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Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
rule-comments@sec.gov

Re: Proposed Rules:

- **Investment Company Names (File No. S7-16-22)**
- **Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices (File No. S7-17-22)**

Secretary Countryman:

I write to submit comments on the proposed rules regarding Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices (Release No. 33-11068; 34-94985; IA-6034; IC-34594; File No. S7-17-22) (the "Fund Disclosure Proposal") and Investment Company Names (Release No. 33-11067; 34-94981; IC-34593; File No. S7-16-22) (the "Fund Names Proposal," referred to together with the ESG Fund Disclosure Proposal as the "Proposals"). Given the symbiotic nature of the Proposals, I am combining my comments on both in this letter and submitting this letter in both comment depositories.

I write in my capacity as President of Soundboard Governance LLC, a sole-proprietor corporate governance consulting firm based in Princeton, New Jersey. My experience includes 25 years of practice in the fields of corporate law, securities regulation, and corporate governance as an attorney at global law firms in New York City and Hong Kong; Assistant General Counsel, Corporate of Tyco International; Assistant General Counsel and Corporate Secretary of Johnson & Johnson; and Executive Director of The Conference Board ESG Center. I have held prominent leadership positions in these fields, including Chair of the Board of the Society for Corporate Governance; President of the Stockholder Relations Society of New York; member of the New York Stock Exchange Corporate Governance Commission; member of the Corporate Laws Committee of the American Bar Association; and member of the American Law Institute. I currently teach corporate governance at the Rutgers Center for Corporate Law and Governance in Newark, NJ. I submit these comments in my personal capacity and not as an agent or representative of any of these organizations other than Soundboard Governance.

I respectfully submit these comments as a seasoned corporate governance professional and educated observer of the ESG industry, not as an expert on the Investment Company Act of 1940, Investment Advisers Act of 1940, or other regulations for the investment fund industry. Therefore, my comments are from a substantive, practical, and common-sense perspective, not a technical legal perspective.

I support the Commission's efforts to enhance the level and quality of disclosure required by funds that claim to invest based on environmental, social, and corporate governance ("ESG") factors, practices, and principles. As well-documented in the Proposals, the ESG investment industry has grown rapidly both in volume and scope. But the industry has done so in an uncontrolled way that works to the detriment of consumers. A big part of the problem is the overuse of terms like "ESG," "sustainable," "clean," "green," "ethical," and "socially responsible." Today, there is great monetary incentive to use one or more of these terms in the sales and marketing of investment products and services, but there is little incentive to clarify why and how those terms are being applied.

I believe the Proposals are very much in the public interest of ensuring efficient and well-functioning capital markets in the United States and protecting the investors that participate in them. The commercial opportunity created by ambiguity in ESG investing will continue to grow, and market actors will perniciously take advantage of such ambiguity unchecked without regulatory involvement. It is imperative that the Commission take affirmative steps to create some semblance of order and structure within today's chaos and noise in the ESG investment industry.

My comments, as fully explained below, are:

1. **Do not try to define ESG.**
2. **Require ESG descriptors and modifiers in fund names.**
3. **Adjust the definition of "Integration."**
4. **Separate Impact from Focused funds.**
5. **Weed out ESG coincidence funds.**
6. **Require the Strategy Overview table for all ESG funds.**
7. **Require more disclosure about third-party service providers.**
8. **Require more disclosure on proxy voting and engagement.**
9. **Scrap the definition of "ESG engagement meetings."**

1. Do not try to define ESG.

Following its mission to "protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation," the Commission should impose order and structure for ESG investing, but trying to define the term "ESG" is not the way to do it. ESG is a term that originated decades ago, morphed over time, has been elusive to those who have tried to pin it down and formally define it in objective ways. Parties with strong commercial and political motivations and resources have created a battlefield for the definition of ESG. Despite its authority, the Commission would be joining too late and with low odds of winning. At this point, creating a regulatory definition of the term "ESG" would not be productive.

I support the Commission's approach instead to categorize ESG funds as "Integration," "Focused," and "Impact." These three types of funds are very different, and yet a fund simply labeled "ESG" is often assumed to be one versus the other. Many investors have come to understand "ESG investing" to axiomatically mean "doing well by doing good," "making money while saving the planet," and other catch phrases that generally characterize impact investing but not ESG investing more broadly. The Strategy Overview table that the Fund Disclosure Proposal introduces will help organize the field of ESG investing. It is important to do this at the outset. I suggest requiring funds to clearly categorize themselves as "Integration," "Focused," or "Impact" at the very top of the Strategy Overview table and for the table to appear at the very beginning of the disclosure document.

I also support the Commission's approach to make the fund managers explain what their terminology means. Require those who call their funds "ESG," "sustainable," "socially responsible," "ethical," etc. to explain how they view and apply those terms. If they came up with the name, they should be able to explain it, even if that means pointing to someone else's written definitions.

Whatever you do, do not "provide a non-exhaustive list of examples of ESG factors" or "define certain factors as being ESG." Lawyers and others who make a living interpreting regulations are wont to using "non-exhaustive" lists as *de facto* exhaustive lists or lists of items that take precedence over items not enumerated in the regulation itself.

2. Require ESG descriptors and modifiers in fund names.

A fund named the "XYZ Environmental, Social and Governance Fund" will be seen as different things to different potential investors. To me, that name would mean next-to-nothing without additional words in the name to describe what type of ESG investing is being used or what part of ESG is the focus. This is where today's ESG fund confusion starts, and the Commission should require ESG fund names to contain descriptive words beyond "ESG," "sustainable," etc. Without more descriptive names, investors looking for Impact funds will continue to be unwittingly lured into Integration and Focused funds. The Strategy Overview table will be helpful, but the protections need to start with the very first words the consumer sees. And the fund naming rules must address words that describe "investment strategies" and "types of investment." Retail investors tend to conflate the two terms or see them as interchangeable, despite how clearly they might be distinguished and described later in the document (probably long after they stopped reading it).

3. Require the Strategy Overview table for all ESG funds.

The Strategy Overview table is a welcome addition. The new rules should go further and make it required disclosure for all ESG funds: Integration, Focused, and Impact. The first row should ask the fund to indicate which of the three the fund identifies as. After that, some rows will not apply to Integration funds, for which a "Not applicable" choice could be added.

Regarding whether to permit a fund to replace the term "ESG" in the heading of the table with another term or phrase that more accurately describes the ESG factors that the fund considers, it would be better to keep the title consistent as simply "ESG Strategy Overview."[1] Allowing or requiring funds to insert their own terms would only create the potential for product confusion, misleading semantics, and missed comparisons across funds. (My suggestion above about requiring the fund names to be more descriptive may obviate the need for differentiation in the table heading.)

4. Adjust the definition of "Integration."

What is considered ESG investing has shifted. In my mind, the essence of ESG investing is considering ESG factors alongside traditional non-ESG financial factors when making investment decisions. This is the case even when ESG factors "are generally not dispositive compared to other factors when selecting or excluding a particular investment." But the market view of what constitutes ESG investing has overtaken my very basic view. What I describe as ESG investing is now mainstream, and ESG investing is something more pronounced.

Based on my observations of the ESG industry over time, the common conception of ESG investing has shifted to one where ESG investing is when one or more ESG factors are being considered such that they meaningfully affect the makeup of a traditional fund portfolio. Not everyone would agree with this, but I believe that is where we are, or at least where we are heading. Thus, the Commission's proposed definition of "Integration" should be adjusted. I would propose that the Fund Disclosure Proposal's language:

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[1] Alternatively, allow the table heading to use "ESG" or "Sustainability." While these two terms are often used interchangeably, many prominent professionals and academics in the field view them as describing very different things.

> *a fund that considers one or more ESG factors along with other, non-ESG factors in its investment decisions, but those ESG factors are generally no more significant than other factors in the investment selection process, such that ESG factors may not be determinative in deciding to include or exclude any particular investment in the portfolio*

be modified to something along the lines of:

> *a fund that considers ESG factors along with traditional financial and other non-ESG factors in its investment decisions, where certain ESG factors will be treated as more significant to various degrees than non-ESG factors in the investment selection process, but those ESG factors may not always be determinative in deciding to include particular investments in the portfolio.*

Without this type of modification, arguably any actively managed fund where ESG factors are considered at a high-level but not in a way that meaningfully affects investment choices could call itself an ESG integration fund. It would mislead consumers and result in gross overestimates of the size of the ESG fund universe.

5. Separate Impact from Focused funds.

Impact funds should be an entirely separate category of ESG funds. These funds are much more actively managed and intentional on matters of ESG. The managers of these funds are trying to finance efforts to effect real change, and their funds should not be lumped in with funds that primarily serve to screen out bad actors or prioritize best-in-class disclosure practices. A fund that invests in companies that are developing technologies to remove carbon from the air and build jet engines that do not use carbon-emitting energy sources is a very different creature than a fund focused on net-zero carbon emissions that uses GHG emissions disclosure to include or exclude companies. While the portfolios of those two funds are both focused on climate change and may have some overlapping holdings, the overlaps will be for different reasons. Deeming Impact funds to be merely a subset of Focused funds will only perpetuate ESG confusion in the marketplace.

The substance of the Fund Disclosure Proposal actually drives home the fundamental difference. It would require Impact funds to “disclose the desired impact(s), as well as how the fund measures its progress towards achieving that impact and the related time horizon.” There would be no such requirements for non-impact Focused funds. The Commission should make that fundamental difference abundantly clear by giving Impact funds their own category next to Integration and Focused funds. This will make it easier for consumers hoping to “save the planet” to find the funds making those concerted efforts.

6. Weed out ESG coincidence funds.

One criticism of the ESG fund industry is the existence of funds that invest in companies that happen to have track records that score high with ESG raters and thus are able to be categorized as ESG funds, even though that was not the original intent. This may be because the fund focuses on an industry that naturally has high ESG ratings. These are what I would call "ESG coincidence" funds, which should not be able to categorize themselves as any kind of ESG fund (not even Integration) for purposes of these new regulations. When it comes to ESG investing, intentionality matters. If the fund is not actively considering ESG factors when making investment decisions, they are not doing ESG investing. Thus, they should not be able to back into an ESG fund category.

7. Require more disclosure about third-party service providers.

An area where the Fund Disclosure Proposal does not go far enough is disclosure about the reliance on third-party data and service providers for making investment and voting decisions and facilitating engagement. Funds should be required to name their third-party data and service providers in the Strategy Overview table and then describe how their data and services are used later in the document. This would include ESG rating firms,[2] proxy voting advisors, and index creators. Some funds use third parties to engage with companies and submit shareholder proposals. These types of third parties should also be included. This requirement should be for all funds, not just Focused and Impact, as many Integration funds do look at ESG ratings and tout their use of engagement and proxy voting to influence corporate ESG disclosures and practices. Adding this row to the table is important to "provide investors a clear, comparable, and succinct summary of the salient features of a fund's implementation of ESG factors."

Requiring funds to name their third-party data and service providers in the Strategy Overview table will make both fund managers and third-party data and service providers accountable. Funds should provide lengthier disclosure later in the document to explain (1) why they use these third parties; (2) the extent to which they rely on these third parties when making investment and voting decisions and engaging with companies, (3) how they choose these third parties. Funds should include hyperlinks to where an investor can learn more about the methodologies of those data and service providers if publicly available.

[2] Regulators in other jurisdictions (*e.g.*, UK Financial Conduct Authority, European Securities and Markets Authority) are contemplating some form of oversight of ESG rating agencies. I strongly urge the Commission to do the same as a next step in the ESG fund disclosure enhancement path.

8. Require more disclosure on proxy voting and engagement.

The Fund Disclosure Proposal would impose requirements for funds to disclose information about voting on ESG shareholder proposals. This is under-inclusive, as some funds cast votes against directors and advisory votes on executive compensation (a.k.a., "say on pay") to express their concerns about ESG issues, especially at companies that are not facing ESG shareholder proposals. Given a vote against a director is a more potent strike against a company, a prospective fund investor should know that the fund uses this tool to further its ESG objectives. Thus, the Commission should require funds to disclose votes against directors and say on pay when ESG issues are the driving consideration, in addition to disclosure on votes on ESG shareholder proposals. This data must be included in the fund prospectuses. If a fund uses proxy voting as part of its ESG strategy, prospective investors should know that from the prospectus and not have to scour Form N-PX filings. Regarding proxy voting policies, require funds to disclose those policies, either in summary or in their entirety, on their websites[3] and hyperlink to them in the disclosure document.

Proxy voting disclosure should not be limited to data about voting on ESG shareholder proposals. Funds should also be required to disclose information about ESG shareholder proposals they submitted or co-filed.[4] Submitting a shareholder proposal is a more aggressive tactic than merely voting on them. If this is part of a fund's ESG strategy, prospective investors should know that from the outset.

When fund managers engage with members of the board of directors or management of portfolio companies on ESG matters, those funds should be required to disclose what those efforts looked like. That disclosure need not name individual companies, but it cannot be generic (*e.g.*, "We engage throughout the year on ESG issues with the board and management of our ten largest holdings"). This should be required for Integration, Focused, and Impact funds, with no *de minimis* exception. There may be certain funds within large asset-management firms where the umbrella corporate governance staff engages with portfolio companies, but the fund managers do not factor whatever was learned from the engagement into their investment or voting decisions. Those funds should *not* be able to say that they engaged.

Disclosure about proxy voting and engagement should not be limited to funds that use these tools as a "significant" portion of their ESG strategies. In reality, very few funds make significant use of voting and engagement relative to the sheer number of positions they hold and proxies they vote. Most corporate annual meetings do not have shareholder proposals being voted on. Directors are elected by votes nearing 100 percent at the vast majority of public companies. And funds, even ESG funds, generally do not submit shareholder proposals or otherwise actively engage with their portfolio

[3] Many of the largest funds already do this.
[4] This should include shareholder proposals that were submitted by the fund and then excluded by the company via the No Action request process under Rule 14a-8 or voluntarily withdrawn by the fund.

companies on a regular basis. Thus, it is significant *anytime* a fund submits a shareholder proposal, votes on a proposal, or engages with management.[5] It is even *more* significant when an Integration fund uses these tools. The Fund Disclosure Proposal's proxy and engagement disclosure requirements should apply to all ESG funds and with no significance qualification or test.

Funds that use shareholder proposals, proxy voting, and/or engagement to further ESG objectives but do not use ESG considerations for investment decisions should not be considered ESG funds (not even Integration). The managers of some strictly market-based index funds (*e.g.*, S&P 500 index funds) do use proxy voting and engagement as tools to influence corporate ESG practices and disclosure, but that alone should not allow them to categorize themselves as ESG funds.

9. Scrap the definition of "ESG engagement meetings."

The Fund Disclosure Proposal's definition of "ESG engagement meeting" has serious flaws. It reads:

> *a substantive discussion with management of an issuer advocating for one or more specific ESG goals to be accomplished over a given time period, where progress that is made toward meeting such goal is measurable, that is part of an ongoing dialogue with management regarding this goal.*

While this describes what an ideal engagement would look like, this is not what actually happens in most cases. Often times the ESG goals being discussed are not specific, time-bound, or measurable. And views of what constitutes a substantive discussion that is part of an ongoing dialogue will differ, even among parties at the same meeting. To require all of this to apply for something to be called an engagement meeting is way too strict a standard that will not benefit anyone.

Here are a few questions that will arise under the Fund Disclosure Proposal's definition:

- Does trying in vain to convince a non-believing board that integrating ESG into business strategy for long-term prosperity count as a "substantive discussion"?

- Is strongly encouraging a company to do better on diversity, equity, and inclusion "specific"?

- Does expressing serious concerns about how a company mishandled a social issue causing reputational damage constitute "advocating for ESG goals"?

[5] Those on the issuer side definitely think so.

As someone experienced in shareholder engagement, I would see these three as examples of real engagement on ESG. This would be true even if they were one-time, event-driven meetings as opposed to "part of an ongoing dialogue."

Corporate issuers have their own conceptions of what constitutes "engagement." Many corporate issuers would say that management's conducting general ESG engagement calls with investors and responding to investor letters regarding ESG issues, even if those letters were form letters sent to 100 company CEOs, is ESG engagement. The same goes for a "meet and greet" between board members and the head of stewardship of an investment firm where ESG is not on the formal agenda but is raised and then consumes the bulk of the time for the meeting. Who is to say whether that conception of "ESG engagement" is correct or incorrect? Many corporate issuers now describe in their proxy statements their engagement with investors. All of what I just described would be contemplated as part of that disclosure.

Here are a few more questions that will arise:

- Does submitting a shareholder proposal on carbon emissions disclosure, or even placing a call to the corporate secretary warning of a possible shareholder proposal, constitute engagement?

- Does a 20-minute phone call between a member of the fund's proxy voting committee and a company's assistant corporate secretary on how the fund may vote on another investor's ESG shareholder proposal constitute engagement?

- If a fund participates in a meeting led by a NGO about human rights in a company's supply chain with the company's head of procurement, or about cybersecurity[6] with the company's chief information security officer, does that constitute engagement?

[6] Cybersecurity is a good example of an issue on which industry experts disagree about whether something is an ESG issue, and if so, which of the three categories it falls under. See "Why is Cybersecurity Important to ESG Frameworks?" J.P. Morgan & Co., August 19, 2021 (placing cybersecurity "under the 'Social' pillar"); "Cybersecurity Risk Emerges as the 'G' in ESG," Marsh McLennan, 2022; "Cybersecurity is an environmental, social and governance issue. Here's why," World Economic Forum, March 1, 2022 (characterizing cybersecurity as both a social and governance issue); "Cyber security: Don't report on ESG without it," KPMG LLP, 2021 ("cyber security aligns with not only the 'G,' but also the 'S' and the 'E' in ESG"); "There is a C in ESG," FS-ISAC, November, 2020 ("Cyber is considered part of ESG considerations; primarily within the governance aspect in terms of operational risk management, but also the social realm in terms of how communications are handled in the wake of an attack. However, as a key operational risk that can have material implications for an entity's brand, reputation and wider business profile, cyber increasingly warrants a distinct focus in its own right.")

Many corporate governance professionals on both the investor and issuer sides would view these as real engagement meetings.

While the lack of agreement on what constitutes engagement is a problem, it is not one that can be solved though fund disclosure requirements. Even if the Commission were to attempt to impose the same definition for both fund and issuer disclosure, it would be extremely difficult and thus ill-advised to draw a bright line between what is "**e**ngagement" versus "**E**ngagement." It would also inevitably impact behavior. While more ongoing dialogue between issuers and investors where specific and measurable goals are discussed in a substantive manner would likely be seen by most as a good thing, a regulatory definition of ESG engagement meetings is likely drive up instances of forced engagement on contrived issues with ill-conceived goals at companies that otherwise would not be subject to them. That would be a bad thing.

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Thank you for your efforts to protect ESG fund investors through the rule-making process and for the opportunity to comment on the Proposals. I look forward to seeing the final adopted rules.

Respectfully,

Douglas K. Chia