WeirFoulds LLP

New Guidance on ESG-Related Investment Fund Disclosure: The CSA Releases Staff Notice 81-334

February 9, 2022

By Janet Bobechko

As interest in environmental, social and governance (**ESG**) investing continues to grow at a rapid pace in Canada, so do concerns about the increased potential for "greenwashing", whereby an investment fund's disclosure or marketing materials intentionally or inadvertently mislead investors about the ESG-related aspects of the fund. This can lead investors to invest in funds that do not meet their objectives, cause investor confusion and negatively impact investor confidence in ESG investing. In recognition of these potential issues, the Canadian Securities Administrators ("**CSA**") published Staff Notice 81-334 – *ESG-Related Investment Fund Disclosure* (the **Staff Notice**). The Staff Notice, which was released on January 19, 2022, provides clarity and guidance to investment funds on their disclosure practices that relate to ESG. In particular, it is aimed at funds whose investment objectives reference ESG factors and funds that use ESG investment strategies (collectively, **ESG-Related Funds**). Common terms used in ESG-Related Funds include sustainable, responsible investing (RI), socially responsible investing (SRI), ethical and green.

The Staff Notice was published following the CSA's review of ESG-Related Funds' regulatory disclosure and marketing materials, which identified several shortcomings such as potentially misleading disclosure and inadequate reporting on investment strategies, proxy voting practices and ESG performance. While the CSA's review concluded that the current securities regulatory requirements are adequate to address these shortcomings, the CSA was of the view that regulatory guidance is needed to clarify how the current disclosure requirements apply to ESG-Related Funds. The Staff Notice aims to bring greater clarity to ESG-related fund disclosure and sales communications to enable investors to make more informed investment decisions.

The CSA's move is in line with developments taking place elsewhere around the world. In April 2021 the US Securities and Exchange Commission (**SEC**) issued a Risk Alert summarizing deficiencies observed in the course of examinations of investment advisers and funds regarding ESG investing. SEC staff cited weak internal controls and poorly designed compliance programs resulting in potential gaps between claims made, and thus the expectations of investors, and the actual practices of investment advisers. The European Union is widely regarded as the global leader in sustainable investing. The EU "Sustainable Finance Disclosure Regulation" has been in place since 2019. Citing a need to address "divergent disclosure standards and market-based practices [which] make it very difficult to compare different financial products" and cause confusion for end investors, leading to distortion in investment decisions, the EU directive sets out rules for product manufacturers with a view to standardizing disclosure.

The challenge with all of these regulatory efforts is the lack of widely accepted definitions and terminology and authoritative credentialing bodies. "ESG Compliant" can and does mean different things to different people, and these differences in interpretation and approach are unlikely to be resolved in the near future.

The Staff Notice provides guidance on best practices for ESG-related disclosure by investment funds in a number of areas including:

- Investment objectives and fund names;
- investment strategies disclosure;

- proxy voting and shareholder engagement policies and procedures;
- risk disclosure; and
- sales communications.

The Staff Notice is based on existing requirements and does not impose any new regulatory requirements for fund managers. An investment management firm considering launching new "ESG" products or making ESG claims about its existing products will be well advised to carefully review the Staff Notice. It would be reasonable to expect that there will be enhanced scrutiny of prospectus disclosure, MRFPs and marketing material by regulators regarding ESG claims going forward.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

The authors of this article wish to thank Jay Tomar, a member of the WeirFoulds' Securities Law Practice Group, and Emma Brown, Student-at-Law, for their contributions to this piece. For more information on this topic please contact Susan Han or Janet Bobechko.

For more information or inquiries:

Janet Bobechko

Toronto
416.947.5073

Email:
jbobechko@weirfoulds.com

Janet Bobechko is a Certified Specialist in Environmental Law and a nationally recognized senior practitioner with extensive experience in all aspects of environmental law, climate change and sustainability, including supply chain transparency.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035