



In [part one](#) of our four-part series, we discussed the U.S. Securities and Exchange Commission (SEC) ESG-related initiatives from 2019 to 2022 that preceded the burst of ESG-related enforcement and rulemaking activity in the first half of 2022. In this second part of the series, we explore this recent enforcement activity.

## **Enforcement Resources and Priorities**

Launched nearly a year and a half ago, the work of the [Enforcement Task Force Focused on Climate and ESG Issues](#) in analyzing disclosure and compliance issues in the asset management industry continues. As in prior years, [the 2022 priorities of the Division of Examinations](#) (Exams) include ESG investing, with the staff viewing the risk of investors being misled in the ESG space as compounded by:

(1) the lack of standardization in ESG investing terminology (e.g., strategies that are referred to as sustainable, socially responsible, impact investing, and environmental, social, and governance conscious, which incorporate ESG criteria); (2) the variety of approaches to ESG investing (e.g., a portfolio may be labeled as ESG because of consideration of ESG factors alongside traditional financial, industry-related, and macroeconomic indicators, among others; other portfolios may use ESG factors as the driving or main consideration in selecting investments; or some portfolios engage in impact investing seeking to achieve measurable ESG impact goals); and (3) the failure to effectively address legal and compliance issues with new lines of business and products."

The 2022 Exams priorities also make clear that SEC staff will continue to focus on registered funds and advisers and whether they are:

(1) accurately disclosing their ESG investing approaches and have adopted and implemented policies, procedures, and practices designed to prevent violations of the federal securities laws in connection with their ESG-related disclosures, including review of their portfolio management processes and practices; (2) voting client securities in accordance with proxy voting policies and procedures and whether the votes align with their ESG-related disclosures and mandates; or (3) overstating or misrepresenting the ESG factors considered or incorporated into portfolio selection (e.g., greenwashing), such as in their performance advertising and marketing."

Generally, this year's ESG-related enforcement settlements involving the asset management industry have centered on claims of greenwashing. We note that ESG-related investigations of a global asset management firm and a well-known mutual fund complex have been reported in the press and are understood to be ongoing. These involve, respectively, whistleblowing regarding overstatements around sustainable investing and allegedly misleading marketing materials.

## **Enforcement Settlements**

Early this year, the SEC published an [investment adviser enforcement settlement](#) involving principles-based investing, which is a type of ESG investing. The settlement revolved around myriad violations by a robo-adviser that claimed its business was operated in compliance with certain Islamic principles and norms. The settlement was not heralded by the SEC as an ESG victory, but among the SEC's allegations were that the robo-adviser failed to consistently apply, as it purported to, income purification procedures and other Islamic principles and norms to client investments. Then, two days before its May 25, 2022, [proposal to prevent misleading or deceptive fund names](#) and [ESG-related disclosure proposals for funds and advisers](#), the SEC published an enforcement settlement styled as "[SEC Charges Adviser for Misstatements and Omissions Concerning ESG Considerations](#)." In summary, the SEC alleged that in managing its mutual fund and other clients, the adviser violated both the Investment Company Act of 1940 and the Investment Advisers Act of 1940 by failing to adopt and implement policies and procedures to prevent misleading statements suggesting that ESG evaluations and quality reviews were conducted for **all** mutual fund and separately managed account client investments when they were actually conducted on **most but not all** investments. To support its claims, the SEC cited fund prospectuses, minutes of fund board meetings, and adviser request for proposal responses, Form ADV disclosures, and marketing materials.

## **2022: Misleading Fund Names and ESG Proposal for Funds and Advisers**

In our third post in this series, we will get into the weeds of the SEC's ESG-related proposals, referenced above, to prevent misleading or deceptive fund names and impose new disclosure obligations on funds and advisers.

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