

MEMO# 35681

April 16, 2024

ICI Files Supplemental Comments on ESG Fund and Adviser Proposal

[35681]

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TO: ICI Members
Accounting/Treasurers Committee
ESG Advisory Group
ESG Fund Disclosure Working Group
ESG Public Company Disclosure Working Group
SEC Rules Committee
Small Funds Committee SUBJECTS: ESG RE: ICI Files Supplemental Comments on ESG Fund and Adviser Proposal

The Investment Company Institute^[1] and ICI Southwest sent the attached letter to the SEC last week, supplementing our prior comments on the ESG Fund and Adviser Proposal^[2] in light of the recent adoption and subsequent stay of the Public Company Climate Rule.^[3] The letter pointed out that because these two rule sets are so closely linked, the SEC should align any future requirements for any fund to disclose its portfolio's carbon footprint and weighted average carbon intensity (WACI) with any greenhouse gas (GHG) emissions disclosure requirements ultimately required for public companies.^[4]

The letter further states that this approach makes eminent sense because of the importance of a fund having public company data in a regulatory report as a source to calculate, and provide in the fund's regulatory report, its carbon footprint and WACI. Given the linkage between the rules, funds clearly should be required to comply with any such new disclosure requirements only after public companies have to comply with their related requirements.^[5] Consistent with our 2022 Comment Letter, we emphasized that, unlike the proposal, any final rule should not require a fund to disclose information based on information provided by one of its portfolio companies outside of a regulatory report or to make a "good faith estimate" of the portfolio company's emissions.

Finally, the letter discussed the effect of the recent court challenges to the Public Company Climate Rule and the SEC's stay of the rule. We pointed out that given the Commission's stay, any requirement that funds be required to report aggregated GHG emissions data of portfolio companies (via carbon footprint or WACI) likewise must be suspended pending judicial review of the Public Company Climate Rule. If the Public Company Climate Rule's disclosure requirements are overturned by the courts, any requirement that funds report

aggregated GHG emissions data of portfolio companies must be eliminated. Moreover, if compliance with the Public Company Climate Rule is delayed due to such litigation, our recommendation remains the same: compliance for public companies with the final Public Company Climate Rule must be required and available to funds before funds are required to report their portfolios' carbon footprint or WACI. Otherwise, funds will incur unnecessarily high costs to calculate carbon footprint and WACI metrics, costs which were not adequately addressed in the ESG Fund and Adviser Proposal.[\[6\]](#)

Dorothy M. Donohue
Deputy General Counsel - Securities Regulation

Notes

[\[1\]](#) The [Investment Company Institute](#) (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$34.4 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional \$9.2 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through [ICI Global](#).

[\[2\]](#) The ICI's letter to the SEC is summarized in Memorandum No. 34170 (June 2, 2022) (2022 Comment Letter) available at <https://www.ici.org/memo34170>. The ICI also filed a supplemental letter in May 2023, which is summarized in Memorandum No. 35317 (May 16, 2023) available at <https://www.ici.org/memo35317>.

[\[3\]](#) The ICI summarized the final rules in Memorandum No. 35645 (Mar. 13, 2024), available at <https://www.ici.org/memo35645> and the stay in Memorandum No. 35670 (Apr. 8, 2024), available at <https://www.ici.org/memo35670>

[\[4\]](#) Under the ESG Fund and Adviser Proposal, an ESG-Focused Fund that considers environmental factors (i.e., environmental funds) would be required to use a hierarchy of data sources from which to calculate, and then subsequently report in the fund's annual report, the carbon footprint and WACI metrics utilizing Scopes 1 and 2 GHG emissions data in a tiered fashion, first using portfolio companies' regulatory reports, then, if unavailable, information publicly provided by the portfolio company, and, if such information is unavailable, a good faith estimate of the portfolio company's emissions. In addition, if a portfolio company reports its Scope 3 emissions in a regulatory report or provides it publicly, then an environmental fund also would be required to report separately the carbon footprint metric using the Scope 3 GHG emissions data.

[\[5\]](#) ICI commented comprehensively on both the ESG Fund and Adviser Proposal and the Public Company Climate Proposal. With respect to the ESG Fund and Adviser Proposal, see Letter from Eric J. Pan, President & CEO, and Annette M. Capretta, Associate General

Counsel, ICI to Vanessa A. Countryman, Secretary, SEC (Aug. 16, 2022), available at <https://www.sec.gov/comments/s7-17-22/s71722-20136279-307345.pdf>; Supplemental Letters filed May 16, 2023, available at <https://www.sec.gov/comments/s7-17-22/s71722-190239-374582.pdf>; July 26, 2023 available at <https://www.sec.gov/comments/s7-17-22/s71722-235999-492462.pdf>; and Nov. 30, 2023 available at <https://www.sec.gov/comments/s7-17-22/s71722-305579-785682.pdf>. With respect to the Public Company Climate Proposal, see Letter from Eric J. Pan, President & CEO, and Dorothy M. Donohue, Deputy General Counsel, Securities Regulation, ICI to Vanessa A. Countryman, Secretary, SEC, (June 16, 2022), available at <https://www.sec.gov/comments/s7-10-22/s71022-20131852-302300.pdf>.

[6] The letter states that the SEC's cost analysis for the ESG Fund and Adviser Proposal assumes that funds will incur less costs once public companies are required to comply with the Public Company Climate Rule, since funds could then rely on public companies' self-reporting of their emissions instead of having to make their own good-faith estimates. See ESG Fund and Adviser Proposal, 87 Fed. Reg. at 36,714-16 & n.426. The SEC's conclusion that the eventual effect of the Public Company Climate Rule will be to reduce funds' potential compliance costs assumes that the Public Company Climate Rule will survive legal challenge. That assumption is speculative, and if the Public Company Climate Rule falls, that would severely undermine the SEC's economic analysis on any final ESG Fund and Adviser Rule.