The Jewish Federations® OF NORTH AMERICA

August 16, 2022

Submitted via email: rule-comments@sec.gov

Secretary Vanessa A. Countryman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Proposed Rule Regarding Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies, File Number S7-17-22

Dear Ms. Countryman:

The Jewish Federations of North America are pleased to submit this letter in response to the May 25, 2022, request by the Securities and Exchange Commission (the "Commission") for public comments on the proposed rule regarding Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies (the "Proposed Rule"). Currently, we do not take a position on whether and how to regulate disclosures related to Environmental, Social, and Governance ("ESG") factors, strategies, and funds addressed by the Proposed Rule. Nevertheless, we believe it is important that any rulemaking in this area consider and address anti-Israel bias. Therefore, in this comment letter, we describe the ways in which anti-Israel bias can pervade ESG ratings and offer best practices for the sector impacting a growing percentage of investor decisions. We thank you for your consideration of the issues discussed in this comment letter.

The Jewish Federations of North America consist of 146 Jewish Federations and hundreds of network communities which collectively raise and distribute more than $2 billion annually to support flourishing Jewish life and the needs of the Jewish people in their home communities and around the world. The Jewish Federation system, among the top 10 charities in North America, leads the largest network of volunteer and professional leaders who build and sustain Jewish communities that are healthy, safe, caring, welcoming and inclusive, educated and engaged, involved in the broader community, and deeply connected to Israel and the global Jewish people.

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Anti-Israel Bias in ESG Ratings Products

As a network of organizations with a long history of combating antisemitism, anti-Israel bias, and the Boycott, Divestment and Sanctions ("BDS") campaign founded in the denial of the right of Israel to exist as a sovereign nation, we have become increasingly concerned with the unfair and biased treatment by some of the companies providing ESG ratings of Israeli companies and those doing business in, with, and related to Israel. As recognized by the U.S. government, 36 other national governments, 865 entities and 320 non-federal governments,[1] the International Holocaust Remembrance Alliance (IHRA) Working Definition of Antisemitism ("the IHRA Definition") highlights that "demonizing" Israel, "applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation," and delegitimizing Israel by "[d]enying the Jewish people their right to self-determination," and denying Israel the right to exist are examples of antisemitism.[2]

Bias in investment ratings is an example of such problematic behavior and leads to divestment from Israel and Israel related companies, furthering the goals of the BDS campaign.

The BDS campaign is antisemitic, relying on the dissemination of false information, demonizing Israel, and applying double standards to it, among other unacceptable tactics to isolate Israel economically, culturally, and politically, including by influencing ESG ratings.[3] The Anti-Defamation

[1] The Combat Antisemitism Movement & The Kantor Center for the Study of Contemporary European Jewry, *IHRA Working Definition of Antisemitism Worldwide Adoption & Endorsement Report*, (Mar. 2022), https://combatantisemitism.org/wp-content/uploads/2022/03/CAM-Kantor-Center-IHRA-Working-Definition-of-Antisemitism-Worldwide-Adoption-Endorsement-Report.pdf.

[2] U.S. Department of State, *Defining Antisemitism*, , https://www.state.gov/defining-antisemitism.

[3] *See, e.g.*, Daniel A. Harris, *The Trojan Bourse* (2022).

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League, a leading civil rights organization, has characterized BDS as "an international campaign aimed at delegitimizing and pressuring Israel."[4]

Recognizing the BDS campaign's goals of isolating and, ultimately destroying, a critical U.S. ally, numerous states have enacted some form of anti-BDS legislation.[5] So has the federal government. For example, 19 U.S.C. § 4201(b)(20)(A)(ii) provides that, in negotiating with foreign countries in the Transatlantic Trade and Investment Partnership, the United States seeks to discourage boycotts of Israel.[6]

The recent Jerusalem Israel-US Strategic Partnership Joint Declaration repudiates the BDS campaign in no uncertain terms:

> "The United States and Israel affirm that they will continue to work together to combat all efforts to boycott or de-legitimize Israel, to deny its right to self-defense, or to unfairly single it out in any forum, including at the United Nations or the International Criminal Court. While fully respecting the right to freedom of expression, they firmly reject the BDS campaign. The two countries will use the tools at their disposal to fight every scourge and source of antisemitism and to respond whenever legitimate criticism crosses over into bigotry and hatred or attempts to undermine Israel's rightful and legitimate place among the family of nations. In this context, they express their deep concern over the global surge in antisemitism and reassert their commitment to counter this ancient hatred in all of its manifestations. The United States is proud to stand with the Jewish and democratic State

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[4] Anti-Defamation League, *The Boycott, Divestment and Sanctions Campaign (BDS)* (May 24, 2022), https://www.adl.org/resources/glossary-term/boycott-divestment-and-sanctions-campaign-bds.

[5] *See*, *e.g.*, 40 Ill. Comp. Stat. Ann. 5/1-110.16; N.J. Stat. Ann. § 52:18A-89.14; Fla. Stat. Ann. § 287.135(2)(a); Cal. Pub. Cont. Code § 2010(c)(1); Tex. Gov't Code Ann. § 808.051(a); Ariz. Rev. Stat. Ann. § 35-393.02(E)(1).

[6] *See also* 19 U.S.C. § 4452 (Congress "opposes politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel, such as boycotts of, divestment from, or sanctions against Israel.").

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of Israel, and with its people, whose uncommon courage, resilience, and spirit of innovation are an inspiration to so many worldwide."[7]

The U.S. objective of combatting the BDS campaign reflects not only a concern that Israel, over time, could face increased international isolation, but also anti-discrimination principles that are fundamental to American democracy.[8] Investment ratings, advice, and reporting that apply a biased double standard to companies from Israel or commercially engaged in relations with Israel promotes divestment and boycotting of Israel. Therefore, elimination of bias from ESG ratings is consistent with U.S. values and foreign policy.

A recently released report (the "Report" or "White & Case Report") commissioned by one leading provider of investment research and financial data, provides one example of the type of pervasive anti-Israel bias found in some ESG ratings products.[9] While the company that commissioned this Report has committed to implementing the initial recommendations included therein to remove some of the anti-Israel bias, the document highlighted how ESG data and ratings create such bias and demonstrated that additional changes are needed to address this problem.

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[7] The White House, *The Jerusalem U.S.-Israel Strategic Partnership Joint Declaration*, (July 14, 2022),https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/14/the-jerusalem-u-s-israel-strategic-partnership-joint-declaration/.

[8] Jim Zanotti, Martin A. Weiss, Valerie C. Brannon, & Jennifer K. Elsea, Congressional Research Service, *Israel and the Boycott, Divestment, and Sanctions (BDS) Movement*, (Dec. 3, 2019), https://www.everycrsreport.com/files/20191203_R44281_1c95dd528315abe4cb3528c526eae77488759f52.pdf.

[9] Joe Mansueto & Kunal Kapoor, *A Letter from Joe Mansueto and Kunal Kapoor*, Morningstar.com (June 2, 2022), https://www.morningstar.com/company/esg-research-integrity (describing and linking to the May 11, 2022 report titled "Report of Independent Investigative Counsel Regarding Alleged Anti-Israel Bias in Morningstar, Inc. ESG Products and Services") (White & Case Report); *see also* The Jewish Federations of North America, *Jewish Federations press Morningstar on anti-Israel bias*, FedBeat (July 15, 2022), https://jewishfederations.org/fedworld/jewish-federations-press-morningstar-on-anti-israel-bias-412243 (describing JFNA's response to the White & Case Report).

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Analysis of this report, as well as research into other companies, points to ways that ESG ratings create bias, including the following:

- First, ESG ratings may rely on sources and data prejudiced against Israel, some of which are produced by activists who are focused on criticizing and delegitimizing Israel. In addition, media sources associated with countries upholding an avowed anti-Israel foreign policy will naturally result in ratings reflecting anti-Israel bias.

- Second, ESG ratings products may include an assessment of the reputational risk to the company in connection with certain events, based on advocacy campaigns, biased sources, and the frequency of media coverage, which is itself driven by such campaigns re-posting of syndicated information. For example, the aforementioned White & Case Report highlighted that 70 percent of the companies that received the most severe human rights controversy ratings from "Controversies Research" related to "Occupied Territories / Disputed Regions" received those ratings due at least in part to the Israeli-Palestinian conflict,[10] although Israel represents only one-third of one percent of global GDP.[11] In effect, reputational risk can become an extension of advocacy and sometimes BDS and antisemitism, itself, rather than reflecting objective facts about the subjects, countries, and companies involved.

- Third, ESG ratings providers may distort the perception of target companies or target geographies with which a set of companies engage commercially by exaggerating their focus well beyond the geography's economic or population size – or by equating the disputed nature of a territory with a presumption of human rights violations. This distortion may be due to a simplistic reliance on analysis by organizations with a history of bias. It may also be based on an inaccurate and negative presumption about all commercial activities associated with the geographic dispute, regardless of either mitigating circumstances or facts associated with any specific company or event.

[10] White & Case Report at 91.

[11] Trading Economics, *Israel GDP - 2022 Data - 2023 Forecast - 1960-2021 Historical - Chart – News,* https://tradingeconomics.com/israel/gdp#:~:text=The%20GDP%20value%20of%20Israel%20represents%200.36%20percent,the%20world%20economy.%20source%3A%20World%20Bank%2010Y%2025Y.

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- Finally, ESG ratings providers can comingle their ratings products and their engagement strategy, sending target companies a clear message, though one that lacks credibility and transparency, that they must discontinue a business practice or risk punishment by investors. Such conduct taints the objective standards of a ratings company and essentially advances boycotts and divestment.

The White & Case Report confirmed that there is a currently unaddressed risk that ESG ratings products are pervaded by anti-Israel biases. It further demonstrated the need for fair and defendable processes for developing such ratings, particularly with respect to "social" issues (the "S" in ESG). In addition, the Report demonstrated a need for increased transparency in data and data processing regarding ESG ratings, so investors can have access to the information needed to identify anti-Israel and other biases. While not fully documented at the time of this comment, public reports of divestments associated with other ESG ratings products raise the specter of anti-Israel bias impacting the sector. This context points to the enormity and urgency of this issue and further highlights the imperative for action.

It is important for the Commission to consider the role of pernicious biases, particularly bias against Israel, as it considers potential regulatory approaches in this area. Engrained biases can negatively impact both issuers and investors. The risk of non-transparent biases affecting ESG ratings is high because "ESG data is noisy," leading to "a divergence in ratings from the independent agencies that evaluate and assign ESG ratings," which in turn leads "to confusion and a much lower probability that ESG ratings have a direct correlation to financial performance," according to the MIT Sloan Sustainability Initiative.[12] If the Commission decides to address ESG ratings, it should ensure that the risk of bias affecting ratings is fully addressed or, at the very least, fully disclosed.

Recommendations for Best Practices

Bias in ESG ratings and engagement negatively impacts the ability of investors to properly evaluate investments and make cogent and fully informed investment decisions and, contrary to U.S. policy and most Americans'

[12] Beth Stackpole, MIT Sloan, *Why sustainable business needs better ESG ratings,* (Dec. 6, 2021), https://mitsloan.mit.edu/ideas-made-to-matter/why-sustainable-business-needs-better-esg-ratings.

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views,[13] could discourage companies from doing business in and in relation to Israel. Given the importance of this issue, we hope that the ESG industry writ large, as well as the investment advisors using such products, take note of the significant risk of bias in ESG ratings products and create or follow best practices that remove such bias.

We suggest that ESG rating providers should:

a) Avoid the presumption that certain broad categories of business activities, particularly those associated with biased analysis and activist attacks, necessarily require a negative rating and institute processes for in-depth understanding of the issues to avoid indiscriminately capturing and branding companies as controversial.
b) Consider the inherent flaws in using a reputational risk methodology associated with negative media campaigns, which by its nature, is overly simplistic and creates structural biases that punish democracies like Israel with its vibrant and uncensored press and NGO community.
c) Develop processes for evaluating biases in source documents underlying ESG ratings. With respect to certain issues involving Israel, for example, sources based on anti-Israel advocacy should not be used. Processes designed to remove such biases should include regular, transparent reviews of products, processes and controls for biases and engagement with persons with deep knowledge of Israeli and Jewish history and politics to examine and eliminate sources with a history of anti-Israel activities, including those that have been denounced by the U.S. government and other credible stakeholders.
d) Not comingle ratings and company engagement with respect to Israel, which naturally leads to the promotion of BDS, and provide transparency regarding engagement with companies that are targets of negative ratings.
e) At minimum, be publicly transparent regarding their methodology, sourcing of information, and engagement with target companies so that investors can make sound investment decisions.
f) Remove inflammatory language indicative of underlying biases from their ratings products.

[13] Becka A. Alper, Pew Research Center, *Modest Warming in U.S. Views on Israel and Palestinians* (May 26, 2022), https://www.pewresearch.org/religion/2022/05/26/modest-warming-in-u-s-views-on-israel-and-palestinians/.

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g) Establish systems and implement trainings to ensure that their research analysts and employees are better educated on explicit and implicit bias, so they can identify and avoid anti-Israel bias in sources, analysis, and terminology.

In the context of this rulemaking, the Commission should consider requiring that investment advisors and investment companies disclose the actions they are taking to ensure that the rating products they use have been vetted to ensure they are not affected by undisclosed biases, such as by employing the best practices described above. The Commission should also consider conducting outreach and providing resources, including through the Office of Investor Education and Advocacy, to investors regarding ESG ratings and investments to facilitate greater understanding and identification of processes and biases.

Conclusion

As is clear from the Report and the best practices described above, it is imperative that ESG ratings firms, which have an outsized influence in how the ESG framework is implemented in investing, provide transparent and unbiased advice. The Proposed Rule requires increased disclosure from investment companies and investment advisors regarding how ESG principles are implemented. While we do not take a position on whether and how to regulate ESG-related disclosures for investment advisers and investment companies, the Commission must not lose sight of ESG ratings firms' biases and should take the steps necessary to promote increased transparency and the implementation of best practices to ensure that the processes and procedures regarding ESG ratings are fully transparent and disclosed. Increased transparency in ESG ratings and the implementation of best practices, will go a long way to removing or reducing bias in ESG ratings that negatively affect the ability of investors to control their investments.

Thank you for your consideration of our comment letter, and we welcome the opportunity to engage with the Commission on this important issue.

Sincerely,

Julie Beren Platt

Julie B. Platt, Chair
Board of Trustees

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