

The Investment Lawyer

Covering Legal and Regulatory Issues of Asset Management

VOL. 28, NO. 5 • MAY 2021

SEC's Fledgling Asset Management Advisory Committee Begins to Spread Its Wings

By Gary O. Cohen

The hot topic of Environmental, Social, and Governance (ESG)¹ disclosure has called attention to a relatively new Securities and Exchange Commission (SEC) advisory committee—the Asset Management Advisory Committee (AMA Committee).

This article² describes the AMA Committee, compares it with the older SEC Investor Advisory Committee (IA Committee), and points out the overlap of the two Committees with each other and the SEC's Investor Advocate. It concludes with an explanation of how the SEC can end up with *six* separate streams of in-house recommendations on ESG disclosure.

Asset Management Advisory Committee

The SEC formed³ the AMA Committee in late 2019 “to provide the Commission with diverse perspectives on asset management and related advice and recommendations.”⁴ At the time, then Chairman Jay Clayton explained that “[t]his committee will help the Commission ensure that our regulatory approach to asset management meets the needs of retail investors and market participants at a time when the industry is evolving rapidly.”⁵

More specifically, the objectives of the AMA Committee are to “provide the Commission with . . . diverse perspectives on asset management” and “related advice and recommendations” regarding:

- “trends and developments affecting investors and market participants;”
- “the effects of globalization, including as it relates to operations, risks and regulation;” and
- “changes in the role of technology and service providers.”⁶

The AMA Committee has submitted two recommendations⁷ to the Commissioners.

The AMA Committee is to be composed of at least one representative member from each of the following groups:

- “investors (for example, retail, institutional);”
- “funds (for example, sponsors, trustees, or directors);” and
- “other market participants and interested parties (for example, service providers, broker-dealers, data providers, investment advisers to retail investors).”⁸

In February of this year, the AMA Committee listed 18 voting and two non-voting members.⁹ The members consisted of business executives, academics, and a state securities regulator.¹⁰ Members were associated with such mutual fund sponsors as Fidelity, Schwab, and T. Rowe Price.¹¹ No member appeared to be associated with variable insurance products.

The AMA Committee has appointed three subcommittees: (1) Diversity and Inclusion, (2) ESG Investments, and (3) Private Investments.¹²

The SEC formed the AMA Committee on November 1, 2019 for an initial two-year term, which the SEC can renew.¹³

Investor Advisory Committee

Congress formed the IA Committee in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁴ (Dodd-Frank Act). However, the SEC did not make the IA Committee operational until almost two years later.¹⁵

The purpose of the IA Committee is to “[a]dvise and consult with the Commission on:”

- “Regulatory priorities of the Commission;”
- “Issues relating to the regulation of securities products, trading strategies, and fee structures, and the effectiveness of disclosure;”
- “Initiatives to protect investor interest;” and
- “Initiatives to promote investor confidence and the integrity of the securities marketplace.”¹⁶

The IA Committee is to submit to the SEC “appropriate” “findings and recommendations,” including “recommendations for proposed legislative changes.”¹⁷ Over close to nine years, the IA Committee has submitted 28 recommendations¹⁸ to the Commissioners.

The SEC must “[r]eview the findings and recommendations” of the IA Committee and “promptly issue a public statement” “[a]ssessing” them and “disclosing the action if any, the Commission intends to take.”¹⁹ However, the SEC is not required to “agree to or act upon any finding or recommendation of the [IA] Committee.”²⁰

The members of the IA Committee must include the SEC’s Investor Advocate, a representative of state securities commissions, and a representative of the interests of senior citizens.²¹ Members must number 10 to 20 individuals who:

- “Represent the interests of individual equity and debt investors, including investors in mutual funds;”
- “Represent the interests of institutional investors, including the interests of pension funds and registered investment companies;”
- “Are knowledgeable about investment issues and decisions;” and
- “Have reputations of integrity.”²²

The IA Committee must meet at least twice annually.²³

The IA Committee has appointed three subcommittees: (1) Investor as Owner, (2) Investor as Purchaser, and (3) Market Structure.²⁴

Overlapping Commission Advisers

The AMA Committee overlaps the IA Committee and the SEC’s Investor Advocate, as described below.

Overlap of Advisory Committees

It is not clear why the SEC found a need for the AMA Committee, which overlaps the IA Committee. A mission of the IA Committee to advise on “[i]nitiatives to protect investor interest”²⁵ and “promote investor confidence”²⁶ subsumes a mission of the AMA Committee to advise on “trends and developments affecting investors.”²⁷

More specifically, the IA Committee is charged with advising the SEC on the “effectiveness of disclosure,”²⁸ which arguably falls within the AMA Committee’s focus on “trends and developments affecting investors.”²⁹ As evidence that the Committees overlap, the AMA Committee and the IA Committee *each* determined that its mission required it to develop recommendations³⁰ to the SEC regarding ESG disclosure.

Furthermore, the IA Committee must include members who “[r]epresent the interests of individual equity and debt investors”³¹ and “institutional investors,”³² just as the AMA Committee must include members who are “investors . . . retail [and]

Exhibit 1—Comparison of SEC Asset Management Advisory Committee and SEC Investor Advisory Committee

Attribute	Asset Management Advisory Committee	Investor Advisory Committee
Formed by	SEC	Congress
Date formed	Nov. 1, 2019	July 21, 2010
First meeting	Jan. 14, 2020	June 12, 2012
Governing authority	Federal Advisory Committee Act	Securities Exchange Act of 1934
Principal mission	Provide diverse perspectives on asset management and related advice and recommendations	Advise on regulatory priorities and initiatives to protect investor interest and promote investor confidence
Matters to address	Trends and developments affecting investors and market participants, effects of globalization, and changes in the role of technology and service providers	Regulation of securities products, trading strategies, fee structures, and effectiveness of disclosure
Term of Committee	Initial two years, subject to renewal by SEC	No fixed term
Number of members	No more than 21	10-20
Member term	No fixed term	Four years
Meetings per year	No requirement; estimate four	At least two
Federal Advisory Committee Act applies	Yes	No

institutional.”³³ This overlap suggests that the SEC’s objectives for the AMA Committee could have been met by the IA Committee’s appointment of one or more subcommittees. (*See also* Exhibit 1.)

Overlap of Investor Advocate

In addition to the AMA and IA Committees, the SEC has a third source of overlapping independent advice on behalf of investors, namely, the Investor Advocate.

Congress established the Office of the Investor Advocate within the SEC³⁴ to “[r]eport directly to the [SEC’s] Chairman”³⁵ and provide the following “functions:”³⁶

- “Assist retail investors in resolving significant problems . . . investors may have with the Commission or with self-regulatory organizations.”³⁷
- “Identify areas in which investors would benefit from changes in the regulations of the Commission or the rules of self-regulatory organizations.”³⁸
- “Identify problems that investors have with financial service providers and investment products.”³⁹
- “Analyze the potential impact on investors of . . . proposed regulations of the Commission and proposed rules of self-regulatory organizations.”⁴⁰

- “Propose to the Commission changes in the regulations or orders of the Commission and to Congress any legislative, administrative, or personnel changes that may be appropriate to mitigate problems identified . . . and to promote the interest of investors.”⁴¹

The Investor Advocate, although compensated by the SEC,⁴² is *independent* of the SEC to a significant extent. This is because Congress requires the Investor Advocate to report annually to Congress on its “objectives”⁴³ and “activities,”⁴⁴ and requires the reports to be made “directly . . . without any prior review or comment from the Commission, any commissioner, any other officer or employee of the Commission, or the Office of Management and Budget.”⁴⁵

Multiple ESG Disclosure Recommendations

The AMA Committee’s Subcommittee on ESG Investments developed “potential” disclosure recommendations⁴⁶ to the SEC. The AMA Committee discussed the recommendations at its meeting on December, 2020 with a view to adopting them at the March 2021 meeting.⁴⁷

The recommendations of the AMA Committee overlap those of the IA Committee. The IA Committee submitted disclosure recommendations⁴⁸ to the SEC the previous spring. The recommendations of the IA Committee have been endorsed by the Investor Advocate in his annual report to Congress for 2020.⁴⁹ This is not surprising, because the Investor Advocate is required⁵⁰ to be a member of the IA Committee and, as noted above, their functions overlap.

Two Commissioners have called for the formation of still another advisory committee, the “ESG Advisory Committee.”⁵¹ These Commissioners have further called for a new SEC Staff “internal task force”⁵² dedicated to building on existing ESG disclosure recommendations.

Such a committee and task force—in addition to the AMA and IA Committees and Investor

Advocate—would mean that the SEC has five separate in-house streams of recommendations regarding ESG disclosure.

The Investor Advocate reported to Congress that he believes that an ESG Advisory Committee and SEC Staff task force “is a sensible course because the move toward a comprehensive ESG disclosure framework will be a challenging project involving numerous complex issues.”⁵³ The Investor Advocate stopped short of advising Congress whether several sets of ESG recommendations would be efficient and cost effective.

More recently, Commissioner Lee became the Commission’s Acting Chair.⁵⁴ She promptly appointed to her office staff a Senior Policy Advisor for ESG and climate matters, who will “advise the agency on environmental, social, and governance matters and advance related new initiatives across its offices and divisions.”⁵⁵ Commissioner Lee stated that “[h]aving a dedicated advisor on these issues will allow us to look broadly at how they intersect with our regulatory framework across our offices and divisions.”⁵⁶

Acting Chairman Lee did not address the advisability, in terms of efficiency and cost, of the SEC’s having *six* sets of ESG recommendations.

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NOTES

- ¹ “ESG” is the acronym for “Environmental, Social and Governance” factors that have increasingly figured into asset management and investment. “References to ‘ESG’ principles doubled last quarter and a full 35% of S&P constituents talked about injustice and equality on their earnings call.” Scott Martin, “ESG Takes Over Wall Street: But What Do Those Letters Mean?,” *Wealth Advisor* (Sept. 22, 2020), available at thewealthadvisor.com. For a comprehensive discussion of the substantive ESG issues raised, see Jennifer L. Klass, Amy J. Greer, and Jonathan E. Hoffman, “ESG Investing Faces Changing Regulatory Landscape,” *The Investment Lawyer*, Vol. 28, No.3 at 7 (Mar., 2021).
- ² This article speaks as of February 4, 2021.
- ³ See *Notice of Federal Advisory Committee Establishment*, Exchange Act Release No. 87256 (Oct. 8, 2019), available at <https://www.sec.gov/files/AMAC-Charter-Filed.pdf>. The SEC established the AMA Committee on November 1, 2019 “through the exercise of its discretionary authority in accordance with the provisions of the Federal Advisory Committee Act, as amended.” Asset Management Advisory Committee Charter [hereinafter AMA Committee Charter], Section (2), available at <https://www.sec.gov/files/AMAC-Charter-Filed.pdf>.
- ⁴ Press Release, SEC, “SEC Announces the Formation of Asset Management Advisory Committee” (Oct. 9, 2019), available at <https://www.sec.gov/news/press-release/2019-208>.
- ⁵ *Id.*
- ⁶ AMA Committee Charter, *supra* n.3, at Section (3).
- ⁷ The SEC lists the recommendations on its Website at Spotlight on the Asset Management Advisory Committee [hereinafter Spotlight on AMA Committee], available at <https://www.sec.gov/spotlight/investor-advisory-committee.shtml>.
- ⁸ AMA Committee Charter, *supra* n.3, at Section (11).
- ⁹ SEC, Spotlight on AMA Committee, *supra* n.7.
- ¹⁰ The state regulator was the Indiana Securities Commissioner who was a non-voting member. *Id.*
- ¹¹ *Id.*
- ¹² See *id.* (gleaned from “Meetings” and “Background Materials”).
- ¹³ AMA Committee Charter, *supra* n.3, at Section (10).
- ¹⁴ Pub. Law 111-203 (July 21, 2010) [hereinafter Dodd-Frank Act], Section 911 that became Section 39 of the Securities and Exchange Act of 1934 (1934 Act). This article cites to Section 39 of the 1934 Act rather than Sec. 911 of the Dodd-Frank Act.
- ¹⁵ The IA Committee became operational on June 12, 2012, when it held its first meeting and adopted a charter and bylaws. See *Dodd-Frank Investor Advisory Committee*, Securities Act Release No. 9322, Exchange Act Release No. 34-66986 (May 14, 2021) (giving notice of the inaugural IA Committee meeting), available at <https://www.sec.gov/rules/other/2012/33-9322.pdf>.
- ¹⁶ Section 39(a)(2)(A) of the 1934 Act.
- ¹⁷ *Id.* at Section 39(a)(2)(B).
- ¹⁸ The SEC lists the “Recommendations of the Investor Advisory Committee” on its Website at Spotlight on the Investor Advisory Committee [hereinafter Spotlight on IA Committee], available at <https://www.sec.gov/spotlight/investor-advisory-committee.shtml>.
- ¹⁹ Section 39(g) of the 1934 Act.
- ²⁰ *Id.* at Section 39(h).
- ²¹ *Id.* at Section 39(b)(1)(A) - (C).
- ²² *Id.* at Section. 39(b)(1)(D).
- ²³ *Id.* at Section 39(d)(1).
- ²⁴ See Spotlight on the IA Advisory Committee, *supra* n.18, at “Organization” and “Subcommittees.”
- ²⁵ Section 39(a)(2)(A)(iii) of the 1934 Act.
- ²⁶ *Id.* at Section 39(a)(2)(A)(iv).
- ²⁷ AMA Committee Charter, *supra* n.3, at Section (3)(a)(i).
- ²⁸ Section 39(a)(2)(A)(ii) of the 1934 Act.
- ²⁹ AMA Committee Charter, *supra* n.3, at Section (3)(a)(i).
- ³⁰ See *supra* ns, 7 and 18.
- ³¹ Section 39(b)(1)(D)(i) of the 1934 Act.
- ³² *Id.* at Section 39(b)(1)(D)(ii).
- ³³ AMA Committee Charter, *supra* n.3, at Section (11)(a).

³⁴ Congress established the Office of Investor Advocate within the SEC and required appointment of an Investor Advocate to lead the new office. Dodd-Frank Act, *supra* n.14, Section 915 which became Section 4(g) of the 1934 Act. This article cites to Section 4(g) of the 1934 Act rather than to Section 915 of the Dodd-Frank Act. The SEC, pursuant to Section 4(g)(1), appointed Rick Fleming as the first Investor Advocate. Press Release, SEC, “SEC Names Rick Fleming as Investor Advocate” (Feb. 12, 2014), available at <https://www.sec.gov/news/press-release/2014-27>. The almost three-and-a-half-year delay in the SEC’s appointment of the Investor Advocate was due, at least in part, to the lack of required “reprogramming approval from the Committees on Appropriations of the House of Representatives and the Senate,” *See* Letter from Mary L. Shapiro, SEC Chairman, to blacked out addressee (June 30, 2011), available at <https://www.sec.gov/spotlight/dodd-frank/investor-advocateletter063011.pdf>.

³⁵ *Id.* at Section 4(g)(2)(A)(i).

³⁶ *Id.* at Section 4(g)(4).

³⁷ *Id.* at Section. 4(g)(4)(A).

³⁸ *Id.* at Section. 4(g)(4)(B).

³⁹ *Id.* at Section. 4(g)(4)(C).

⁴⁰ *Id.* at Section 4(g)(4)(D).

⁴¹ *Id.* at Section 4(g)(4)(E).

⁴² *Id.* at Section 4(g)(2)(B).

⁴³ *Id.* at Section 4(g)(6)(A)(i) (requiring reports be submitted not later than June 30 of each year).

⁴⁴ *Id.* at Section. 4(g)(6)(B)(i) (requiring reports be submitted not later than December 31 of each year).

⁴⁵ *Id.* at Section 4(g)(6)(B)(iii) (titled “*Independence*” (italics in original)). Sections 4(g)(6)(A)(i) and (B)(i) require the Investor Advocate to submit its reports to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

⁴⁶ SEC Asset Management Advisory Committee, “Potential Recommendations of ESG Subcommittee” (Dec. 1, 2020) (Discussion Draft), available at <https://www.sec.gov/files/potential-recommendations-of-the-esg-subcommittee-12012020.pdf>. At the

AMA Committee’s December 1, 2020 meeting, two Commissioners and the then-Director of the SEC’s Division of Investment Management questioned the potential recommendations. Hester M. Peirce, SEC Commissioner, Opening Remarks at the December 1, 2020 Meeting of the Asset Management Advisory Committee (Dec.1, 2020), available at <https://www.sec.gov/news/public-statement/peirce-opening-remarks-amac-meeting-120120>; Elad L. Roisman, SEC Commissioner, Statement at the Meeting of the Asset Management Advisory Committee (Dec. 1, 2021), available at <https://www.sec.gov/news/public-statement/roisman-statement-amac-meeting-120120>; and Dalia Blass, Director, SEC Division of Investment Management, Remarks at the December 1, 2020 Meeting of the Asset Management Advisory Committee (Dec.1, 2020), available at <https://www.sec.gov/news/public-statement/bllass-amac-statement-120120>.

⁴⁷ SEC Spotlight on AMA Committee, *supra* n.7, at “Transcript of Meeting” 99, lines 14-16 (Dec. 1, 2020), available at <https://www.sec.gov/files/amac-120120-transcript.pdf>.

⁴⁸ SEC Investor Advisory Committee, Recommendation [sic] of the SEC Investor Advisory Committee Relating to ESG Disclosure (May 21, 2020), available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/esg-disclosure.pdf>.

⁴⁹ SEC Office of the Investor Advocate, Report on Activities Fiscal Year 2020 at 9 [hereinafter Investor Advocate 2020 Report], available at <https://www.sec.gov/files/sec-investor-advocate-report-on-activities-2020.pdf>.

⁵⁰ Section 39(b)(1)(A) of the 1934 Act.

⁵¹ “In addition, the Commission should have an internal task force and ESG Advisory Committee that is dedicated to building upon the recommendations of leading organizations, such as the Task Force on Climate-related Financial Disclosures, and defining a clear plan to address sustainable investing.” SEC Commissioner Allison Herren Lee and Commissioner Caroline A. Crenshaw, Joint Statement on Amendments to Regulation

S-K: Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information (Nov. 19, 2020), available at <https://www.sec.gov/news/public-statement/lee-crenshaw-statement-amendments-regulation-s-k>.

⁵² *Id.*

⁵³ Investor Advocate 2020 Report, *supra* n.49, at 9.

⁵⁴ See Press Release, SEC, “Allison Herren Lee Named Acting Chair of the SEC” (Jan. 21, 2021), available at

https://www.sec.gov/news/press-release/2021-13?utm_medium=email&utm_source=govdelivery.

⁵⁵ Press Release, SEC, “Satyam Khanna Named Senior Policy Advisor for Climate and ESG” (Feb. 1, 2021), available at https://www.sec.gov/news/press-release/2021-20?utm_medium=email&utm_source=govdelivery.

⁵⁶ *Id.*

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