

MEMO# 35383

July 27, 2023

ICI Files Supplemental Letter on SEC Proposed ESG Disclosure for Funds and Advisers

[35383]

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TO: ESG Advisory Group
ESG Fund Disclosure Working Group
ESG Public Company Disclosure Working Group
SEC Rules Committee SUBJECTS: Disclosure
ESG RE: ICI Files Supplemental Letter on SEC Proposed ESG Disclosure for Funds and Advisers

We submitted a letter to the SEC yesterday to further support our recommendation that the Commission not include a separate category for "ESG Integration" funds in any final rule. In support of our view that distinctly singling out "Integration Funds" is unnecessary, we describe how FINRA's review of fund sales materials promotes consistency between a fund's prospectus and its marketing materials. We point out that FINRA rules, accompanied by comprehensive, multifaceted staff review, serve to ensure that fund communications are clear and not misleading, ameliorating many of the concerns that prompted the SEC to propose a separate category for "Integration Funds" with distinct disclosure requirements.

We also describe a June 2023 Supreme Court decision which underscores that the Commission compelling ESG disclosures raises constitutional concerns under the First Amendment to the U.S. Constitution.[\[1\]](#) The letter quotes from that decision, which expresses the view that businesses do not "shed their First Amendment protections by" speaking "with an expectation of compensation." The letter puts the Court ruling in the context of the Commission's proposal, stating that:

Here, the Proposing Release compels investment companies to speak about their investment strategy and portfolio in a misleading way. For instance, the Proposing Release requires disclosure that risks misleading investors into thinking that most, if not all, funds operate as ESG funds [because of how broadly ESG Integration and ESG-Focused funds are defined]. Because the First Amendment prohibits the government from compelling misleading speech, the Proposing Release, if adopted as proposed, cannot survive any level of scrutiny under the First Amendment.[\[2\]](#)

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Notes

[1] See 303 Creative LLC v. Elenis, No. 21-476, slip op. at 26 (U.S. June 30, 2023).

[2] See Nat'l Inst. of Fam. and Life Advoc. v. Becerra, 138 S. Ct. 2361, 2372-73 (2018); Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 967 (9th Cir. 2009), aff'd, 564 U.S. 786 (2011).

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