



August 16, 2022

Secretary Vanessa A. Countryman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090
Submitted via email: rule-comments@sec.gov

Proposed Rule Regarding Environmental, Social, and Governance Disclosures for
Investment Advisers and Investment Companies,
File Number S7-17-22

Dear Ms. Countryman:

We write on behalf of The Louis D. Brandeis Center for Human Rights Under Law (the “Brandeis Center”), a non-profit human and civil rights organization that works to protect the rights of Jewish Americans on campus, in the workplace, and in the corporate setting, and to promote justice for all Americans.

Through your rulemaking, we urge you to address the rising problem of corporate anti-Semitism and anti-Zionism both *through* and *in* Environmental, Social, and Governance (“ESG”) ratings. That is to say, when ESG ratings are used to address social (“S”) issues such as civil and human rights, they should disclose the extent to which they recognize and include discrimination against Jews in their calculation and analysis. Anti-Semitism, although it is society’s oldest hatred, is often misunderstood and may go unnoticed, particularly in the corporate world.¹ More than half of Jewish workers reported dealing with discrimination in their workplace, according to a 2022 Rice University report.² We hope that the regulatory process will improve the use of social ratings to address the growing problem of corporate anti-Semitism. When ESG

¹ Matt Gonzales, “Stories of Antisemitism: Corporate America has seen a rise in discrimination and bias against Jewish workers,” *HR News* (Society of Human Resource Management) (May 14, 2022), <https://www.shrm.org/hr-today/news/all-things-work/pages/antisemitism-on-the-rise.aspx>.

² Rachel C. Schneider, Deidra Carroll Coleman, Elaine Howard Ecklund, and Denise Daniels, “How Religious Discrimination is Perceived in the Workplace: Expanding the View,” *Socius: Sociological Research for a Dynamic World*, Volume 8: 1–14, <https://journals.sagepub.com/doi/pdf/10.1177/23780231211070920>.

ratings are used to address civil and human rights problems, it is important to know whether the ratings analysis even acknowledges the existence of the historic and persistent hatred of Jews. Requiring companies to disclose whether anti-Semitism is included in the ESG analysis, will, *through* ESG, help raise awareness of and sensitivity to discrimination of Jews.

In addition, the rulemaking should address the rising problem of corporate anti-Semitism and anti-Zionism *in* ESG ratings. Our recent experience with Morningstar, a leading investment company, revealed that its Sustainalytics ESG rating system was tainted by anti-Israel bias. Morningstar is seeking to address the problem, but the revelations exposed in this investigation demonstrate that the individuals responsible for creating ESG ratings may harbor anti-Israel or anti-Semitic animus, which leads to skewed results. This development is especially troubling within a process that is intended to ameliorate, not exacerbate, such social pathologies.³

Morningstar is not alone in promulgating misinformation coming from activist groups like the Boycott, Divestment and Sanctions movement (“BDS”), which seeks the destruction of the Jewish State, including through economic isolation and manipulation of ESG ratings of companies based in Israel or doing business with Israel or Israeli companies.⁴

As the Brandeis Center has explained at length elsewhere, BDS is just the latest instantiation of anti-Semitic animus against the Jewish people. Boycott campaigns have provided an outlet for anti-Semitism for centuries. In the twentieth century, the Nazi regime promulgated a resurgence of anti-Jewish boycotts in Germany. Indeed, the Nazi regime’s first move against the Jews of Germany was to institute a boycott as the first step in its campaign to eradicate a Jewish presence in Germany and in the whole of Europe and the Middle East.⁵

Post World-War II boycotts have formally targeted the State of Israel but are closely associated with the history of boycotts against Jews. As the Brandeis Center’s Chairman, Kenneth L. Marcus, has observed, “[t]he pre-Nazi, Nazi, Arab League and BDS boycotts all share common elements: they seek to deny Jewish legitimacy or normalcy as punishment for supposed Jewish transgressions.”⁶ Like its predecessors,

³ See L. Rachel Lerman, “Morningstar drops anti-Israel tool, but is it enough?” *Jerusalem Post* (June 14, 2022), <https://www.jpost.com/business-and-innovation/article-709409>.

⁴ See, e.g., Daniel A. Harris, *The Trojan Bourse* (July 12, 2022).

⁵ See, e.g., Robert Wistrich, *Hitler’s Apocalypse: Jews and the Nazi Legacy* (New York, 1985).

⁶ See *Fighting Anti-Semitism: Hearing on H.B. 476 before the H.R. Comm. on Gov’t Accountability & Oversight*, 131st Gen. Assemb. 13 (Ohio 2016) (statement of Kenneth L. Marcus),

the modern BDS campaign “work[s] to sustain a movement that attacks the commitment to Israel that is central to the identity of the Jewish people as a whole.”⁷

That the United States government has repudiated BDS policies both as a matter of U.S. foreign policy and corporate governance is clear from the series of federal anti-Arab Boycott laws and regulations enacted beginning in 1977.⁸

BDS’ goals remain antithetical to the United States government’s pledge to protect its ally and its Jewish citizens from the discriminatory conduct promoted by such groups,⁹ and to the laws of many states that prohibit discriminatory boycotts of Israel.

It is unclear how allowing an anti-Semitic campaign to influence investment decisions is consistent with a fund’s fiduciary duty toward its clients. At the very least, investors must be put on notice when ESG ratings are influenced, if not actually driven, by anti-Semitic animus, including one driving a BDS activist agenda.

We respond to the proposed rulemaking by addressing these concerns in connection with the following questions posed by the SEC:

http://brandeiscenter.com/wp-content/uploads/2017/10/16-16-09_Ohio_House_of_Representatives_Testimony.pdf.

⁷ Kenneth L. Marcus, *The Definition of Anti-Semitism* 213 (2015).

⁸ See International Trade Commission: Antiboycott Compliance: A Legal Consideration of Exporting: Antiboycott Compliance <https://www.trade.gov/antiboycott-compliance>; Elizabeth Blessing, “Investing Laws & Regulations: Anti-Boycott Regulations, Investopedia, November 30, 2021, <https://www.investopedia.com/terms/a/anti-boycott-regulations.asp>.

⁹ The Jerusalem Israel-US Strategic Partnership Joint Declaration of July 14, 2022, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/14/the-jerusalem-u-s-israel-strategic-partnership-joint-declaration/> affirms that:

The United States and Israel . . . will continue to work together to combat all efforts to boycott or de-legitimize Israel, to deny its right to self-defense, or to unfairly single it out in any forum, including at the United Nations or the International Criminal Court. While fully respecting the right to freedom of expression, they firmly reject the BDS campaign. The two countries will use the tools at their disposal to fight every scourge and source of antisemitism and to respond whenever legitimate criticism crosses over into bigotry and hatred or attempts to undermine Israel’s rightful and legitimate place among the family of nations. In this context, they express their deep concern over the global surge in antisemitism and reassert their commitment to counter this ancient hatred in all of its manifestations. The United States is proud to stand with the Jewish and democratic State of Israel, and with its people, whose uncommon courage, resilience, and spirit of innovation are an inspiration to so many worldwide.

24. Should ESG-Focused Funds disclose information other than what we have proposed about their ESG strategy?

31. Is there additional information concerning the investment selection process in addition to the proposed disclosures for ESG-Focused Funds that would be helpful to investors? Should we require that additional information be included in the table or in another disclosure item?

34. Is the information that we are proposing to require an ESG-Focused Fund to disclose about how the fund incorporates ESG factors into its investment process for evaluating, selecting, and excluding investments appropriate and sufficiently clear?

35. Should we specifically require, as proposed, an ESG-Focused Fund to disclose in the ESG Overview Table whether it seeks to select or exclude issuers that engage in certain activities, or whether the fund seeks to select or exclude issuers from particular industries?

136. Is there other information about the consideration of ESG factors when providing investment advice that advisers should be required to include in their brochures? If so, please describe.

148. Are there other types of disclosure about advisers' significant strategies for which the adviser considers ESG factors that a client would find helpful? If so, what additional disclosures would be helpful for a client?

With respect to these questions, we offer the following suggestions.

First, the SEC should require funds and/or advisers that employ ESG ratings to disclose the *sources* they use to derive ratings for companies doing business in or with Israel, including media, government, NGOs, and any other sources, including information promulgated by groups like BDS. These funds and/or advisers should also disclose *which* of their sources, if any, are potentially biased against Israel, and/or are otherwise tainted by anti-Semitism, and advise investors how they correct for bias in making ratings-determinations based on these sources.

Second, the SEC should require all funds and/or advisers employing ESG social factors, such as civil and human rights, to disclose whether, and in what manner, they consider anti-Semitic incidents at the corporations or corporate bodies subject to their review and whether they use widely adopted definitions in making their assessments.

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Third, funds and/or advisers employing ESG factors should disclose whether they apply any presumptions in rating companies in or doing business with companies in Israel. We have learned that some funds providing “S” ratings assume that Israel is engaged in alleged human rights violations without properly examining the facts on the ground or the relevant laws. Investors should be made aware when funds and/or advisers are making investment decisions or recommendations based on such assumptions and be apprised of the underlying reasons for these assumptions.

Finally, the SEC should require all funds and/or advisers employing ESG factors to disclose any facts which would lead a reasonable investor to suspect anti-Semitism within their ratings process, including but not limited to inquiries by federal, state, or local agencies or law enforcement, and the result of such inquiries.

Sincerely,



Kenneth L. Marcus
Founder and Chairman



L. Rachel Lerman
General Counsel



Alyza D. Lewin
President