories will need to have a Responsible Investment policy that covers at least 50% of their assets under management, name a person within the organization tasked with carrying out the Responsible Investment policy, and spell out who in their group's senior ranks is accountable for it.[69]

Another initiative that has received recognition and support from certain asset owners and asset managers is TCFD. TCFD aims to develop voluntary, consistent climate-related financial disclosures for use by companies, including asset owners and asset managers, in order to better represent the costs associated with climate change. TCFD believes that all asset managers and asset owners should implement its recommendations so that their clients and beneficiaries may better understand the performance of their assets, consider the risks of their investments as related to climate sustainability, and make more informed investment choices. While TCFD reporting taxonomy is voluntary, those that become a signatory should consider the resulting implications. For example, what is the impact on an asset manager's existing proxy voting guidelines: will the asset manager take into account TCFD reporting taxonomy when voting shares in a company? In addition, TCFD appears to recommend that asset managers disclose portfolio exposure to carbon-intensive companies. Thus, an asset manager should consider whether it has the necessary internal processes in place to report such information. Furthermore, to the extent an asset manager already provides Responsible Investing reporting to its clients, it should consider whether TCFD reporting taxonomy should be incorporated into such reporting. Finally, it has been reported that beginning in 2020, it is PRI's intention to make certain TCFD indicators mandatory to report to PRI and voluntary to disclose.[70] PRI's CEO, Fiona Reynolds, stated that "TCFD provides the best available framework for systematically including climate-related risks and opportunities into investment strategy."[71] Thus, an asset manager looking to become a PRI signatory must take under consideration that by becoming a PRI signatory it also may be, indirectly, agreeing to the TCFD reporting taxonomy. As collaboration between PRI and TCFD grows, it is easy to imagine a mandate from PRI that requires PRI signatories to show commitment not only to PRI principles but also to TCFD reporting taxonomy. An asset manager that becomes a signatory to either but fails to implement the underlying principles risks reputational harm.

Certain asset owners in the United States and Europe have also put forward Responsible Investing criteria that must be considered when managing assets on their behalf. For example, The California State Teacher's Retirement System ("CalSTRS") has put forward 21 risk factors,[72] outlining the ESG factors it considers as part of its asset management due diligence. Thus, whenever an asset manager signs on to manage assets on behalf of CalSTRS it must comply with the policy, review the risk factors, and report back to CalSTRS annually on how it incorporates the 21 risk factors "within [its] investment

[67] Jennifer Thompson, *UN Responsible Investing Body Threatens to Kick Out Laggards*, FINANCIAL TIMES (May 27, 2018), https://www.ft.com/content/794219c0-6002-11e8-ad91-e01af256df68.

[68] Ruth Williams, *Get Active or Get Delisted, Responsible Investment Group Warns Funds*, SYDNEY MORNING HERALD (Apr. 12, 2018), https://www.smh.com.au/business/companies/get-active-or-get-delisted-responsible-investment-group-warns-funds-20180330-p4z71x.html.

[69] PRI, Minimum Requirements for Membership, Signatories, https://www.unpri.org/signatories/minimum-requirements-for-membership/315.article (last visited Oct. 16, 2019).

[70] PRI, TCFD-Based Reporting to Become Mandatory for PRI Signatories in 2020, NEWS & PRESS (Feb. 18, 2019), https://www.unpri.org/news-and-press/tcfd-based-reporting-to-become-mandatory-for-pri-signatories-in-2020/4116.article.

[71] *Id.*

[72] CALSTRS, *Investment Policy for Mitigating Environmental, Social, and Geopolitical Risks (ESG)*, https://www.calstrs.com/sites/main/files/file-attachments/esg_policy_and_21_risk_factors.pdf (last visited Oct. 16, 2019).

management process."[73] The New York State Common Retirement Fund similarly has established a Responsible Investing policy and evaluates its investments and the asset managers it selects based on such policy.[74]

Regardless of whether an asset manager is a PRI or TCFD signatory, or whether it manages assets on behalf of a pension plan that has adopted specific Responsible Investing criteria, it is important for the asset manager to understand the specific obligations that come with such mandates and to ensure that it has the necessary systems in place so that it can meet and execute on such mandates.

Responding to Investor Due Diligence Requests

Asset managers must be prepared for investor due diligence that will evaluate whether the asset manager is able to deliver on its Responsible Investing promise. During due diligence investors will likely seek to determine an asset manager's operational competence, the ability of the management team to follow through on the Responsible Investing mandate, and, as noted above, whether the asset manager will deliver the required reporting to the investor. While each investor will have its own set of due diligence criteria, an asset manager should typically be ready to address the following: (1) the investment process and its pursuit of Responsible Investing goals; (2) how the underlying investment process achieves the goal of Responsible Investing; (3) what criteria are used to measure attainment of Responsible Investing; (4) the experience and expertise of the investment team; and (5) compliance, legal, and operational support allocated to the Responsible Investing strategy. While an asset manager's due diligence preparedness should lead to a successful capital raise, its responsibilities will not end with the conclusion of due diligence process. Accordingly, an asset manager should have the necessary processes in place to ensure that it follows through on the representations made during the process.

V. CONCLUSION

Some may argue that Responsible Investing is just a fad and that it cannot be judged until it has been through a down market. But a closer look at the forces that are driving Responsible Investing seem to suggest otherwise. Environmental changes, in particular climate change, have put Responsible Investing front and center. Data, technology, and analytics will continue to progress, which should allow asset owners and asset managers to more easily identify, measure, and analyze Responsible Investments. This should also lead to longer validated investment track records, which should enable asset owners to clearly measure performance of Responsible Investments. In the end, whether Responsible Investing stands on its own, or is subsumed into traditional financial analysis, it presents an opportunity for well-prepared asset managers. Asset managers, however, must take the time to understand the legal and compliance challenges that are associated with managing this type of strategy. Those who ignore building out a robust compliance and legal framework at the outset, run the risk of reputational damage, regulatory penalties, or being unable to capitalize on the investor demand for Responsible Investments. ■

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[73] Amrita Sareen-Tak, *Skytop Strategies: Plan Sponsors Share ESG Expectations, Strategies and Goals*, Chief. Inv. Off. (Oct. 31, 2017), https://www.ai-cio.com/news/skytop-strategies-plan-sponsors-share-esg-expectations-strats-goals/.

[74] N.Y. City Comptroller, NYC Funds Reach Settlement with TransDigm to Protect Shareholder Ability to Call for Pollution Reduction, Press Release (Jan. 23, 2019), https://comptroller.nyc.gov/newsroom/nyc-funds-reach-settlement-with-transdigm-to-protect-shareholder-ability-to-call-for-pollution-reduction/; Chris Butera, *New York Comptroller Aims to Double Pension Plan's ESG Funding*, Chief. Inv. Off. (Jun. 10, 2019), https://www.ai-cio.com/news/new-york-comptroller-aims-double-pension-plans-esg-funding/ (In 2019, the New York City Employees' Retirement System on behalf of itself and other New York City public pension plans (collectively "NY City Pension Plans"), reached a settlement with TransDigm Group, Inc., a publicly listed corporation, after TransDigm attempted to block a shareholder proposal from the NY City Pension Plans that would require TransDigm to examine and set internal goals for managing its greenhouse gas emissions. TransDigm attempted to block the proposal by making a no-action request with the SEC, claiming the proposal concerned the ordinary business of the company. In response to the no-action request, NY City Pension Plans filed a lawsuit in federal court challenging TransDigm's right to exclude the proposal. As part of the settlement, TransDigm agreed to withdraw its no-action request and to allow the proposal to proceed to a vote at TransDigm's 2019 annual meeting).