EVERSHEDS SUTHERLAND

Taking stock

Environmental, social and governance (ESG) considerations

May 27, 2021

ESG will be front and center in the SEC's 2021 agenda. Our ESG Matrix can help establish a baseline for compliance by SEC-regulated funds, investment advisers, private funds and insurance companies. The Matrix covers currently required disclosures and previews regulatory actions on the horizon. We will update the Matrix as new regulatory initiatives are announced.

	SEC-Registered Investment Companies	SEC-Registered Investment Advisers	Department of Labor	Private Funds – 3(c)(1) and 3(c)(7)	New York Department of Financial Services
Legal Requirement	To (i) disclose the fund's investment objectives or goals; (ii) summarize how the fund intends to achieve its objectives by identifying the fund's principal investment strategies (including types of securities in which the fund invests or will invest principally); (iii) summarize risks of investing in the fund; (iv) disclose any strategy to invest more than 25% of a fund's net assets in a particular industry or group of industries; (v) disclose any strategy(ies) of an investment adviser to the fund that are not principal strategy(ies) and the risks of those strategy(ies); (vi) disclose any policy to concentrate investments in a particular industry or group of industries; (vii) disclose any other policy that the fund deems fundamental or that may not be changed without shareholder consent; (viii) describe policies/procedures the fund uses for proxy voting.	Disclose (i) the types of services offered, including whether investment advice is limited with respect to product type; (ii) whether clients may restrict investments by type of security or security; (iii) methods of analysis and investment strategies; (iv) material risks of each significant method of analysis and investment strategy; (v) *in detail* significant or unusual risks; (vi) whether or not you have authority to vote proxies and describe your voting policies and procedures.	Note that a non-enforcement policy for this requirement is currently in place. (i) Plan fiduciaries generally may consider only pecuniary factors in selecting investments for retirement plans; (ii) an investment fund, product, or model portfolio cannot be (or be a component of) a QDIA [Qualified Default Investment Alternative] if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more nonpecuniary factors; (iii) when voting proxies, plan fiduciaries may not subordinate the interests of the participants in their retirement income or financial benefits under the plan to any nonpecuniary objective, or promote nonpecuniary benefits or goals unrelated to those financial interests. These general requirements also apply to collective investment trusts (CITs) that hold plan assets.	To disclose all material facts; make no misstatements or material omissions.	**Enterprise Risk Management (ERM) Reporting:** – Insurer's ERM framework should "address all reasonably foreseeable and relevant material risks including, as applicable, insurance, cybersecurity, climate change, epidemic, pandemic, underwriting, asset-liability matching, credit, market, operational, reputational, liquidity, and any other significant risks." – Insurer's ERM report is required to describe the insurer's ERM function, "including its risk culture and governance; risk identification and prioritization; risk appetite, tolerances, and limits; risk management and controls; and risk reporting and communication." **Own Risk and Solvency Assessment (ORSA) Reporting:** Insurers are required to conduct an ORSA at least annually, consistent with the process set forth in the NAIC ORSA Guidance Manual. **Corporate Governance Annual Disclosure (CGAD) Reporting:** Insurers must submit a CGAD annually that describes the insurer's corporate governance framework.
Source of Legal Requirement	Form N-1A including Statement of Additional Information	Form ADV Brochure; in some circumstances, Form CRS (e.g., where the firm limits its investment advice to certain types of products)	Final Rule – Financial factors in selecting plan investments Prior DOL guidance, in Interpretive Bulletin 2015-01, may also be relied upon by the DOL staff in assessing investment decisions.	SEC anti-fraud rules including Rule 206(4)-8	**ERM Reporting:** 11 NYCRR 82.2 **ORSA Reporting:** 11 NYCRR 82.3 **CGAD Reporting:** 11 NYCRR 90

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Trigger	Investment company registration with the SEC	Fiduciary status; investment adviser registration with the SEC (note: fiduciary status is not dependent on registration with the SEC)	ERISA fiduciary status; selection of investments or investment options for ERISA plans; exercise of shareholder rights	Publication of written materials, e.g., offering and marketing documents; misuse of investor funds	**ERM Reporting:** New York-licensed insurers **ORSA Reporting:** New York-domiciled insurers **CGAD Reporting:** New York-licensed insurers
Proxy Voting	SEC Division of Examinations will examine proxy voting policies and practices to ensure voting aligns with investors' best interests and expectations and with firms' business continuity plans.	SEC Division of Examinations will examine proxy voting policies and practices to ensure voting aligns with investors' best interests and expectations and with firms' business continuity plans.	Final Rule – Fiduciary Duties Regarding Proxy Voting and Shareholder Rights Prior DOL guidance, in Interpretive Bulletin 2016-01, may also be relied upon by the DOL in assessing how fiduciaries vote proxies.	N/A	N/A
Private Remedy	SEC Division of Enforcement, through its Climate and ESG Task Force, will accept tips, referrals, and whistleblower complaints related to ESG.	SEC Division of Enforcement, through its Climate and ESG Task Force, will accept tips, referrals, and whistleblower complaints related to ESG; state law claims.	DOL, plan participants and beneficiaries, and plan fiduciaries are authorized to bring a case in federal court for equitable relief for breach of fiduciary duty; DOL may assess civil penalties.	SEC Division of Enforcement, through its Climate and ESG Task Force, will accept tips, referrals, and whistleblower complaints related to ESG; state law claims.	N/A
Exams	SEC Division of Examinations will examine the consistency and adequacy of the fund's ESG disclosures; look for a match between the disclosures and the fund's policies and procedures; and review advertising for false or misleading statements. Specific areas of review include (i) portfolio management practices that appear inconsistent with ESG-approach disclosures; (ii) inadequate procedures and controls that would enable a firm to monitor whether client directives are actually being implemented; (iii) unsubstantiated or otherwise misleading claims regarding ESG approaches, including undisclosed fund sponsor expense reimbursement; (iv) inadequate controls over public disclosures; and (v) compliance programs that do not adequately address relevant ESG issues and do not have adequate oversight over ESG data and analysis. See SEC Risk Alert noting exam deficiencies, available here: https://www.sec.gov/files/esg-risk-alert.pdf	SEC Division of Examinations will examine the consistency and adequacy of the RIA's disclosures on ESG strategies; look for a match between the disclosures and the firm's policies and procedures; and review advertising for false or misleading statements. Specific areas of review include (i) portfolio management practices that appear inconsistent with ESG-approach disclosures; (ii) inadequate procedures and controls that would enable a firm to monitor whether client directives are actually being implemented; (iii) unsubstantiated or otherwise misleading claims regarding ESG approaches, including undisclosed fund sponsor expense reimbursement; (iv) inadequate controls over public disclosures; and (v) compliance programs that do not adequately address relevant ESG issues and do not have adequate oversight over ESG data and analysis. See SEC Risk Alert noting exam deficiencies, available here: https://www.sec.gov/files/esg-risk-alert.pdf	DOL has an enforcement project under which it has requested "ESG policies" from plans, investment advisers, and CITs.	SEC Division of Examinations will examine the consistency and adequacy of the fund's ESG disclosures; look for a match between the disclosures and the fund's policies and procedures; and review advertising for false or misleading statements. Specific areas of review include (i) portfolio management practices that appear inconsistent with ESG-approach disclosures; (ii) inadequate procedures and controls that would enable a firm to monitor whether client directives are actually being implemented; (iii) unsubstantiated or otherwise misleading claims regarding ESG approaches, including undisclosed fund sponsor expense reimbursement; (iv) inadequate controls over public disclosures; and (v) compliance programs that do not adequately address relevant ESG issues and do not have adequate oversight over ESG data and analysis. See SEC Risk Alert noting exam deficiencies, available here: https://www.sec.gov/files/esg-risk-alert.pdf	NAIC Financial Condition Examiners Handbook directs examiners to review an insurer's process for identifying and monitoring risks resulting directly or indirectly from the impact of climate change risk (e.g., business risk and investment risk).

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Request for Comments	On March 15, 2021, SEC Acting Chair Allison Herren Lee requested public comment on whether the SEC should consider new disclosure rules on climate change. Comments are due by June 13, 2021. https://www.sec.gov/news/public-statement/lee-climate-change-disclosures (March 21 Request) Comments already filed with the SEC are available here: https://www.sec.gov/comments/climate-disclosure/cll12.htm	March 21 Request calls for comment on whether the SEC should regulate, possibly through certain investment advisers, private fund disclosures with respect to climate change.	N/A at this time.	March 21 Request calls for comment on whether the SEC should regulate private fund climate disclosures.	**ERM Reporting:** Amendments to 11 NYCRR 82 (Insurance Regulation 203) referencing climate change took effect May 1. **NYDFS Proposed Guidance:** June 23, 2020, NYDFS requested interested parties submit comments on Proposed Guidance for New York Domestic Insurers on Managing Financial Risks from Climate Change
Rulemaking	None as of May 27, 2021, but see then-Acting Chair Allison Herren Lee's remarks to the Investment Company Institute on March 17, 2021, noting her request that SEC staff prepare options for updating Form N-PX (Annual Report of Proxy Voting Record of Registered Management Investment Company). See also President Biden's Executive Order issued May 20, 2021, requiring the Financial Stability Oversight Council (of which the SEC is a member) to consider among other things ways in which climate-related financial risk can be assessed and mitigated.	None as of May 27, 2021, but see then-Acting Chair Allison Herren Lee's remarks to the Investment Company Institute on March 17, 2021, noting her request that SEC staff prepare options for updating Form N-PX (Annual Report of Proxy Voting Record of Registered Management Investment Company).	On May 20, 2021, President Biden issued an Executive Order calling on the DOL to "consider publishing, by September 2021, for notice and comment a proposed rule to suspend, revise, or rescind 'Financial Factors in Selecting Plan Investments' [and] 'Fiduciary Duties Regarding Proxy Voting and Shareholder Rights.'"	None as of May 27, 2021	On March 25, 2021, NYDFS released Proposed Guidance that lays out NYDFS's expectation that every New York domestic insurer should: 1. Integrate the consideration of climate risks into its governance structure, including that the board of directors have responsibility for managing climate risks, which should be reflected in the company's risk appetite and organizational structure (includes the adoption by the board of a written risk policy and the designation of a board member or committee, as well as a member of senior management, as responsible for the insurer's assessment and management of climate risks). 2. Consider the impact of climate-related factors on its business environment in the short, medium, and long term when making strategic and business decisions. 3. Incorporate climate risks into its existing financial risk management, including by analyzing the impact of climate risks on existing risk factors (including credit, legal, liquidity, market, operational, pricing and underwriting, and reputational and strategic risks), and considering climate risks in the company's ORSA. 4. Expand current scenario analysis practices to consider physical risks and transition risks, multiple carbon emissions and temperature pathways, the fact that climate risks may not be reflected in historical data, and short, medium, and long time horizons. Scenario analyses should inform business strategies and risk assessment and identification. 5. Publicly disclose its climate risks, including how the risks are integrated into its corporate governance and risk management, and the processes used to assess whether these risks are considered material. Each insurer should consider the Task Force on Climate-related Financial Disclosures framework and other initiatives when developing its disclosure approaches. [View an introduction to the TCFD standards for financial institutions, including insurance companies](). The Proposed Guidance acknowledges that each insurer's actions should be proportionate to the nature, scale and complexity of the insurer's businesses, but provides that all insurers, regardless of size, are expected to analyze their climate risks. See also NYDFS Circular Letter No. 15 (2020) (directed to all New York-licensed insurers).

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Task Force	As of March 4, 2021, the SEC Division of Enforcement has a dedicated task force on climate and ESG issues (Climate and ESG Task Force). The task force will develop initiatives to identify ESG misconduct, with an initial focus on issuer climate disclosures.	SEC Enforcement Division Climate and ESG Task Force will analyze disclosure and compliance issues for ESG strategies.	N/A	SEC Enforcement Division Climate and ESG Task Force will analyze disclosure and compliance issues for ESG strategies.	N/A

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