April 16, 2024

Vanessa A. Countryman
Securities and Exchange Commission
100 F St. NE
Washington, DC 20549

Re: Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance (ESG) Investment Practices (File No: S7-17-22)

Dear Secretary Countryman,

Americans for Financial Reform Education Fund and the below-signed organizations appreciate the opportunity to comment on the proposal of the U.S. Securities and Exchange Commission ("the Commission") to bring much-needed disclosures to the vast market of ESG-designated investment products and services. We strongly support the Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices proposed rule and urge the Commission to finalize it as soon as possible. We write to recommend changes to the way the proposed rule addresses disclosure of metrics by ESG-Focused Funds. These changes would improve the rule by generating disclosures that better reflect ESG-Focused Funds' varied strategies and priority metrics while alleviating concerns expressed by some commenters.

Proposed Rule

The proposed rule gives ESG-Focused Funds that consider environmental factors two options when it comes to GHG emissions disclosures: 1) disclose the carbon footprint and the weighted average carbon intensity ("WACI") of the fund's portfolio in the annual report; or 2) affirmatively state in the "ESG Strategy Overview" table in the fund's prospectus that it does not consider issuers' GHG emissions as part of its investment strategy.

Investors — both institutional and retail — have repeatedly both expressed their need for GHG emissions information[1] and set financed emissions targets. For example, the Glasgow

[1] *See* Steven M. Rothstein, "Analysis shows that investors strongly support the SEC's proposed climate disclosure rule," Ceres, Oct. 11, 2022, https://www.ceres.org/news-center/blog/analysis-shows-investors-strongly-support-secs-proposed-climate-disclosure-rule; *see also* Americans for Financial Reform Education Fund & Public Citizen, "Results of a nationwide survey: Retail investors' supportfor the SEC mandating climate-related financial disclosures from public companies," Apr. 28, 2022, https://ourfinancialsecurity.org/wp-content/uploads/2022/04/FINAL-Report_Climate-Disclosure-Survey-Results_AFR-PC-2.pdf.

Financial Alliance for Net Zero includes groups of asset owners with $11 trillion assets under management (AUM) and asset managers with $66 trillion AUM that have committed to net zero emissions by 2050.[2] In addition to institutional investors, two thirds of wealthy individuals, family offices, and foundations would like their investments to "contribute to reaching the Paris climate agreement goal."[3] According to US SIF Foundation, of the $8.4 trillion AUM in funds that consider ESG factors in their investment decision-making, $3.45 trillion address climate change/carbon and $1.23 trillion apply fossil fuel divestment policies.[4] As discussed further below, the comment file reflects investor need for GHG emissions information. Some commenters, however, expressed concerns with how the proposal approaches GHG emissions disclosure requirements. We recommend an approach that addresses those concerns while increasing investor protection and making markets more fair and efficient.

Our Approach

We recommend ESG-Focused Funds be required to disclose one to five metrics of their choosing in their annual report that in their assessment represent the most important measures of the factors that are the focus of the funds' ESG strategies. Each metric should be accompanied by relevant information about the methodology used to calculate it, and any relevant inputs, estimates, and assumptions. ESG-Focused Funds that indicate they consider environmental factors would have three options:

1. Include GHG emissions information as one of the one to five metrics;
2. Include GHG emissions separately, noting that emissions are not one of the most important factors in the fund's ESG strategy; or
3. Having affirmatively stated in the "ESG Strategy Overview" table in the fund's prospectus that they do not consider issuers' GHG emissions as part of their investment strategy, omit GHG emissions information from the annual report.[5]

[2] Rep. 2022 Progress Report. Glasgow Financial Alliance for Net Zero, 2022, https://assets.bbhub.io/company/sites/63/2022/10/GFANZ-2022-Progress-Report.pdf.
[3] Abby Schultz, "Future Returns: Wealthy See a Role in Investing to Tackle Climate Change," Barron's Penta, Sept. 21, 2021, https://www.barrons.com/articles/future-returns-wealthy-see-a-role-in-investing-to-tackle-climate-change-01632255522.
[4] US SIF Foundation, 2022 Report on US Sustainable Investing Trends Executive Summary, 4, https://www.ussif.org//Files/Trends/2022/Trends%202022%20Executive%20Summary.pdf. Not all of these funds are registered investment companies or are connected to registered investment advisers, and thus not all would be subject to the proposed rule.
[5] A similar approach could be taken with the metrics the Commission proposed (or commenters recommended) for funds that use engagement as a strategy and funds with voting securities: these metrics could be included as one of the one to five metrics or reported on separately.

Lastly, we recommend the inclusion of a safe harbor from liability for funds' good faith GHG emissions disclosures if they abide by the data hierarchy proposed by the Commission and explain their methodology for any good faith estimates.

How Our Approach Would Meet Investor Needs While Addressing Some Commenter Feedback

Allowing ESG-Focused Funds themselves the flexibility to identify the metrics they determine represent the most important measures of the factors that are the focus of the fund's ESG strategy would both respond to investors' need to have information about GHG emissions and address some of the concerns articulated by commenters because:

1. Funds with different strategies and goals would not be compared against a single metric that may not be as relevant to some of the funds' strategies and goals;
2. If ESG-Focused Funds choose a variety of environmental, social, and governance metrics, investors will learn about funds' priorities without a potentially misleading focus on GHG emissions over other ESG-related metrics; and
3. For funds that do not select GHG emissions as one of their 1-5 key metrics, investors would not be misled as to the importance of GHG emissions to the fund's strategies and goals.

While all ESG-Focused Funds that consider GHG emissions in some manner would be required to report them, if this is *not* one of the fund's top metrics, that would be clear in the annual report.

Investors have repeatedly made very clear that GHG emissions data (even though imperfect, improving every year) *is* of tremendous importance to their investment decision-making,[6] making a compelling case for requiring their disclosure by ESG-Focused Funds that consider environmental factors even though some commenters expressed concern about the data being imperfect.

A safe harbor from liability as described above would relieve funds from potential liability for disclosures that portfolio companies themselves are not required to make. A safe harbor would also address any concerns that new disclosure requirements would disincentivize funds for which GHG emissions are not a key consideration from considering emissions at all.

The Comment File Supports Our Approach

[6] *See* footnotes 1-3 for general support outside the comment file and the section below for support in the comment file.

The comment file supports our approach, as commenters: 1) emphasized investors' desire and need for funds' GHG emissions data; 2) expressed the desire for and utility of metrics in addition to GHG emissions; and 3) argued for a safe harbor from liability for funds' GHG emissions disclosures when certain requirements are met.

Many commenters reiterated the importance of GHG emissions disclosures for investors. For example, JP Morgan Asset Management agreed that "investors in environmental strategies are increasingly interested in funds' emission metrics, and that consistent and comparable GHG emissions metrics may help these investors make better informed decisions."[7] Domini Impact Investments wrote in support of GHG emissions disclosure requirements, adding: "While we recognize industry concerns that the scope of funds subject to the proposed GHG emissions reporting obligation may capture funds that do not seek to mitigate or manage GHG emissions reduction as part of [their] investment objective or principal investment strategies, we believe as the data and market currently stand, GHG emissions provide investors with the most meaningful measure of the implementation of a funds' [sic] commitment to its environmental focus. Although this information is imperfect in its current form, it is the best available."[8] Amalgamated Financial Corp. described GHG emissions disclosures as "increasingly essential to the marketplace," "a key factor for any funds claiming to be taking an ESG approach," and helpful for investors to "understand their exposures across a portfolio if they have chosen to include ESG factors in their approach."[9] Many more commenters also expressed the importance of these disclosures.

Some commenters pointed to the availability and potential utility of additional climate-related metrics. The United Nations Principles for Responsible Investment (UN PRI), for example, said that while it "supports the proposed GHG emissions disclosure metrics,"[10] funds should "be encouraged to disclose additional metrics they utilize related to climate and GHG emissions, to reflect that current market practices are still developing."[11] It pointed to the fact that the UK's Climate Financial Risk Forum, a working group involving many of that country's leading financial institutions, conducted a review of climate metrics currently being used that culminated in an "illustrative dashboard" of fifteen "potentially useful climate metrics."[12] As another example, BlackRock argued that for some types of funds that focus on environmental factors, another metric would be useful.[13]

Many other commenters also pointed to the desire and utility of other metrics more generally — both those seeking to quantify environmental factors as well as those seeking to

[7] JP Morgan Asset Management, 12, https://www.sec.gov/comments/s7-17-22/s71722-20136187-307162.pdf.
[8] Domini Impact Investments LLP, 12, https://www.sec.gov/comments/s7-17-22/s71722-20136243-307275.pdf.
[9] Amalgamated Financial Corp., 2, https://www.sec.gov/comments/s7-17-22/s71722-20137057-307663.pdf.
[10] UN PRI, 26, https://www.sec.gov/comments/s7-17-22/s71722-20136241-307272.pdf.
[11] *Id*. at 24.
[12] *Id*.
[13] BlackRock, 9, https://www.sec.gov/comments/s7-17-22/s71722-20137500-307978.pdf.

quantify social and governance factors. It is important to note that funds that focus on environmental factors often do not do so to the exclusion of social and governance factors. The CFA Institute recommended "requiring ESG-Focused Funds to discuss in their annual reports (or within the separate ESG-specific document) progress toward, or attainment of, any ESG-related objectives, goals, and/or targets disclosed within the principal investment strategies of the fund, including any supporting key performance indicators and other metrics."[14] Similarly, Dimensional Fund Advisors argued that if ESG-Focused Funds "are permitted to provide reporting that the fund has determined is appropriate and relevant to an investor's understanding of how the fund's ESG strategy has performed, we believe investors will be better equipped to evaluate whether such funds are delivering the non-financial benefits that they claim to pursue."[15] Domini Impact Investments argued that while GHG emissions are important, they "do not believe it is the only priority topic that an ESG fund should be required to disclose related to its progress" and "encourage[d] the Commission to identify other commonly held, priority topics, for example related to diversity, worker health and safety, human rights, or access, which would better allow ESG investors to compare 'ESG' funds."[16] The State of Hawai‘i Employees' Retirement System argued for giving funds "flexibility in addressing additional ESG factors and strategies," arguing that "simple minimum disclosures with built in flexibility for additional detail is key."[17]

It is worth noting that in another area where the Commission proposed specific metrics — when engagement is a fund strategy — commenters also noted the desirability of additional metrics. For example, US SIF: The Sustainable Investment Forum noted that "[m]eetings are not the only quantifiable metric related to stewardship," and suggested that instead, for example, "[f]unds could disclose the number of shareholder proposals they filed each year, the number of those proposals on which settlements were reached, the substance of such settlements, the support obtained on proposals that went to a vote, and any changes made by portfolio companies following the shareholder meeting."[18] Additionally, the Interfaith Center on Corporate Responsibility (ICCR) argued that "[a] mix of quantitative metrics and narrative disclosure . . . would give investors a much fuller picture of funds' engagement strategies than that depicted through the minimal disclosures in the Proposed Rules."[19] As yet another example, As You Sow noted that "[t]he Impact of Equity Engagement Initiative (IE2) identified 14 activities that shareholders use when engaging companies" and recommended that the rule "require fund managers to describe their engagement activities more broadly than the current proposal does."[20]

[14] CFA Institute, 16, https://www.sec.gov/comments/s7-17-22/s71722-20136195-307170.pdf.
[15] Dimensional Fund Advisors, 1-2, https://www.sec.gov/comments/s7-17-22/s71722-20136192-307167.pdf.
[16] Domini Impact Investments LLP, 14, https://www.sec.gov/comments/s7-17-22/s71722-20136243-307275.pdf.
[17] State of Hawai'i Employees' Retirement System, 2, https://www.sec.gov/comments/s7-17-22/s71722-20136400-307439.pdf,.
[18] US SIF: The Sustainable Investment Forum, 7, https://www.sec.gov/comments/s7-17-22/s71722-20137520-307989.pdf.
[19] Interfaith Center on Corporate Responsibility (ICCR), 2, https://www.sec.gov/comments/s7-17-22/s71722-20136268-307312.pdf.
[20] As You Sow, 2-3, https://www.sec.gov/comments/s7-17-22/s71722-20136120-306863.pdf.

We agree with these commenters and encourage the Commission to consider including in the final rule a set of non-exhaustive metrics and narrative disclosures that funds should report on if engagement is a strategy they use.[21]

Unsurprisingly, many commenters from the regulated community argued for a safe harbor from liability for GHG emissions disclosures, including SIFMA AMG, Fidelity, and JP Morgan Asset Management. We believe this is a reasonable approach for the Commission to take. However, the safe harbor for good faith emissions disclosures should be contingent on a fund's compliance with the data hierarchy proposed by the Commission and the provision of a reasonable explanation of the methodology used for any good faith estimates.

<u>Our Approach Is a "Logical Outgrowth" of the Proposed Rule</u>

Our approach is a "logical outgrowth" of the proposed rule under the Administrative Procedure Act (APA), as the proposed rule contains questions squarely on the issue of additional metrics. The goal of the APA's notice-and-comment requirement is "fair notice."[22] When evaluating whether an agency's rulemaking process was fair, "'[judges] ask [themselves], would a reasonable member of the regulated class . . . anticipate' the general aspects of the rule."[23] The logical outgrowth test requires that a final rule "be a logical outgrowth of the version set forth in its notice of proposed rulemaking"[24] such that commenters "'should have anticipated' the agency's final course in light of the initial notice"[25] and had an opportunity to comment on it.

Two questions in the rule proposal directly address the issue of potential additional metrics, giving the public fair notice of this possibility and an opportunity to consider and comment on it: 1) "Rather than our proposed approach to limit the scope of funds subject to the GHG reporting requirement, *should we instead require these funds to report alternative metrics that they consider in making investment decisions*?"[26] and 2) "*Are there alternative metrics* that funds focused on climate change consider in making investment decisions *that we should require*

[21] These could include: engagement strategy (e.g., identifying any escalatory pathways if a company fails to respond to engagement); engagement priorities; number of engagements; number of companies engaged on each priority topic; instances in which any portfolio company followed through with or met engagement objectives; number of shareholder proposals filed; and narrative disclosure on any private or public engagement undertaken, including on relevant policy issues, lobbying and sovereign engagements, and engagements with relevant industry players (e.g., index providers or proxy advisors). As suggested in footnote 5, the Commission could decide on a set of metrics to require of funds that identify engagement as an ESG strategy, and the funds themselves could choose to include them in their top metrics or report on them separately.
[22] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).
[23] *Telesat Canada v. Fed. Commc'ns Comm'n*, 999 F.3d 707, 713 (D.C. Cir. 2021), quoting *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014).
[24] *Brennan v. Dickson*, 45 F.4th 48, 68–69 (D.C. Cir. 2022).
[25] *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006), quoting *Small Refiner Lead Phase-Down Task Force v. EPA,* 705 F.2d 506, 548-49 (D.C. Cir. 1983).
[26] Proposed Rule, 110 (emphasis added).

funds to report alongside or instead of the proposed GHG emission metrics?"[27] Another question also indicates the Commission's openness to "modifications or enhancements" to the proposed disclosure requirements: "Are there any modifications or enhancements to all the proposed disclosures in *annual reports* and Forms N-CEN, N-CSR, or N-PORT that we should adopt?"[28] A reasonable member of the regulated class, therefore, had reason to anticipate the possibility of the Commission requiring additional metrics and was given a chance to comment on it. Indeed, many commenters did, as discussed above.

We appreciate the Commission's consideration of our recommendations on required disclosures by ESG-Focused Funds. For further discussion, please contact Natalia Renta at natalia@ourfinancialsecurity.org and Alex Martin at alex@ourfinancialsecurity.org.

Sincerely,

Americans for Financial Reform Education Fund
17 Communications
American Federation of Teachers
Climate Action California
Environmental Defense Fund
Green America
Institute for Agriculture and Trade Policy
Interfaith Center on Corporate Responsibility
Majority Action
Natural Resources Defense Council
Oxfam America
Province of Saint Joseph of the Capuchin Order, Corporate Responsibility Office
Seventh Generation Interfaith Coalition for Responsible Investment
Sierra Club
The People's Justice Council
Transformative Wealth Management, LLC
Tulipshare
Unlocking America's Future
Zevin Asset Management

[27] Proposed Rule, 111 (emphasis added).
[28] Proposed Rule, 72 (emphasis added).