



October 30, 2023

Via Electronic Mail: rule-comments@sec.gov

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

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

Dear Ms. Countryman,

Managed Funds Association¹ (“**MFA**”) wishes to take the opportunity to further comment on the proposal from the Securities and Exchange Commission (the “**Commission**”), “Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices” (the “**Proposal**”).² These comments supplement our comment letter dated August 15, 2022 (the “**August 2022 Comment Letter**”)³ on the Proposal, and are in furtherance of meetings that we and our members have had with Commissioners and staff of the Commission.

MFA supports the Commission’s policy goal of advisers’ provision of reliable, accurate, and decision-useful disclosures related to environmental, social, and governance (“**ESG**”) practices, in order to better inform investors or potential investors as they make investment determinations. As noted in the August 2022 Comment Letter, however, we are concerned that the approach set forth in the Proposal will in fact have the opposite effect. In particular, we believe that the vague and overbroad categories into which advisers would be compelled to fit their strategies will result in the categorization of an extremely wide array of strategies

¹ MFA, based in Washington, D.C., New York, Brussels, and London, represents the global alternative asset management industry. MFA’s mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 170 member firms, including traditional hedge funds, credit funds, and crossover funds, that collectively manage nearly \$2.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

² See Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, Securities Act Release No. 11068, Exchange Act Release No. 94985, Investment Advisers Act Release No. 6034, Investment Company Act Release No 34594, 88 Fed. Reg. 36654 (June 17, 2022) (“**Proposing Release**”), available at <https://www.govinfo.gov/content/pkg/FR-2022-06-17/pdf/2022-11718.pdf>.

³ Managed Funds Association Comment Letter re: Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices [File No. S7-17-22] (August 15, 2022) (“**August 2022 Comment Letter**”), available at <https://www.sec.gov/comments/s7-17-22/s71722-20136728-307562.pdf>.

(including those *not* marketed to investors as having an ESG component) as at least “ESG Integration” strategies. The unintended negative consequence will be to effectively “greenwash” the U.S. private funds industry, resulting in investor confusion and rendering ESG-related strategy labels unreliable and nearly meaningless.

As the Commission continues to consider public comment on the Proposal and work towards a final rulemaking, MFA wishes to draw the Commission’s attention to recent activity by policymakers in the European Union (“EU”) relating to the EU Sustainable Finance Disclosures Regulation (“SFDR”)⁴. On September 14, 2023, the European Commission (the “EC”) published a set of consultations⁵ (collectively, the “Consultation”) on SFDR. SFDR has been in effect in the EU since March 2021; recognizing significant concerns relating to certain SFDR requirements that industry participants have flagged since that date, the EC released the Consultation with the goal of gathering stakeholder feedback. EC Commissioner McGuinness had previewed that the EC would be undertaking “a comprehensive assessment of the [SFDR] framework to assess potential shortcomings – focusing on legal certainty, the useability of the regulation and its ability to play its part in tackling greenwashing.”⁶

MFA urges the Commission to consider the EC’s experience with SFDR in the EU and, specifically, the ways in which the EC now acknowledges that the SFDR’s classification regime has in fact potentially contributed to greenwashing rather than mitigating it. In the Proposing Release, the Commission explained its desire to address the “risk that a fund or adviser’s actual consideration of ESG does not match investor expectations” and the associated “potential for ‘greenwashing’.”⁷ The EC’s original goals for SFDR were notably similar—the EC originally described its new cross-EU classification scheme for financial products with ESG objectives as requirements that “aim to enhance investor confidence... to create visibility and to address concerns about ‘greenwashing’.”⁸ In adopting SFDR, the EC also highlighted its desire to

⁴ The full text of the current SFDR, published as Regulation (EU) 2020/852 of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32020R0852>.

⁵ The EC released two public consultation documents under the unified theme of seeking stakeholder input on experiences with SFDR to date. The first, “Consultation Document,” is a general questionnaire on SFDR; it covers two main topics, (1) SFDR’s current requirements and (2) the interaction of SFDR in practice with other sustainable finance legislation. See Consultation Document, Implementation of the Sustainable Finance Disclosures Regulation (SFDR), available at https://finance.ec.europa.eu/system/files/2023-09/2023-sfdr-implementation-consultation-document_en.pdf. The second, “Targeted Consultation Document,” also includes a forward-looking aspect and seeks input on (3) potential changes to disclosure requirements for financial market participants and (4) the potential establishment of a financial product categorization system. See Targeted Consultation Document, Implementation of the Sustainable Finance Disclosures Regulation (SFDR), available at https://finance.ec.europa.eu/system/files/2023-09/2023-sfdr-implementation-targeted-consultation-document_en.pdf. Both documents are introduced by the EC as a “public consultation [that] aims at gathering information from a wide range of stakeholders, including financial practitioners, non-governmental organisations, national competent authorities, as well as professional and retail investors, on their experiences with the implementation of the SFDR.”

⁶ See “European Commission’s Sustainable Finance Disclosure Regulation – assessment,” available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13961-Report-on-the-Sustainable-Finance-Disclosure-Regulation/public-consultation_en.

⁷ See Proposing Release, *supra* note 2, at 36,739.

⁸ See SFDR, *supra* note 4, at paragraph (11).

mitigate what it saw as negative effects of the “absence of uniform criteria”⁹ for categorization of products and strategies. With those aims in mind, the EC used SFDR to set forth an EU-wide set of categories (and categorization criteria) that advisers would be required to utilize when disclosing information to investors regarding their financial products.

The questions that the EC poses in the current Consultation provide important insight into the post-implementation problems that the EC has identified with the SFDR framework and now wishes to remediate. Among other things, the EC indicates its desire to revisit Articles 8 and 9 of SFDR¹⁰, noting that these two Articles “are being used as de facto product labels” and that “there are persistent concerns that the current market use of the SFDR as a labelling scheme might lead to risks of greenwashing”—an unintended negative consequence of the fact that “the intention behind [Articles 8 and 9] was to encompass as wide a range of products as possible, so that any sustainability claims had to be substantiated.”¹¹ The “Targeted Consultation Document” component of the Consultation includes a section (“**question 1.6**”) asking commenters to indicate whether and how strongly they agree with the following statements, among others:

- Some disclosures required by the SFDR are not sufficiently useful to investors.
- Some legal requirements and concepts in the SFDR, such as ‘sustainable investment’, are not sufficiently clear.
- The SFDR is not used as a disclosure framework as intended, but as a labelling and marketing tool (in particular Articles 8 and 9).¹²

In subsequent sections, the EC asks whether and how strongly commenters agree that the “issues raised in question 1.6 create a risk of greenwashing and mis-selling”¹³ and whether commenters, due to SFDR’s requirements, had in fact “*increased* [their] offer of financial products that make sustainability claims since the disclosure requirements of Articles 8 and 9 of the SFDR began to apply (emphasis added).”¹⁴

These problems that the EC has identified with the current SFDR framework are strikingly similar to those that MFA and other industry stakeholders¹⁵ have flagged with the ESG

⁹ *Id.*

¹⁰ At a high level, as set forth in SFDR, Article 8 funds are those that pursue ESG investment-related goals in some fashion (including by implementing negative screens), while Article 9 funds are those that make sustainable investing their primary objective or that prioritize ESG-related goals ahead of financial returns.

¹¹ Targeted Consultation Document, *supra* note 5, at p. 30.

¹² *Id.* at p. 6.

¹³ *Id.* at p. 7.

¹⁴ *Id.* at p. 13.

¹⁵ *See, e.g.*, U.S. Chamber of Commerce Comment Letter re: Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices [File No. S7-17-22] (August 12, 2022), available at <https://www.sec.gov/comments/s7-17-22/s71722-20137309-307871.pdf>. The Chamber of Commerce emphasizes that the “proposed ‘Integration Fund’ category would capture virtually every fund and make it difficult for investors to distinguish between funds’ use of ESG criteria.” *Id.* at p. 2, p. 6. *See also* Investment Company Institute Comment Letter re: Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices [File No. S7-17-22] (August 16, 2022), available at <https://www.sec.gov/comments/s7-17-22/s71722-20136279-307345.pdf>. In its letter, ICI notes its concern that, with respect to the “Integration Funds” category, “the proposed new

framework proposed by the Commission. In the August 2022 Comment Letter, MFA noted that the breadth and unclear boundaries of the proposed “ESG Integration” category—and the fact that such category would include strategies *not* marketed or held out to investors as affirmatively pursuing ESG outcomes—could create a “misleading impression of the importance of ESG factors” to that strategy or product and “could result in undue emphasis on an otherwise immaterial aspect of the strategy, which would be contrary to the Commission’s stated goal.”¹⁶ We strongly recommend that the Commission reconsider its proposed categorization framework now with MFA’s comments in mind, in order to avoid the greenwashing effects and other pitfalls that the EC has identified later in its own regulatory process with respect to SFDR. Doing so ahead of releasing the final version of its own ESG regulation (as opposed to later amending such regulation upon recognizing significant unintended negative consequences) will enable the Commission to effect crucial cost savings, to contribute to beneficial allocations of resources, and to avoid meaningful investor confusion with respect to ESG-related financial products.

* * *

We appreciate the opportunity to provide additional comments to the Commission on the Proposal, and we would be pleased to meet with the Commission or its staff to discuss our comments. If the staff has questions or comments, please do not hesitate to contact Rachel Grand, Vice President and Senior Counsel, or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Jennifer W. Han

Jennifer W. Han
Executive Vice President
Chief Counsel & Head of Global Regulatory Affairs
Managed Funds Association

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

disclosure requirements could even increase the risk of investor confusion and the appearance of greenwashing.” *Id.* at p. 5.

¹⁶ August 2022 Comment Letter, *supra* note 3, at p. 13.