Blogs

In this final post in our series, we consider some of the competing views around the regulation of ESG investing and offer considerations for registered fund boards in today's unsteady ESG environment.

A Dissenting Commissioner

As we discussed previously, the U.S. Securities and Exchange Commission (SEC) has responded to the increasing popularity of ESG-oriented investing with enforcement activity and names rule and disclosure proposals for registered funds and investment advisers (the ESG Proposals). SEC Chair Gary Gensler and other Commissioners have repeatedly expressed concern about investor vulnerability given the incentive for firms to "greenwash," or overhype their ESG capabilities and commitments, to attract ESG investors. But "greenwashing" has always been prohibited by the federal securities laws—as noted in our first post in this series and an article I wrote in 2018—the basic anti-fraud provisions of the securities laws essentially require truth in advertising. SEC Commissioner Hester Pierce has made this point repeatedly, most recently at the May 25, 2022, open meeting where she voted against the ESG Proposals. Insisting that the SEC's existing standards amply protect investors, Commissioner Pierce stated her view that the ESG Proposals were too subjective and stood to unduly restrict asset managers' ability to act in investors' best interests.

Fund Board Considerations

Meanwhile, criticism of ESG ratings, scores, and strategies abounds and there is no doubt that ESG is a political issue. While riding out the storm, fund boards should work with the chief compliance officer (CCO) and the fund adviser to understand the overall approach to ESG investing in the fund complex.

- What funds in the complex have ESG-related names or investment strategies?
- Are there integrated ESG funds? ESG-focused funds? Impact funds?
- To what portion of the complex does the adviser's ESG investment approach apply?
- Are different approaches taken for different funds? Different groups of funds?
- Does the adviser have an ESG taxonomy that is used consistently across the complex?
- How does the adviser assess its performance and the funds' performance in meeting ESG objectives, and any impact objectives in particular?
- Are internal or third-party ESG rating/scoring systems or global frameworks, such as the United Nations Principles of Responsible Investing (UNPRI) or Sustainable Development Goals (SDGs) employed? What about ESG-oriented indexes and other benchmarks?
- What are the primary financial and other risks of the adviser's overall ESG approach and specific ESG strategies?
- What additional fees do shareholders pay, if any, in connection with the adviser's ESG approach?
- How does the adviser believe its approach to ESG investing serves the best interests of shareholders?
- What controls are in place to comply with the April 2021 ESG Risk Alert (the Risk Alert)?

Registered fund boards should probe and engage with management to ensure the ESG-related expectations articulated by the SEC staff in the Risk Alert are met. The funds' CCO, and likely counsel, should play a key role here. Fund boards should also seek to understand how fund names, disclosures and/or compliance policies and procedures might have to be revised if the ESG Proposals were adopted as proposed. Board approvals would likely be required for:

- Changes to fund names, investment strategies and policies driven by the ESG Proposals;
- Any material disclosure revisions arising from the ESG Proposals; and
- Other ESG-related fund initiatives.

Conclusion

Registered fund industry groups and others have been busy providing comments on the ESG Proposals. Whether final rules will be adopted, and in what form, remains to be seen. We will cover these and other regulatory developments around ESG investing here, as they come.

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