August 16, 2022

Submitted electronically via SEC.gov
Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-17-22
Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices

Dear Ms. Countryman:

The Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG")[1] appreciates the opportunity to comment on the Commission's proposal[2] to enhance disclosures by certain investment advisers and funds about their environmental, social and governance ("ESG") investment practices (the "Proposal").

SIFMA AMG supports the Commission's aims to promote comparable, reliable and material information[3] for investors by requiring certain disclosures for funds that consider ESG factors in their investments. We applaud the Commission's decision to avoid prescriptive definitions of "ESG" and to focus on ensuring funds and managers provide adequate disclosures to support their claims about the role of ESG factors in their investment decisions.[4]

[1] SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit http://www.sifma.org/amg. SIFMA AMG appreciates the assistance of George B. Raine, James D. McGinnis, Jennifer Choi and Colton Canton of Ropes & Gray LLP in the preparation of this response.
[2] Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices Release No. IA-6034, 87 Fed. Reg. 36654 (proposed May 25, 2022), *available at* https://www.sec.gov/rules/proposed/2022/ia-6034.pdf (the "Proposing Release").
[3] *See* Proposing Release at 1 ("The proposed rules and form amendments are designed to create a consistent, comparable, and decision-useful regulatory framework for ESG advisory services and investment companies to inform and protect investors while facilitating further innovation in this evolving area of the asset management industry.")
[4] SIFMA AMG appreciates that the Commission has included a 60-day comment period for this rulemaking. *See* Proposing Release at 1. SIFMA AMG continues to believe that, consistent with federal guidance on rulemaking procedure, the public should be provided a minimum of 60 days to comment on rule proposals. *See* Joint Comment Letter from SIFMA & SIFMA AMG on the "Importance of Appropriate Length of Comment Periods" (Apr. 5, 2022), *available at* https://www.sifma.org/resources/submissions/importance-of-appropriate-length-of-comment-periods. However, given the complexity of the rulemaking and the Commission's crowded overall agenda, the Commission should consider extending the comment deadline to provide commenters due time to provide thoughtful commentary on the proposal and its interactions with other proposed changes to the federal securities laws, including but not limited to changes to the proxy rules, rules relating to fund names, additional disclosures

However, as discussed below, SIFMA AMG believes certain provisions of the Proposal can be modified to better achieve the Commission's goals while providing investors with disclosures that are better targeted and more supportive of informed decision-making. We thus submit the following comments, which include suggested modifications and improvements, for the Commission's consideration.

1. Executive Summary

SIFMA AMG has identified various topics where we believe the Commission could strengthen the Proposal, as well as several areas where we wish to express support for the Commission's approach. We have organized the letter as follows: first, we discuss the conceptual underpinnings of the rule, including an explanation of why we believe the Commission's decision to forego a definition of "ESG" is appropriate. Second, we suggest several improvements to the Proposal's ESG classification framework for funds and investment strategies. Finally, we discuss and suggest improvements related to several specific disclosure provisions from the Proposal, such as those regarding proxy voting, issuer engagement and greenhouse gas ("GHG") emissions. We conclude with certain concerns SIFMA AMG has about the Proposal's economic analysis and authority discussion. For the convenience of the Commission, we summarize the most significant aspects of the sections that follow below:

- Definition of "ESG": SIFMA AMG supports the Commission's decision to refrain from defining "ESG."[5] ESG investing is rapidly evolving, and a prescriptive definition of "ESG" may limit market innovation and lead to a mismatch between regulatory definitions and investor expectations. Prescribing a single definition of ESG may also create conflicts with international frameworks,[6] thereby increasing uncertainty, investor confusion and inefficiency in the market. Maintaining the Commission's current approach allows investment companies and investment advisers to provide more-accurate disclosures by explaining those funds and strategies that advisers consider within the scope of ESG.
- Fund Categories: SIFMA AMG has concerns with the proposed Integration Fund category and the breadth of the definition of ESG-Focused Funds. With respect to the former, for example, the current Proposal arguably classifies all funds that consider "governance" as Integration Funds, which carries implications for actively managed equity (and other) strategies.[7] Many advisers believe ESG factors impact the value of all investments and inherently incorporate analysis of ESG factors into all investment decisions across the funds they manage. Obligating all such funds to provide the

relating to cybersecurity risk management, the proposed Climate Disclosure Rule and the possible proposal of additional disclosures relating to human capital management.

[5] *See* Proposing Release at 24–25.

[6] *See, e.g.,* Regulation (EU) 2019/2088 on Sustainability-Related Disclosures in the Financial Services Sectors; G.A. Res. A/RES/70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015).

[7] *See* Proposing Release at 26 ("An Integration Fund, for this purpose, would be 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.")

enhanced disclosures required of an Integration Fund in offering materials and shareholder reporting risks misleading investors by overstating the role ESG factors play in a fund's investment decisions. Certain SIFMA AMG members therefore suggest that the Commission consider removing the "Integration Fund" category entirely and instead clarify that funds may discuss their integration of ESG factors into their general analysis of material factors affecting an investment in the statement of additional information (*i.e.*, treating the ESG factors similarly to any other factor that may influence any investment). Advisers that employ ESG integration strategies in one or more funds should provide a brief discussion of how they integrate ESG factors in their Form ADV, as discussed further below. Other SIFMA AMG members would support defining as Integration Funds only those funds that affirmatively opt-in to the Integration Fund category. Relative to the disclosures proposed, either approach would have the benefit of avoiding undue and misleadingly prominent ESG-related disclosures in prospectuses while still providing investors useful, comparable information about funds' incorporation of ESG factors in their analyses.

Similarly, the current definition of an ESG-Focused Fund would potentially encompass many funds that neither intend to be nor hold themselves out as focusing on ESG issues solely because of activities they undertake as part of their advisers' normal courses of business. SIFMA AMG therefore recommends the Commission revise the definition of an ESG-Focused Fund to clarify that a fund is "ESG-Focused" only if (i) analysis based on one or more ESG factors is part of the fund's principal investment strategies, (ii) the fund's advertisements or sales literature indicate that the fund primarily focuses on ESG factors, or (iii) the fund has a name including terms indicating the fund's investment decisions incorporate one or more ESG factors.[8] Additionally, SIFMA recommends eliminating the use of the ESG Strategy Overview table for ESG-Focused and Impact Funds in the Proposal and instead requiring funds' disclosure of ESG-related analysis in the same manner as other principal investment strategies, including narrative explanations of the use of investment screens, indexes, and proxy voting or issuer engagement policies. Finally, SIFMA AMG recommends additional flexibility for Impact Funds in describing their impact-related disclosures.

- Undue Prominence of ESG-Related Strategies in Form ADV: The Proposal's new Form ADV disclosures, especially in the context of ESG integration strategies, would likely mislead investors about the prominence of ESG factors in advisers' investment decisions and thus could potentially exacerbate, rather than combat, greenwashing. The Proposal would "require an adviser to provide a description of the ESG factor or factors it considers for each significant investment strategy or method of analysis for which the adviser considers any ESG factors."[9] Advisers would as a result be obligated to disclose significantly more information about the role of ESG factors in their investment strategies than they do about other investment-related factors, where Form ADV only requires a discussion of any "material, significant, or unusual risks" of a strategy or investment in a particular type of security.[10] Advisers that employ active and certain passive strategies (*e.g.*, non-quantitative or non-algorithmic strategies) often consider a wide range of ESG

[8] *Id.* at 33–34.
[9] *Id.* at 129.
[10] *Id.*

factors across all their products. These advisers would therefore likely need to devote significantly more space and time to discussing the role of ESG factors in their investment processes than other concerns of similar or potentially greater importance, as advisers generally do not identify or describe in their Form ADV all or even most investment factors considered (nor would it be practicable to do so).

- Proxy Voting and Engagement Strategies: SIFMA AMG is concerned that quantitative disclosure requirements related to proxy voting and outreach engagement in firms' annual reports[11] are unlikely to provide meaningful information to investors and could discourage constructive conversations and engagement efforts. The use of quantitative metrics fails to account for, or at least risks significantly de-emphasizing, the quality of proxy proposals and engagement efforts. Indeed, classifying a proxy proposal as advancing (or even related to) particular ESG goals is not a straightforward enterprise for a variety of reasons—for example, proxy proposals may carry counterintuitive titles such that a vote against an ostensibly "ESG" related proposal may actually advance ESG goals (or vice versa).[12] These issues are especially salient because an ESG-Focused Fund that does not expect to engage with issuers on ESG issues must "disclose that neither proxy voting nor engagement with issuers is a significant means of implementing its investment strategy."[13] This aspect of the Proposal implicitly and unnecessarily encourages funds to use engagement and/or proxy voting strategies as a significant part of their strategies to avoid the otherwise unfair implication that those methods are of no import to the fund at all. Moreover, requiring quantitative disclosures about whether firms voted for or against ESG-related proxy proposals or the number of engagements with portfolio companies will not provide apples-to-apples comparisons across different advisory firms and fund groups because different complexes will not use identical definitions of the critical terms. SIFMA AMG recommends that the Commission replace these quantitative disclosures with a narrative, "show your work" approach, whereby ESG-Focused and Impact Funds would be required to disclose and explain their engagement efforts and proxy votes only if they claim to use proxy voting or engagement as an important part of their ESG strategies (*i.e.*, in a manner that is distinct from typical investment management stewardship).

- Greenhouse Gas Emissions: While SIFMA AMG supports efforts to increase disclosure regarding fund greenhouse gas emissions where appropriate, we are concerned that the disclosures around GHG emissions are too broad and should apply to funds that focus on emission specifically to avoid comparisons among fundamentally incomparable investment products. For instance, funds that focus on non-GHG emissions factors but do "consider" environmental factors (*i.e.*, funds with significant focus on the "S" and/or "G," or that primarily focus on environmental factors other than GHG emissions) will be benchmarked against strategies that focus primarily or entirely on GHG emissions, meaning that unalike products will be compared on identical bases. Additionally, the Proposal's requirement that funds estimate GHG emissions when information is not

[11] *See id.* at 77–86.

[12] In addition, and similar to issues discussed above, it may be difficult to determine whether an issue is an "ESG" issue because governance (or topics that could arguably be viewed as governance-related) is often the focus of issues put forward for proxy votes.

[13] *Id*. at 63.

available from issuers would provide misleading information to investors and place an unsustainable and unwarranted compliance burden on funds. To address these issues and thus avoid undue tunnel vision on emissions in environmental investing, we would support applying GHG emissions disclosures only to funds with a specific emissions focus (rather than any ESG-Focused Fund that "considers" environmental factors but does not affirmatively state that carbon emissions play no role in their investment decisions) and eliminating the requirement that funds provide estimates if GHG emissions statistics are not available from regulatory documents or other information published by issuers themselves.

- Unit Investment Trusts: SIFMA AMG is generally supportive of the Proposal's approach to unit investment trusts ("UITs"). However, the Commission should ensure that the ESG disclosure requirements for UITs only apply on a prospective basis – i.e., only apply to newly launched UITs and not those already in operation. Additionally, because most UIT issuers do not amend Form N-8B-2 when registering additional series, but instead use Form S-6 to describe the investment strategies for each series, we believe the Commission should amend only Form S-6 to require ESG strategy disclosure for UITs.
- Cost/Benefit Analysis: SIFMA AMG believes the Proposal would benefit from more extensive cost-benefit analysis in some respects. Specifically, the breadth of some disclosure proposals discussed herein may subject more funds and advisers than anticipated to enhanced disclosures based on their use of ESG strategies. It would be useful, at a minimum, if the Commission attempted to provide some estimate of the number of funds and advisers that would be subject to the Integration Fund and ESG integration strategy disclosure requirements. SIFMA AMG would further appreciate a more detailed discussion of the cost estimates for other disclosure requirements, particularly with regard to Form ADV disclosures relating to investment strategies and the costs associated with GHG emissions reporting for ESG-Focused Funds. The Commission should also consider whether the Proposal would lead to costs such as advisers deciding affirmatively to disregard ESG factors, or to offer fewer investment options (including funds) that are intended to be socially or environmentally beneficial, or to direct more capital to issuers with negative ESG factors.
- Statutory Authority: Without taking a position on the Commission's legal authority with respect to the substantive requirements of the Proposal, SIFMA AMG wishes to note that the Supreme Court's recent decision in *West Virginia v. EPA*[14] may limit the Commission's ability to implement both the Proposal and/or the recently proposed operating company climate disclosure rulemaking (the "Climate Disclosure Rule").[15] In the interest of promoting regulatory stability and preserving the reasonable reliance interests of the advisers, funds and investors impacted by the rule, the Commission should consider extending compliance periods and making certain GHG disclosure requirements contingent upon the successful compliance implementation of the Climate Disclosure Rule.

[14] *W. Virginia v. Env't Prot. Agency*, No. 20—1530, 2022 WL 2347278 (U.S. June 30, 2022).
[15] The Enhancement and Standardization of Climate-Related Disclosures for Investors Release No. 33-11042, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022), https://www.sec.gov/rules/proposed/2022/33-11042.pdf.

2. SIFMA AMG supports the Commission's decision not to provide a single definition of "ESG."

- ***SIFMA AMG supports the Commission's decision to forego prescribing a single definition of "ESG" and believes this aspect of the Proposal should be retained in the final rule.***

The Proposal does not define ESG.[16] Instead, it requires funds to "disclose to investors (1) how they incorporate ESG factors into their investment selection processes and (2) how they incorporate ESG factors in their investment strategies."[17] SIFMA AMG broadly agrees with this approach. Imposing a static definition of "ESG," which does not currently and may never have a fixed market definition, is inappropriate. Doing so would run the risk of any ESG definition being both over- and under-inclusive of important ESG-related considerations. Additionally, defining what constitutes "environmental" or "social" benefits or considerations would run the risk of further politicizing the rule proposal and may impact the Commission's authority to promulgate the rules and disclosures otherwise called for in the Proposal (as discussed below). Furthermore, other jurisdictions such as the EU have already promulgated their own rules regarding the use of analogous terms.[18] Misalignment among the Commission's definition of ESG, investor and marketplace understanding of the term and other jurisdictions' definitions would confuse investors and undermine adoption of ESG investing strategies. For these reasons, the Commission should maintain its current position and not define "ESG" in the final rule.

3. The Commission should reconsider or eliminate the Integration Fund category and narrow the definition of ESG-Focused Funds.

- ***Part of our membership believes the Commission should remove the concept of "Integration Funds" from the Proposal.***

Under the Proposal, Integration Funds must describe how the fund incorporates ESG factors into its investment selection process, including what ESG factors the fund considers. Open-end funds would provide this information in the summary section of the fund's prospectus, while closed-end funds would disclose the information as part of the prospectus's general description of the fund.[19] Additionally, if an Integration Fund "considers the GHG emissions of portfolio holdings as one ESG factor in the fund's investment selection process" it must describe how the fund considers the GHG emissions of its portfolio holdings.[20] This explanation must include a description of the methodology the fund uses to analyze portfolio company GHG emissions.[21] These GHG disclosures would be included in the fund's statutory prospectus or later in a closed-end fund's prospectus.[22]

SIFMA AMG supports the Proposal's attempt to make more consistent disclosures about ESG issues but believes the level of required detail in Integration Funds' disclosures misleadingly

[16] *See* Proposing Release at 24–25.
[17] *Id.*
[18] *See, e.g.,* Regulation (EU) 2019/2088 on Sustainability-Related Disclosures in the Financial Services Sector.
[19] *See* Proposing Release at 25–26.
[20] *Id.* at 28.
[21] *See id.*
[22] *See id.* at 29.

over-emphasizes the role of ESG factors for the vast majority of potentially encompassed funds. For example, declaring funds that consider "governance" to be ESG funds would capture a wide range of actively managed funds and some passively managed funds. More generally, many fund managers now consider environmental and social issues an intrinsic part of the value proposition of nearly any investment and purposefully incorporate such factors into their analysis of all or nearly all investments as part of their ordinary courses of business. Indeed, a significant reason why ESG issues have become a part of the investment landscape is the increasing view among both investors and investment managers that ESG concerns are intertwined with the financial performance and value of any investment.[23] That is to say, the "integration" of E, S, and/or G consideration is inherent to many managers' processes, similar to consideration of any other investment-related factor such as "macroeconomic trends or [other] company-specific factors."[24] Creating a unique category for "Integration Funds" may be to some degree inherently confusing for investors, because it indicates that these funds' relationship to ESG issues is not grounded in the same concerns about materiality as non-Integration Funds.

Sweeping so many funds into the "Integration Fund" category as proposed therefore risks contributing to greenwashing by overemphasizing such funds' considerations of ESG factors relative to other investment factors. The sheer number of funds that would be likely to fall under such a classification would to some degree render the category unhelpful to investors. Moreover, classifying so many funds as ESG Integration Funds would create problems for ERISA, state public funds and other clients who wish to avoid ESG investments.[25]

SIFMA AMG recognizes, however, that the Commission's proposal responds to a legitimate need to ensure that investors are able to distinguish between funds whose investment processes are truly influenced by ESG factors and those whose strategies "vary little from ones without" an ESG "label" and to provide uniform, comparable disclosures.[26] Certain SIFMA AMG members therefore propose that the Commission eliminate the Integration Fund category from its rule proposal, and instead replace it with guidance to investment managers for how and where they can disclose information about their integration of ESG factors into their investment considerations.

This guidance would provide that funds are permitted to discuss their view of how ESG factors are material to their investments and their process for incorporating consideration of those factors so long as they state that ESG factors are one of many considerations in the funds' investment processes, such that ESG factors are no more determinative of a particular investment

---

[23] *See, e.g.,* Linda-Eling Lee, "What Does ESG Investing Really Mean? Measuring Materiality," Pension Research Council Symposium, April 29–30, available at https://pensionresearchcouncil.wharton.upenn.edu/wp-content/uploads/2021/04/LeeCombined_OSM-4.9.21.pdf.

[24] Proposing Release at 14.

[25] For example, ERISA clients must be sensitive to situations where integration of ESG factors into a fund's investment selections conflicts with their fiduciary duties under ERISA. *See* Celia A. Soehner and Elizabeth S. Goldberg, *ERISA and the challenges of using ESG in retirement plan investing*, Reuters, September 20, 2021. Non-ERISA funds may also be wary of assuming a regulatory label implying a unique focus on ESG concerns in light of political developments in different regions. *See ESG under fire in US state capitols,* The Financial Times, July 25, 2022 (noting that "anti-ESG laws being enacted in conservative states are adding significant risks for asset managers worldwide.")

[26] Proposing Release at 18.

decision than other factors the funds may consider. Funds whose integration of ESG factors arises from a conviction that the environmental, social or other impacts of an investment are inextricably linked to the investment's value to shareholders are generally not perceived by managers or the public as using ESG factors in a unique way that would require prescriptive disclosures. Furthermore, describing how ESG analysis is incorporated as part of examining a stock's financial value would not mislead investors who seek to invest in products for their ESG qualities and thus presents little risk of greenwashing.

Providing this guidance would both prevent greenwashing and provide the standardization and uniformity investors need to make informed decisions. Because funds would need to tie their discussion of ESG factors to traditional standards of materiality, the Commission would be able to demand heightened disclosures from funds whose description of their ESG integration processes imply that they are employing a unique ESG-related strategy separate from the materiality analyses investors expect funds to make of all investments. Under this framework, a fund that leads investors to believe they "are investing in—and potentially are paying higher fees for—a 'sustainable' strategy that may actually vary little from ones without such a label"[27] could be policed by the Commission because such funds description of its strategy would necessarily not be tied solely to standard notions of materiality. Finally, funds under this approach would be encouraged to provide uniform disclosures in language already familiar to investors, and investors would know exactly where to look in a funds documents to find those disclosures.

- ***Other members believe the Commission should limit the application of the "Integration Fund" classification by applying the label (and attendant disclosures) only to funds that intentionally opt into the ESG Integration category.***

Other SIFMA AMG members believe that there are benefits to maintaining the "Integration Fund" category but believe the Commission should take several steps to more clearly delimit the boundaries of the "Integration Fund" definition and better contextualize the role of ESG factors in Integration Funds' investment decisions.

First, if the category is maintained, the Commission should limit the Integration Fund category to those funds that affirmatively opt into classification as an Integration Fund. As discussed above, many advisers view themselves as "integrating" ESG factors into their normal analyses of material factors affecting a possible investment but would not consider many funds they advise to be "ESG" funds. Advisers that view ESG issues as part of the inherent value proposition of any investment should not necessarily be subject to the heightened disclosure requirements proposed in the Commission's rule. Indeed, requiring those firms to provide the same fund-level disclosures as firms that believe their products' incorporation of ESG analyses are distinct from to their general consideration of "financial, industry-related, or macroeconomic factors"[28] dilutes the meaning of the required disclosures and contributes to greenwashing. Thus, the Commission should permit those funds that do not wish to fall under an "ESG integration" label (implying that their funds' analyses of ESG is unrelated to their standard analysis of materiality) to briefly explain their incorporation of those factors in their funds' statement of additional information without being categorized within the spectrum of ESG funds (*i.e.*, such funds should not necessarily be labeled "Integration Funds").

---

[27] Proposing Release at 17.
[28] *Id.* at 30

However, some funds may view their strategies as reflecting some heightened level of integration that justifies disclosure beyond that in the statement of additional information; in that case, these "Integration Funds" could be subject to more particularized prospectus disclosure requirements while not being inappropriately deemed "ESG-Focused." Funds that place a heavier emphasis on their incorporation of ESG factors would then make lengthier and more prominent disclosures about their ESG integration than funds that do not view ESG factors as occupying a place in their decisions separate from other material factors. This revision would avoid some issues that an overbroad application of the Integration Fund label would cause but still permit funds to provide detailed information to investors about their investing processes.

- ***The Commission should define an "ESG-Focused Fund" as a fund that either uses ESG factors as part of a principal investment strategy when selecting investments or that markets its use of ESG factors in a manner that suggest ESG factors are a primary focus of the fund, including through the fund's name.***

The Proposal's definition of "ESG-Focused Funds" is too broad and would apply to many funds that neither investors nor managers understand to be focused on ESG investing. The Proposal provides two ways that a fund may be subjected to the enhanced disclosures required of an "ESG-Focused Fund": the fund may use ESG factors as "a significant or main consideration (1) in selecting investments or (2) in its engagement strategy with the companies in which it invests." The Proposal identifies two specific actions as examples of a fund using ESG factors as a "significant or main consideration" in selecting investments: tracking "an ESG-focused index" or "apply[ing] a screen to include or exclude investments in particular industries based on ESG factors." Funds could further be subject to the rules for ESG-Focused Funds if the fund "has a policy of voting its proxies and engaging with the management of its portfolio companies to encourage ESG practices or outcomes."[29]

Yet, as the Proposal itself notes, many investment managers "engage in fundamental-oriented analysis" that involves "long-standing considerations of governance factors in their investment selection processes."[30] For these managers, all funds that involve these "long-standing considerations of governance factors" as a "significant" part of their investment strategies may suddenly become ESG-Focused Funds. Similarly, managers that employ governance or other ESG-related engagement policies across their fund complexes might also be caught in the Proposal's definition of an "ESG-Focused Fund". Investors might easily believe such funds give ESG factors special weight, or at least some weight, in selecting investments because of the "ESG-Focused" label, even if the funds do not use ESG factors when selecting investments at all. These funds would therefore be forced to either adopt an "ESG-Focused" classification they view as inaccurately describing their investment strategies or cease engagement activities they view as potentially beneficial to shareholders.

A similar over-breadth issue arises from the interaction of the Proposal's classification of funds that use ESG-related proxy voting strategies as "ESG-Focused Funds" and managers' fiduciary duties. The instructions to the relevant Forms provide that "[t]he Fund should only check the box [in the ESG Strategy Overview Table] for proxy voting or engagement with issuers (or both,

---

[29] *Id.* at 33.
[30] *Id.* at 30.

as applicable) if it is a significant means of implementing the Fund's ESG strategy, *meaning that the Fund, as applicable, regularly and proactively votes proxies or engages with issuers on ESG issues to advance one or more particular ESG goals the fund has identified in advance"* (emphasis added).[31] As fiduciaries, investment advisers owe each of their clients, including funds, a duty of care and loyalty with respect to services undertaken on the client's behalf, including proxy voting. Given advisers' fiduciary duties, advisers typically take steps such that funds "regularly and proactively" vote proxies.[32] It would be difficult to differentiate funds that regularly and proactively vote proxies generally from those funds that regularly and proactively vote proxies on ESG issues to advance a particular ESG goal—which could mean, under the Proposal, that many funds that would not consider themselves ESG-related would find themselves deemed "ESG-Focused."

Other funds would be deemed to use ESG factors as a "significant or main" consideration—and thus to be an ESG-Focused Fund—simply because they apply "a screen to include or exclude investments in particular industries based on ESG factors" no matter how minimal the use of such a screen might be.[33] This prong of the definition would simultaneously sweep up funds that screen investments in a *de minimis* fashion or for purposes only tangentially related to ESG considerations,[34] which in turn would present a significant risk of greenwashing by forcing funds that employ broad or ineffective screens to claim the "ESG-Focused" label. To use an extreme example, one could imagine a fund employing a screen that limits investments to the five hundred most socially conscious issuers in the S&P 500, which under the Proposal as written could at least arguably then be classified as an ESG-Focused Fund.[35]

Indeed, the Proposal's use of the term "significant or main consideration" is itself vague and provides limited guidance to funds seeking to determine if they will fall under the definition of an "ESG-Focused Fund." By contrast, the concept of a principal investment strategy is well understood by both investors and fund managers and used across a range of contexts in modern investment law.

A better alternative to the Proposal is to define "ESG-Focused Funds" by reference to a fund's principal investment strategies and how the fund otherwise holds itself out to the public. An ESG-Focused Fund should be a fund where (i) analysis based on one or more ESG factors is part of the fund's principal investment strategies, (ii) the fund's advertisements or sales literature indicate that the fund primarily focuses on ESG factors, or (iii) the fund has a name including terms indicating the fund's investment decisions incorporate one or more ESG factors.

Under this definition, a fund's use of various tools such as proxy voting and engagement strategies, ESG screens or index tracking would not themselves qualify a fund as an ESG-

---

[31] *Id.* at 319.
[32] *Cf.* Proxy Voting by Investment Advisers, Release No. IA-2106, at n. 2 and accompanying text (Jan. 31, 2003), citing SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963) (interpreting Section 206 of the Investment Advisers Act of 1940).
[33] Proposing Release at 33.
[34] For example, some SIFMA members employ "sin screens" excluding investments in tobacco, gambling or other industries for historical reasons. Such funds could unintentionally become "ESG-Focused Funds."
[35] *Cf.* Matt Levine, *The SEC Goes After Greenwashing*, Bloomberg May 23, 2022. https://www.bloomberg.com/opinion/articles/2022-05-23/the-sec-goes-after-greenwashing.

Focused Fund unless the use of such tools rose to the level of a principal investment strategy. A fund that uses investment screens in a broad fashion that does not noticeably constrain its investment universe could not claim to be an ESG-Focused Fund, nor would a manager whose ESG engagement formed a baseline part of its interaction with issuers across its fund complexes inadvertently be classified as an ESG-Focused Fund. Similarly, proxy voting policies would classify a fund as an ESG-Focused Fund if the proxy voting policies were a principal strategy of the fund in a manner distinct from the policies of non-ESG funds advised by the same adviser. Our proposed definition would draw firmer boundaries that better match investor and industry expectations and would ensure funds could only claim the title of an "ESG-Focused Fund" if ESG factors were an important part of a fund's investing processes.

- ***Attributing third-party advertising and commentary to funds would introduce significant regulatory uncertainty and discourage funds from engaging in socially and economically beneficial activities solely to avoid regulatory burdens.***

SIFMA AMG notes that the Commission requested comment on whether a third party's statements about a fund, such as when an adviser has "explicitly or implicitly endorsed or approved" a third party's description of the fund as an ESG-Focused Fund, should at times be attributed to the fund.[36] SIFMA AMG believes the current posture of the Proposal properly focuses on the statements and actions of the fund and the adviser itself.

As noted, the current definitions of "ESG-Focused" and "ESG Integration" funds are quite broad and could already apply to many funds the Commission did not necessarily intend to subject to heightened ESG disclosures. Causing funds to fall into these categories based on the "endorsement" of third-party statements would exacerbate this uncertainty and may prevent funds from providing useful information to investors. The Proposal's current focus on the acts and statements of funds and managers themselves is therefore appropriate and should not be changed.

4. Certain modifications should be made to the proposed disclosure requirements for fund prospectuses and shareholder reporting as well as advisers' Form ADV brochures.

- ***The proposed ESG Strategy Overview table is unnecessary and is likely to produce misleading comparisons of non-comparable strategies, and thus should be eliminated in favor of standard narrative disclosures.***

SIFMA AMG believes the Proposal's "ESG Strategy Overview" table provides little value to investors compared to standard narrative disclosures and encourages investors to ignore the context in which funds use various tools to achieve ESG goals. Instead of these tabular disclosures, the Proposal should have funds disclose their use of ESG tools and factors in the same manner as those funds disclose other important aspects of their investment strategies.

Under the Proposal, ESG-Focused and ESG-Impact Funds would need to include an "ESG Strategy Overview" table with three components: (1) a check-the-box system for various "strategies" such as index tracking, ESG screens or proxy voting; (2) a brief narrative explanation of how the fund incorporates ESG factors in its investment decisions and (3) a brief

[36] Proposing Release at 39.

narrative description of how the fund "votes proxies and/or engages with companies" about ESG issues.[37]

The latter two rows are generally unnecessary because the release requires funds to provide the same information, plus additional details, in the body of their prospectuses.[38] While SIFMA AMG acknowledges the Commission's desire to "help an investor determine if a given ESG-Focused Fund's approach aligns with the investors' goals,"[39] providing this information in a tabular format, instead of using the same method as the Commission uses for other important strategy disclosures, does not necessarily advance this goal. Given its relative uniqueness as a disclosure tool, the inclusion of such a table may mislead investors into believing that all important information about an ESG-Focused Fund's investment strategies is included in the summary table. Placing the required ESG-related disclosure in the body of the fund's prospectus alongside other important information about the fund's investment strategies would ensure investors properly contextualize the role of ESG strategies and tools in the fund's investment decisions.

In regard to the "check-the-box" disclosures in the first row, SIFMA AMG believes that the checklist format, even complemented by necessarily brief disclosures in the same row, could be confusing to investors in two ways. First, by checking each box for a particular investment strategy a fund may imply that all such strategies are equally important to the fund. Second, investors may be tempted to compare the use of tools for which different funds have checked the appropriate box even if those funds use those tools in drastically different ways. SIFMA AMG recommends that the Commission forego use of the ESG Strategy Overview table and instead implement the same substantive disclosure requirements in the current Proposal in the same narrative format used for other important investment strategy disclosures.

- ***To avoid giving undue prominence to potentially misleading disclosures, the Proposal should replace the more extensive quantitative and other proxy voting and engagement disclosures in annual reports with a general requirement to provide investors with the location of an adviser's engagement/stewardship and proxy voting policies. A fund should make further narrative disclosures about its proxy and engagement strategies in shareholder reporting only if it employs different strategies than its adviser generally applies across complexes.***

The Proposal currently requires "funds for which engagement with issuers, either by voting proxies or otherwise, is a significant means of implementing their ESG strategy to check the appropriate box in the first row of the ESG Strategy Overview Table."[40] If a fund does not use proxy voting or engagement as a significant strategy, it would disclose that neither proxy voting nor engagement with issuers is a significant part of its investment strategy.[41] If checked, the fund

[37] Proposing Release at 36.
[38] *Id.* at 43 ("Funds would be required to provide specific information in [the "How the Fund incorporates [ESG] factors in its investment decisions"] row and supplement the disclosure in this row with a more detailed description later in the prospectus"); *id.* at 64 (noting that the description of how the fund votes proxies/engages with companies would be "complemented by additional information in an open-end fund's statutory prospectus and later in a closed-end fund's prospectus").
[39] *Id.* at 37.
[40] *See id.* at 61.
[41] *See id.*

would have to disclose (a) its proxy policies in its prospectus and "the percentage of ESG-related voting matters related to the ESG factors the fund considers during the reporting period for which the fund voted in furtherance of the initiative" in its annual report and (b) "the number or percentage of issuers with whom [the fund] held ESG engagement meetings related to one or more ESG issues and the total number of ESG engagement meetings" in its annual report.[42] ESG engagement meetings are defined as 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."[43]

These quantitative disclosures in shareholder reporting should be eliminated. Specifically, the Commission should replace the quantitative disclosures with a general requirement that funds reference an adviser's engagement/stewardship and proxy voting policies in their annual report. A fund should then make further narrative disclosures in its annual report only if the fund employs a proxy or engagement strategy that differs from the general strategy employed by its main adviser.

Requiring quantitative, fund-by-fund disclosures would introduce numerous ambiguities and practical difficulties: analysts who cover entire industries for an adviser might hold dozens of meetings with different issuers about various ESG topics and disseminate the results of those discussions to numerous funds, each of whom will attach differing significance to the information from those meetings. In addition to lacking any clear system for deciding which funds (if any) could "count" such a meeting as an engagement meeting for the purpose of that fund, funds and advisers would face additional difficulties resulting from the different approaches different complexes and advisers would take to what constitutes ESG, with different funds and advisers developing dissimilar practices with respect to ESG engagement and proxy voting metrics reporting. This diversity of approaches means that funds will not produce comparable results when disclosing the number of proxy votes or engagement meetings they cast or held related to ESG issues. This difficulty is exacerbated by the nature of proxy initiatives, which often focus on the governance of a company.

Even more significantly, the Proposal privileges the quantity of interactions over the quality of those interactions with, for instance, a series of pro forma meetings where a low-level fund employee reads out a list of generalized ESG-related goals counting potentially as more engagement for the purposes of the engagement-related disclosure than a high-level meeting between a company's executives and senior members of an asset manager's stewardship team about key strategic changes an issuer has made or should make to its climate policies. Similarly, the currently proposed quantitative disclosure requirements for proxy voting records would misleadingly present all proxy proposals related to ESG considerations as being equally effective and worthwhile. SIFMA AMG believes that the proxy voting record reporting requirement may mislead investors into believing that firms should vote "yes" to all proxy proposals involving the ESG-related concerns of a particular fund or strategy, no matter their underlying merits. Managers engaging in proxy voting strategies to advance ESG goals must balance numerous factors including their fiduciary duty to consider the financial impacts of their investments as

[42] *Id.* at 219.
[43] *Id.* at 81.

well as competing priorities among different ESG factors. Flattening these nuanced considerations into a single number based on a binary yes/no choice of a proxy vote absent the context of what led to particular votes being taken is likely to mislead investors and encourage them to compare fundamentally dissimilar situations faced by different funds, thereby potentially pushing investors towards making investments that are inconsistent with their actual preferences.

Further, there is no reliable way to distinguish between meritorious proposals and proposals that only purport to address ESG issues. A fund may very well promote ESG goals by voting against ill-conceived or deceptively worded proposals, yet these votes would appear as "no" votes in the Proposal's quantitative metrics, unfairly implying that the vote was against an ESG goal.

A more sensible method is to require ESG-Focused Funds to provide a narrative description of any proxy voting or engagement activities not covered by a fund's general engagement/stewardship policies and how they advance a given fund's ESG strategy in the fund's annual reports. Such a description would avoid the misleading aspects of quantitative disclosures and force ESG-Focused Funds that claim to engage with portfolio companies on ESG issues to "show their work" by describing their approach to interactions with management in detail. This approach would focus investor attention on the most relevant information about firm engagement and proxy voting efforts and ensure funds are providing comparable disclosures.

- *If the Proposal retains quantitative disclosure requirements for engagement meetings, the Commission should refine the definition of an "engagement meeting" to mean "a substantive discussion with management of an issuer about one or more specific ESG issues" to capture the full range of funds' legitimate engagement efforts.*

Apart from the issues described above, the Proposal's definition of "engagement meetings" also fails to capture the range of engagement efforts undertaken by fund managers. The Proposal defines engagement meetings as efforts to "advocate" for "one or more specific ESG goals to be accomplished over a given time period" where progress toward the goal is "measurable."[44] This raises two issues. First, we question whether an ESG-Focused Fund could ever claim to use "engagement" as a "significant means" of implementing its strategy without becoming an Impact Fund under this definition of ESG engagement meetings. It is not clear how holding meetings advocating for "specific ESG goals to be accomplished" and treating that engagement as a "significant" part of a fund's ESG strategy is distinct from "seek[ing] to achieve a specific ESG impact or impacts that generate specific ESG-related benefits"—*i.e.,* the definition of an Impact Fund.[45] The Proposal should not implicitly forbid funds from discussing their ESG engagement efforts lest they become Impact Funds.

Second, funds and advisers may push for issuers to consider ESG factors without prescribing specific policies to the issuers—that is, there are important engagements that would not count towards the quantitative metrics prescribed in the Proposal. Funds can serve an important role by facilitating discussions about ESG-related problems or by keeping portfolio companies accountable on their existing ESG efforts and obligations without "advocating" for specific ESG policies. Indeed, the Proposal as written would discourage funds from this type of constructive engagement as a matter of course because a fund that does not wish to prescribe specific policies

---

[44] *Id.* at 81.
[45] *Id.* at 15.

to its portfolio companies would have to affirmatively disclose it does *not* participate in investor engagement (as defined under the Proposal). ESG funds and advisers that wish to implement only ESG-focused strategies would therefore have to disclose, in a manner that may mislead investors, that they do not participate in issuer engagement under the current Proposal.

To prevent this outcome, the Commission should consider revising the definition of engagement meeting to a more flexible formulation, such as the following: "a substantive discussion with management of an issuer about one or more specific ESG issues." This definition would capture the full range of issuer engagement strategies a fund might undertake and better comport with the classification system detailed in the rest of the proposal. However, as noted above, we believe that quantitative metrics are inappropriate in this context, and more narrative disclosure would provide information more supportive of informed decision-making by investors.

- ***The Proposal's quantitative GHG emission disclosure requirements should be better-tailored by applying only to funds that hold themselves out as specifically considering emissions-related factors as part of a principal investment strategy and eliminating the requirement that advisers provide "good-faith" estimates of issuers carbon emissions in some circumstances. Those requirements should also be contingent on the implementation of the Climate Disclosure Rule.***
    - *Only funds that specifically focus on GHG emission-related issues should be required to provide quantitative disclosures.*

The Proposal would require an ESG-Focused Fund that considers environmental factors as part of its investment strategy to disclose the carbon footprint and the weighted average carbon intensity ("WACI") of the fund's portfolio in the management's discussion of fund performance or management discussion and analysis section of the fund's annual report (as applicable).[46] Any ESG-Focused Fund that considers environmental factors would need to make this annual disclosure unless the fund states in the ESG Strategy Overview table in the fund's prospectus that it does not consider issuers' GHG emissions as part of its investment strategy.[47]

As noted above, to avoid undue focus on carbon emissions in broader environmental-related investing, SIFMA AMG requests the Commission amend these reporting rules to apply only to funds that hold themselves out as considering GHG emissions factors specifically as part of a principal investment strategy of the fund. Additionally, SIFMA AMG believes any GHG reporting requirements the Commission does retain should be expressly contingent upon the successful implementation and operation of the SEC's Climate Disclosure Rule.

Requiring GHG emission disclosures of all funds that focus on environmental issues and incorporate carbon emissions in any capacity into their investment processes presents several practical difficulties and disadvantages to funds and investors. First, the Proposal implicitly relies to some degree on the Climate Disclosure Rule taking effect, as the annual reporting data from U.S. public companies provides a significant component of the quantitative metrics required under the Proposal.[48] We therefore propose that, if the Commission chooses to retain these

[46] *Id.* at 88.
[47] *Id.* at 89.
[48] *See* Proposing Release at 103–04 (noting that portfolio company disclosures regarding GHG emissions included in regulatory reports would be considered "the most reliable source" of GHG information for portfolio companies).

quantitative disclosure requirements, the disclosure requirements be made contingent upon successful implementation of the proposed Climate Disclosure Rule, and the compliance period for reporting such data for ESG-Focused Funds be adjusted to one year following the compliance date of the Climate Disclosure Rule.

Second, the Proposal requires funds to disclose information based in part on data that the Climate Disclosure Rule does not require of private and non-U.S. operating companies, and a fund's portfolio may not consist solely of U.S. public companies. In those cases, funds will have to depend on estimates derived using varying methodologies and unverifiable reporting from their portfolio companies. Thus, the calculations will be based on underlying data that is neither reliable nor reliably comparable across different advisory firms and fund groups. This issue is exacerbated by the requirement to disclose Scope 3 emissions for companies that report such emissions[49] because—especially in the possible absence of the Climate Disclosure Rule, but additionally even for U.S. public companies not required to make Scope 3 emissions disclosures under that rule—there is no guarantee (or even likelihood) that such Scope 3 estimates will be derived using comparable methodologies.

Additionally, in the absence of the Climate Disclosure Rule, funds would by necessity rely even more heavily on estimates produced by operating companies using an unpredictable variety of measurement methodologies. This would significantly undermine the Commission's stated goal of creating a "consistent, comparable, and decision-useful regulatory framework."[50]

Finally, the proposed GHG emission disclosures for ESG-Focused Funds will put many funds in a double-bind where they must either over-emphasize the importance of GHG emission data in their investment decisions or else potentially cease incorporating any consideration of climate factors into those decisions at all (and then be required to affirmatively state that they do not consider issuer GHG emissions). For example, a fund focused on nature conservancy or biodiversity may consider GHG emissions but give them little weight in comparison to other, more relevant environmental impacts from its investments. Requiring this fund to report the panoply of carbon footprint and WACI information may lead investors to believe that GHG emissions carry the same weight as other environmental impacts the fund actually emphasizes and would also place such funds on equal footing with funds that are explicitly and entirely focused on reducing carbon emissions. We fear that some funds may choose to forego consideration of GHG emissions in any capacity when making investment decisions solely to avoid these unintended consequences.

SIGMA AMG acknowledges and agrees that some investors are particularly concerned about GHG emissions relative to other environmental factors[51] and supports efforts to provide investors with reliable and comparable information on climate change-related issues. However, providing useful disclosure to these investors need not require onerous and counterproductive reporting requirements. The Commission could achieve its goals with greater efficiency and reliability by adopting these suggestions.

---

[49] *See id.* at 108.
[50] *Id.* at 1.
[51] *See id.* at 28.

- *Funds should only be required to calculate their carbon footprint and WACI based on information in regulatory reports or otherwise publicly provided by issuers.*

The Proposal requires funds to calculate their investments' carbon footprints and WACIs by using a "good faith estimate" of their portfolio companies' Scope 1 and Scope 2 emissions if such information is not available from a regulatory report or other public source.[52] The Commission would not prescribe any particular methodology for deriving such estimates, but would require funds to "disclose the percentage of the aggregate portfolio GHG emissions that was calculated using the fund's good faith estimation process" and "provide a brief explanation of the process it used to calculate its good faith estimates…including the data sources the fund relied on to generate these estimates."[53]

The Commission acknowledges that the use of estimates based on varying methodologies "may impact the consistency of the data across different portfolio holdings of one fund as well as the comparability of funds with the same or similar portfolio holdings."[54] As the Proposal admits, the methods used to estimate these emissions statistics will likely be "technical and complex,"[55] especially because funds generally lack the environmental expertise to knowledgeably sift through the reams of data from multiple sources that will be necessary to formulate a reasonable estimate. This could present a significant burden to advisers that would ultimately be paid by investors and discourage investment in industries, asset classes and geographies where GHG emission data would be difficult to come by.

Moreover, as the Proposal notes, "advisers' and funds' compliance policies and procedures must address the accuracy of disclosures made to clients, investors and regulators" and must "annually review the adequacy and effectiveness of such compliance policies and procedures."[56] Funds would therefore be justifiably cautious about considering environmental factors in their investment process lest they be required to disclose GHG emissions data and run the risk of inadvertently producing an estimate the Commission or a court deems to be made not in good faith. Meanwhile issuers, which actually possess the information needed to provide accurate, useful disclosures, may face less pressure to provide their own emissions measures if investors are led to believe they are receiving the same information from funds.

Instead of requiring funds to incur undue litigation risk and ambiguous compliance burdens for the sake of providing incomparable, unverifiable estimates, the Commission should require funds to base their disclosure only on regulatory filings or other publicly available documents provided by issuers themselves.[57] If, despite our objections, the Commission decides to require funds to use estimates, the Commission should provide a safe harbor from liability for the use of any good-faith estimations in GHG reporting to avoid creating incentives that may push advisers away from considering GHG emissions.

---

[52] *See id.* at 104.
[53] *Id.* at 106.
[54] *Id.*
[55] *Id.* at 107.
[56] *Id*. at 165.
[57] Funds could be required to account for underlying portfolio companies without such available information by, for example, stating the percentage of fund assets for which relevant data is unavailable.

- ***The Commission should provide additional flexibility in disclosures for Impact Funds.***

Under the Proposal, Impact Funds are ESG-Focused Funds that seek to achieve a specific ESG impact or impacts.[58] An Impact Fund would be required to make specific disclosures about its strategies in its prospectus, as well as both qualitative and quantitative disclosures relating to how the Impact Fund is achieving its impact in annual reporting.[59]

While SIFMA AMG generally supports both the Impact Fund category and additional investor disclosure for Impact Funds consistent with the Proposal's goals, we are concerned that the Proposal makes unrealistic assumptions with regard to whether impacts can be readily or accurately quantified, particularly across portfolio investments. Many funds may not necessarily seek to generate an impact related to one theme across investments that can be counted up and applied in the aggregate.

As a result, we recommend that any disclosure and reporting requirements for Impact Funds permits funds to assess or measure impact on an investment-by-investment basis (if the Impact Fund so chooses), rather than compelling Impact Funds to attempt to standardize results across portfolio investments.[60] For similar reasons, Impact Funds should be able to describe progress across its investments in quantitative <u>and/or</u> qualitative terms. This approach acknowledges that certain impacts may be based on qualitative criteria set by an adviser.

- ***The Commission should revise the required level of disclosure related to ESG factors for investment advisers in the Form ADV brochure to be more comparable to other required disclosures.***

Under the Proposal, investment advisers would be required to provide "an explanation of whether and how the adviser incorporates a particular ESG factor (E, S, or G) and/or a combination of factors"[61] and to "include an explanation of whether and how the adviser employs integration and/or ESG-focused strategies, and if ESG-focused, whether and how the adviser also employs ESG impact strategies."[62] The Proposal mandates advisers make these disclosures for "each significant investment strategy or method of analysis for which the adviser considers any ESG factors."[63]

This aspect of the Proposal would require more extensive disclosures about advisers' consideration of ESG factors in their investment strategies than current rules require for other investment strategies. As the Proposal itself notes, advisers generally must only explain "any material, significant, or unusual risks" presented by their "significant strategies or methods of analysis" or recommendation of a particular type of security.[64] Advisers that pursue value investing strategies, for example, do not need to detail each factor they consider when determining the fundamental value of a security, but rather disclose only the "material, significant or unusual risks" of a value strategy.

---

[58] *See* Proposing Release at 35.
[59] *See id.* at 56–58 (prospectus disclosure), 73–74 (annual reporting disclosure).
[60] Impact Funds should then be able to employ layered disclosure by linking to a separate impact report, rather than providing unduly lengthy impact-focused annual reporting.
[61] Proposing Release at 130.
[62] *Id.*
[63] *Id.* at 129.
[64] *Id.*

For funds that incorporate numerous ESG considerations as part of their general investment processes, the Proposal would effectively require strategy-by-strategy disclosure of each ESG factor the fund considers. Advisers often incorporate a wide range of ESG factors across all their products, even when those advisers do not advertise their strategies in ESG-related terms. For example, an adviser that offers a strategy involving fundamental analysis is likely to consider—in addition to financial and general business risks—the governance risks of each issuer it reviews and possibly even the sustainability of issuers' business models. These advisers would need to devote significant space to disclosing "laundry lists" of potential ESG factors. This lengthy disclosure has the potential to mislead investors by placing undue prominence on the importance of ESG factors in advisers' investing processes, especially in the context of ESG integration strategies, where advisers commonly incorporate a wide range of ESG factors into their analysis of a stock. The mere amount of time and space spent disclosing that an adviser considers these numerous factors would itself lead investors to believe ESG plays a significant role in the advisers' investment analyses, undercutting the purposes of the rule.

SIFMA AMG recommends that the disclosures required of advisers employing ESG integration fund strategies be revised to reflect the importance of ESG factors more accurately in comparison to other significant elements of an advisers' investment strategy. Instead of providing the current strategy-specific disclosures envisioned in the Proposal, advisers employing ESG integration strategies should be able to fulfill their disclosure obligations related to those strategies by referencing or hyperlinking to their engagement/stewardship or other applicable ESG policy statements. If specific funds offered by an adviser employ ESG factors in a different manner than those policies describe, the investment adviser could be required to note the differences in the fund offering disclosure documents.

Additionally, SIFMA AMG recommends that for any Form ADV disclosure that the adviser not be required to disclose strategies or screens used for separately managed accounts or single-investor vehicles that are not otherwise used as part of a standard strategy by that adviser. These approaches are inherently specific to a particular client and both would unnecessarily add length and complexity to the adviser's Form ADV disclosure as well as risk unnecessarily publicly exposing particular individual clients' preferences.[65]

5. While SIFMA AMG is generally supportive of the Proposal's approach relating to UITs, the Commission should state that the rules only apply to UITs launched after the compliance date of the rules and make other certain clarifications and changes relating to UITs.

[65] In addition to concerns regarding brochure disclosures, SIFMA AMG has concerns regarding the Proposal's mandates for advisers that conduct business activities as ESG providers or have related persons that are ESG providers, which as proposed would likely require unnecessary disclosure of business activities that do not relate to the adviser's advisory services to its clients. SIFMA AMG proposes that the amendments be limited and tailored to require disclosure only if the adviser provides its ESG provider services to its own advisory clients or in its advisory business to a material extent. Similarly, if an adviser has a related person that provides ESG provider services, the adviser should only be required to disclose the related person's ESG-related activities if the adviser actually uses the services of the related person ESG provider.

SIFMA AMG supports the Proposal's tailored approach to UITs, but we note that the proposed rule does not include a UIT-specific compliance date nor an exception for UITs deposited prior to that date. The hallmark of a UIT is maintaining a fixed and transparent portfolio of securities for a specified term, regardless of how market movements impact the weighting of those securities or whether the investment thesis underlying the selection of the securities comes to fruition. As a result, we believe that enhanced disclosure regarding ESG strategies is most relevant for UIT investors when they are reviewing a prospectus in the context of making a purchase decision. This counsels against applying the proposed rules to UITs whose shares are no longer available for purchase.

Excluding UITs deposited prior to the compliance date would also be consistent with the cost/benefit analysis of the Proposal's effect on UIT, which states that a UIT needing to comply with the proposed rule "would incur one-time direct compliance costs at inception . . . [and after inception] there would be no recurring costs during the life of the UIT." Failing to exclude UITs deposited prior to the compliance date would be inconsistent with this statement, as such UITs would have to amend their registration statements to comply with the rule, even if their units are no longer available for purchase.

In addition, given a UIT's fixed and transparent portfolio, the elements of which are configured at the time of deposit, we believe that UIT investors understand that UIT selection methodologies are not subject to revision. As a result, we believe that any "drift" away from ESG (or non-ESG) factors that led to the selection of a particular security does not require further disclosure.

Lastly, although we support the adoption of form changes to require enhanced disclosure of ESG strategies within newly launched UIT prospectuses, we request that such changes be made exclusively to Form S-6 as opposed to both Form N-8B-2 and Form S-6. We believe that most UIT issuers do not amend Form N-8B-2 when registering additional series, but instead use Form S-6 to describe the unique elements – including the investment strategy – for each series. As a result, we believe it would be more efficient to amend only Form S-6.

6. The cost-benefit analysis for the Proposal could be improved by accounting for the possibility some ESG categories will encompass more funds than anticipated and attempting to estimate how many funds will be classified as Integration Funds under the Proposal.

SIFMA AMG is concerned that the Commission has not engaged in a sufficiently exhaustive analysis of the cost of some proposed requirements in the rule. For example, the Proposing Release currently notes that "[f]unds that already disclose some form of ESG-related information would incur lower compliance costs compared to the funds that currently do not disclose any ESG-related information"[66] and that the Commission currently estimates that the "annual direct costs attributable to information collection requirements in the proposed amendments to the open-end fund prospectus would be $1,319.50 per Integration Fund… and $9,084 per ESG-Focused Fund."[67] We note that, given the above, even if the cost estimates relating specifically to

[66] *Id.* at 214.
[67] *Id.* at 213 n.376.

information collection are appropriate, the broader compliance cost associated with ensuring disclosures are and remain accurate on an ongoing basis could be very significant. This further bolsters the case for ensuring that the tiered categorization of Funds is designed appropriately and that the rules only apply to those funds that do or should truly hold themselves out as ESG funds.

The Commission appropriately notes that the Proposal may "prompt some funds to change their current investment strategies and investment implementation practices" thus incurring "costs in changing [their] current investment strategy, including adjusting [their] disclosure and marketing practices to reflect such a change."[68] The Commission further states it "cannot precisely estimate the magnitude of such potential adjustments."[69] Deriving some sense of the estimated magnitude of these changes by comparison to changes in fund strategies from past disclosure enhancements would provide valuable data to the industry and the Commission that could affect the design and implementation of the Proposal. Indeed, one way that the Commission could improve the cost-benefit analysis is to estimate how many funds would be classified as "Integration Funds" instead of foregoing such analysis due to the acknowledged breadth of the category as designed in the Proposal.[70] Similarly, the Commission should provide estimates for how many advisers would need to make disclosures related to the use of ESG integration strategies (to the extent those disclosures are maintained in the rules upon adoption).

Finally, it would also be useful to consider whether the Proposal would lead to costs such as advisers deciding affirmatively to disregard ESG factors, or to offer fewer investment options (including funds) that are intended to be socially or environmentally beneficial.

7. SIFMA AMG suggests the Commission should consider the impact of recent court decisions on its ability to implement the Proposal as envisioned, especially regarding the Proposal's GHG emission disclosure requirements.

Without taking a position on the Commission's claim of authority in the Proposal, we note that, as discussed above, the GHG emissions reporting requirements of the Proposal would be facilitated to a significant extent by the Climate Disclosure Rule currently undergoing review, comment, and implementation prior to the implementation of the rules contemplated in the Proposal. We further note that the Supreme Court's recent decision in *West Virginia v. EPA*[71] raises concerns about the Commission's ability to implement both the Proposal and the Climate Disclosure Rule under the "major questions" doctrine.[72] In the interest of promoting regulatory stability and preserving the reasonable reliance interest of the advisers, funds and investors impacted by the rule, the Commission should consider extending compliance periods and making the GHG disclosure provisions of the Proposal contingent upon the full compliance

[68] Proposing Release at 214.
[69] *Id.*
[70] Proposing Release at 174 ("Determining the number of Integration Funds is particularly difficult, as these funds only consider ESG factors as part of a broader investment strategy. According to one commenter, today virtually all asset managers have incorporated ESG considerations to some degree, or have plans to do so, across their investment strategies.").
[71] West Virginia v. Env't Prot. Agency, No. 20-1530, 2022 WL 2347278 (U.S. June 30, 2022).
[72] Numerous commentators have noted such concerns in light of *West Virginia v. EPA*. *See, e.g.*, Paul Atkins and Paul Ray, "The SEC's Climate Rule Won't Hold Up in Court," Wall St. Journal (Jul. 12, 2022).

implementation of the Climate Disclosure Rule, including the cessation of litigation that would threaten the Climate Disclosure Rule's full implementation.

* * * * *

SIFMA AMG supports the SEC's efforts to increase transparency and accountability around ESG investing and is grateful for the opportunity to comment on the proposed rules. If you have any questions or would like to discuss anything in this letter further, we welcome the opportunity to engage with you. Please feel free to contact Lindsey Keljo [redacted] or our counsel George B. Raine [redacted] and James D. McGinnis [redacted] at Ropes & Gray LLP.

Sincerely,

Lindsey Weber Keljo, Esq.
Head – Asset Management Group
Securities Industry and Financial Markets Association

cc: The Hon. Gary Gensler, Chair, U.S. Securities and Exchange Commission
The Hon. Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission
The Hon. Caroline A. Crenshaw, Commissioner, U.S. Securities and Exchange Commission
The Hon. Mark T. Uyeda, Commissioner, U.S. Securities and Exchange Commission
The Hon. Jaime Lizárraga, Commissioner, U.S. Securities and Exchange Commission
Mr. William A. Birdthistle, Director, Division of Investment Management, U.S. Securities and Exchange Commission