

Private Funds and ESG: Investment, Reporting and Disclosure Issues; Industry Protocols

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Today's faculty features:

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Debra Franzese, Partner, **Seward & Kissel**, New York

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ASSET MANAGERS GUIDE TO ESG INVESTING

Presented by Vadim Avdeychik, Debra Franzese, and Alexandra Poe

What is the proper terminology

ESG

- Environmental, Social and Governance

SRI

- Socially Responsible Investing, historically associated with negative screening method

Impact Investing

- Making investments to achieve goals that are beneficial to society or environment

Ethical Investing

- Using ethical principles as the primary filter for choosing where to invest

Who determines the definition

- Index Providers
- Member and Reporting Organizations
- Regulators
- Rating Agencies
- Investors
- Advisers

Overview of Global Initiatives/Member Organizations

- Task Force on Climate Related Financial Disclosures (TCFD)
- Principles for Responsible Investment (PRI)
- Sustainability Accounting Standards Board (SASB)
- Int'l Integrated Reporting Council (IIRC; now merging with SASB)
- Global Reporting Initiative (GRI)
- Int'l Financial Reporting Standards (IFRS)
- UN Global Compact
- UN Dept of Econ & Social Affairs (author of the UN SDGs)
- UN Environment Programme - Finance Initiative
- CDP (formerly, the Carbon Disclosure Project)
- Climate Disclosure Standards Board (CDSB)
- Impact Management Project
- Cambridge Institute for Sustainability Leadership
- Climate Action 100+
- Institutional Investors Group on Climate Change
- Investor Group on Climate Change
- The Forum for Sustainable and Responsible Investment
- Institutions for Occupational Retirement Provision Directive II
- European Commission on Sustainable Investing/High Level Expert Group
- World Business Council/ The Reporting Exchange

Regulatory and compliance landscape

U.S. Securities and Exchange Commission

- Div of Examinations' Review of ESG Investing / Risk Alert
- SEC Announces Enforcement Task Force Focused on Climate and ESG Issues
- SEC Div of Examinations Announces 2021 Examination Priorities
- Div of Investment Management Request for Comment on Fund Names
- SEC's Request for Comment on Climate Disclosure
- Recommendation of the SEC Investment Advisory Committee Relating to ESG Disclosure

U.S. Department of Labor

- Financial Factors in Selecting Plan Investments Rule
- Fiduciary Duties Regarding Proxy Voting and Shareholder Rights

European Initiatives

- Sustainable Finance Disclosure Regulation
- EU Taxonomy Regulation
- Related UK regulations

Global Initiatives

- Numerous anti-human slavery and related human rights acts

Regulatory and compliance landscape

SEC Announces Enforcement Task Force Focused on Climate and ESG Issues

- Division-wide effort with 22 members
 - Work closely with other SEC divisions and offices
- Initial focus on identifying material gaps or misstatements in issuers' disclosure under existing rules
- Analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies
- Use of sophisticated data analysis to identify potential violations

Regulatory and compliance landscape

SEC 2021 Examination Priorities

- Review of adequacy of ESG disclosure to clients
- Consistency between disclosure and compliance practices relating to ESG
- Marketing materials
- Proxy Voting

Regulatory and compliance landscape

SEC Recent Examinations

- Examples of Topics included on Recent SEC Exams for Registered Investment Advisers
 - Litigation/Arbitration with ESG focus or related issues
 - ESG Disclosure
 - ESG Policies and Procedures
 - ESG Standards
 - ESG Scoring Systems (Proprietary or Third Party)
 - Issuer Communications/Shareholder Proposals related to ESG
 - ESG and Investment Process
 - Performance of ESG Products
 - Side Letters related to ESG

Launching a new esg investment product

Establish an Investment Thesis

Decide on a Product Type:

- Open-end mutual fund
- Exchange-traded fund
- Closed-end fund
- Business development company
- Separately managed account
- Collective investment trust
- Direct indexing
- Private fund

Create Clear Offering and Marketing Materials

- Align understanding across portfolio management, marketing, reporting, and compliance

Engage Third-Party Service Providers

ESG Investment products

New ESG/Sustainable Product

- Investment Strategy
- Product Type
 - Private Fund
 - Fund of One/Separately Managed Account
 - Registered Investment Company
 - ETF
 - SPV/Co-Investment Vehicles
- Governing Documents, Form ADV Disclosure
- Marketing Materials
- Side Letters
- Third-Party Service Providers
 - ESG Scoring
 - ESG Research Providers

ESG Investment products

Existing Product (ESG Integration)

- Existing Investment Strategy
 - Consider whether this is an enhancement/clarification or material change to the strategy
 - Consider any client/investor consent issues
 - Align understanding across portfolio management, marketing, reporting, and compliance
- Revisions to Governing Documents and Marketing Materials
 - Updated disclosure and risk factors
 - Review of expenses, including any fund related expenses specific to ESG
- Investment Staff/Third-Party Service Providers

ESG Investment products

Additional Compliance Considerations related to ESG Products

- Review and Update Form ADV Disclosure
- Allocation of Investment Opportunities
- Review ESG Compliance Policies and Procedures
 - Implementation of more specific and additional practices related to investment team diligence and compliance oversight
- Consider ESG Engagement with Issuers
 - Proxy Voting
 - Meetings with management
 - Shareholder resolutions/proposals

Compliance and legal considerations

- Greenwashing
- Conflicts of Interest
- Reporting
- Responding to Investor Due Diligence
- Proxy Voting

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Investment Management Practice

- Mr. Avdeychik counsels mutual funds, closed-end funds, exchange-traded funds (ETFs), business development companies (BDCs), hedge funds, and their investment advisers.
- He also has transactional experience concerning funds and their advisers, including merger and acquisition transactions.
- Mr. Avdeychik also has significant ERISA experience, with particular focus on fiduciary issues and prohibited transaction exemption questions under Title I of ERISA. he has authored several articles dealing with the intersection of ERISA and the investment management industry.

Debra Franzese



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Education

American University
Washington College of Law

- J.D., 2008
- *magna cum laude*

The Richard Stockton
College of New Jersey

- B.A., 2005
- *summa cum laude*

Bar Admissions

- New York

Summary

- Debbie is a partner in the Investment Management group who focuses on providing practical and results-oriented legal and regulatory advice. She works with sponsors and managers of various private investment funds and other pooled investment vehicles, including hedge funds, private equity funds, funds of funds, commodity pools, co-investment vehicles and various “hybrid” funds. In particular, Debbie focuses on fund formation and structuring, the offering of interests by private investment funds, and the negotiation and documentation of such investments. Debbie has experience in organizing both domestic and offshore partnerships and other investment vehicles, including separately managed accounts established for institutional investors. She has significant experience advising clients regarding regulatory and compliance matters, including the availability of exemptions from registration for both U.S. and non-U.S. investment advisers, the development of compliance policies and procedures, the completion of regulatory filings, and assistance with regulatory examinations. Debbie also represents investment advisers in connection with seed-capital investments and side letters and represents funds of funds and other institutional investors in connection with their investments in private funds. She has also assisted clients with the completion of non-U.S. regulatory filings, including those required in connection with AIFMD.
- Debbie was instrumental in the formation of the Firm’s ESG practice, spearheading a task force dedicated to staying at the forefront of the ESG issues affecting investment managers. Debbie also completed a Sustainable Capitalism & ESG course through US Berkeley School of Law in Spring 2021.
- Debbie received a B.A. from Stockton University, *summa cum laude*, and her J.D. from American University, Washington College of Law, *magna cum laude*.

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- Ms. Poe counsels private equity, venture, and hedge fund advisers in all stages of their business, including fund formation, domestic and cross-border structuring, adviser registration, compliance program development, compliance training and advice, governance and fiduciary issues, placement arrangements, marketing, client relations, side letter and seeding arrangements, SPAC transactions, implementation of ESG and liquidity strategies, and day-to-day trading and operations advice. She also advises institutional investors in connection with key and seed investment in private funds.
 - Ms. Poe also has considerable in-house experience in general counsel and chief legal officer roles, advising boards and C-suite officers on matters of consequence, including responses to government examinations and investigations, investor litigation, and fiduciary and auditor independence issues.
 - She also brings experience with gender and LGBTQ+ inclusion, and addressing the risks and opportunities of crypto currencies, crypto securities, and non-fungible tokens.
 - She was the President of the Schroders Funds Boards and currently serves on the Board of Advisors for ESG fintech company, Seeds Investor.