The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 35920

November 8, 2024

SEC Charges Investment Adviser with Making Misleading Statements About Supposed Investment Considerations

[35920]

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TO: ICI Members
Investment Company Directors
Chief Compliance Officer Committee
ESG Advisory Group
SEC Rules Committee SUBJECTS: Compliance
Disclosure
ESG
Litigation & Enforcement RE: SEC Charges Investment Adviser with Making Misleading Statements About Supposed Investment Considerations

On November 8, 2024, the SEC instituted public administrative and cease-and-desist proceedings against an asset manager arising from misleading statements concerning the company-wide percentage of assets under management by it and its affiliates that was "ESG integrated," a term that the asset manager used to indicate the incorporation of environmental, social, and governance (ESG) considerations into investment decision making processes.[1] To settle the charges, the asset manager has agreed to pay a penalty of $17.5 million.

The Asset Manager's Statements Regarding Firmwide ESG Integration

The SEC's order found that between approximately April 2020 and July 2022, the asset manager "made statements in documents that were not specific to any of its funds or investment strategies concerning [asset manager's] firmwide ESG integration and the percentage of its AUM that was ESG integrated" and that such claimed percentages "varied from 70% to 94%." The order stated that the asset manager made "representations regarding the percentage of firmwide AUM that was ESG integrated to specific clients and prospective clients," and "similar representations to a broader audience" including in ESG Investment Stewardship Reports available on the asset manager's website.

The order found that the "representations [asset manager] made concerning the percentage of AUM that was ESG integrated were overstated" for several reasons. First, the

order found that "a substantial portion of the investment strategies that [asset manager] counted as ESG integrated could not consider ESG factors in making investment decisions because they were passive strategies that did not follow an ESG index." The asset manager was found to have "counted all of its ETFs—including passive ETFs that followed a non-ESG index—as ESG integrated." Second, the order found that the asset manager "did not have written policies and procedures governing what should be considered ESG integrated," and as a result, its "approach to classifying strategies as ESG integrated changed" during the relevant period. Third, the order stated that the asset manager's "justification for the integration of its passive ETFs" was "at odds with the public statements [asset manager] made in the ESG Investment Stewardship Reports." The order found that the asset manager "justified its classification of passive ETFs as ESG integrated solely on the basis of two factors: its index oversight practice and its proxy voting policy." However, the order found that the asset manager's "approach focused on the operations of the index provider and not how it selected the underlying securities in the index in which clients' funds were being invested." Further, the order stated that the asset manager's proxy voting policy with respect to equity securities held in passive ETFs but not held in active strategies would utilize the asset manager's "default proxy voting policy, pursuant to which there was no active consideration on a vote-by-vote basis as to whether ESG factors were financially material to the investment," and that such practice was inconsistent with disclosure in an ESG Investment Stewardship Report that stated that "ESG integration included 'consideration of financially material ESG aspects.'"

Compliance Deficiencies, Violations and Sanctions

The order found that the asset manager "failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder."

The asset manager consented to the entry of the order, which stated that, as a result of the conduct, the asset manager willfully violated Sections 206(2) and 206(4) of the Investment Advisers Act of 1940 (Advisers Act) and Rules 206(4)-1(a)(5), 206(4)-7 and 206(4)-8 under the Advisers Act.

The order noted the cooperation of the asset manager, and the asset manager was ordered to cease and desist from committing or causing future violations of these provisions, censured, and ordered to pay a civil money penalty of $17.5 million.

Joshua Weinberg
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Notes

[1] See In the matter of Invesco Advisers, Inc., IA Rel. No. 6770, File No. 3-22306 (Nov. 8, 2024), available at: https://www.sec.gov/files/litigation/admin/2024/ia-6770.pdf.