August 16, 2022

VIA ELECTRONIC SUBMISSION

Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090
rule-comments@sec.gov

Re: Comment Letter on Proposed Rule on Investment Company Names;
Release No. 33-11067; 34-94981; IC-34593; File No. S7-16-22

Ladies and Gentlemen:

We are grateful for the opportunity to comment on the Securities and Exchange Commission's (the "Commission") proposed rule on Investment Company Names (the "Proposal"). WisdomTree Asset Management, Inc. ("WTAM") is currently the eleventh largest provider of exchange-traded funds ("ETFs") in the United States and manages (as of August 12, 2022) $51.3 billion in assets across 77 ETFs, the majority of which are managed passively against respective indices.

As described in more detail below, the Proposal would amend Rule 35d-1 (the "Names Rule") under the Investment Company Act of 1940, as amended, to, among other things, expand the scope of its application to a broader array of investment company names, set forth prescriptive criteria regarding investment policy exceedances and associated corrections, and implement new portfolio holdings disclosure requirements.[1]

As a manager of index funds, we are primarily concerned with the potential compliance expectation with respect to index funds. In addition, we are concerned more generally with the expansion of the scope of the Names Rule as described in the Proposal, the prescriptive criteria governing departures from the required investment policy, the limited time frames for restoring compliance, and the significant compliance burdens that would be caused by the new portfolio holdings reporting requirement on Form N-PORT. While we fully support the Commission's objective to ensure that investors understand their investments and receive accurate information about their funds, we are concerned that the Proposal is both unnecessary in scope and would have unintended consequences that would discourage investment companies from adopting appropriately descriptive fund names.

I. Background

The Names Rule was originally adopted in 2001 to "address certain investment company names that [were] likely to mislead an investor about an investment company's emphasis." As currently in effect, the Names Rule requires an investment company whose name suggests a particular investment emphasis to

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[1] Proposed Rule: Investment Company Names, Securities Act Release No. 11,067; Exchange Act Release No. 94,981; Investment Company Act Release No. 34,593; File No. S7-16-22 (May 25, 2022).

invest in a manner consistent with its name by adopting an investment policy, disclosed in the fund's prospectus, to invest at least 80% of the fund's assets in the securities suggested by the fund's name (an "80% Investment Policy"). The Names Rule is currently limited in scope to names that suggest an emphasis on (i) a particular type of investment or investments or industries or groups of industries, (ii) a particular country or geographic region, or (iii) investments that allow for the fund to make tax-exempt distributions. An 80% Investment Policy applies at the time of purchase of an investment and only "under normal circumstances."

With the Proposal, the Commission seeks to significantly expand the scope of the Names Rule to apply not only to the existing categories of names, but also to any name that suggests an "investment focus."[2] The expanded Names Rule would specifically require an 80% Investment Policy with respect to terms that have previously indicated investment strategies outside the scope of the current Names Rule, such as "value" or "growth." In addition, the Proposal would amend the Names Rule to permit, only under certain specified circumstances, a fund's departure from its 80% Investment Policy, and includes specific time frames for restoring compliance with the 80% Investment Policy. The amended Names Rule would also include a provision noting that compliance with the 80% Investment Policy does not establish compliance with the Names Rule where the fund makes significant investments that are antithetical to the investment focus suggested in the fund's name. These amendments are accompanied by a discussion in the Proposal that suggests passively managed funds would be required to test the qualifications of the underlying index constituents to maintain compliance with the required 80% Investment Policy. Finally, the Proposal would implement amendments to Form N-PORT to require funds to include specific information concerning their compliance with their 80% Investment Policies, including a requirement for funds to indicate, with respect to each investment, whether the investment was considered a qualifying investment for the purposes of the 80% Investment Policy.

II. Application to Index Funds

As a manager of index funds, our primary concern with the Proposal relates to the application of the new antithetical investment limit to index funds. As noted above, the Proposal would amend the Names Rule to provide that compliance with an 80% Investment Policy does not necessarily connote compliance with the Names Rule. We acknowledge that this sentiment was reflected in the original adopting release for the Names Rule in 2001; however, the discussion included in the Proposal suggests a wholly new application of the Names Rule for index funds. Specifically, the Proposal notes that an index fund that invests more than 80% of its assets in securities included in its tracking index, in compliance with its 80% Investment Policy, could nonetheless have a materially misleading name if the underlying index includes components contradictory to the name of the index.[3] Such a fund would, presumably, be required to adjust its investments to avoid such components.

This interpretation of the Names Rule would represent not an evolution of the existing interpretation of the Names Rule with respect to index funds, but instead would create entirely new and burdensome compliance obligations for these funds. In the original adopting release, the Commission noted that "[t]he term[] . . . 'index' suggest[s] a focus on a particular type of investment, and investment companies that use [that] term[] will be subject to the 80% investment requirement of the rule." Thus, index funds were expected and required to adopt an 80% Investment Policy with respect to the constituents of the

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[2] Proposal at 202; *see* Proposed Rule Section 270.35d-1(g)(1), Definition of 80% basket.
[3] *Id.* at 69.

underlying index; however, there was no requirement for the index fund to further verify that the index constituents were the types of investments suggested by the name of the underlying index.

Requiring index funds (and, by extension, their managers) to perform Names Rule compliance testing on the constituents of their underlying index would be a costly and unnecessary exercise. Index funds provide shareholders with cost-effective access to a diversified set of investments precisely because additional fundamental analysis is not required in connection with the management of such funds. If the Commission adopts the interpretation described in the Proposal, managers of index funds could be required to develop new fundamental analysis capabilities to evaluate each index constituent against the index name, which would increase the operating costs of these funds.

Assuming managers of index funds can create cost-effective compliance testing on the constituents of their underlying indices, such testing, as required under the Proposal, would create unnecessary transactions (and associated expenses) and could generate significant tracking error for index funds. Indices are generally rebalanced only on a periodic basis (*e.g.*, quarterly), while markets move in real time. As discussed in more detail below, the proposed amendments would require compliance with the 80% Investment Policy at all times, subject to allowances for certain temporary deviations. Where markets move quickly, the characteristics of an index fund may change significantly while the indices may not themselves change. For example, in the immediate aftermath of the 2008 financial crisis, many banks ceased paying dividends, but those banks were not necessarily removed from "dividend" indices. Similarly, large and pronounced market shocks such as the current COVID-19 pandemic may significantly alter market capitalization of certain issuers, and those indices may not address those changes immediately or in near-term rebalancings. The result is that based on this proposed interpretation, in these situations, fund managers would be expected to rebalance away from their index holdings to comply with their 80% Investment Policy, creating unnecessary transaction costs and tracking error – which is not beneficial to shareholders and is not why shareholders invest in index funds.

Further, such testing is wholly unnecessary. Investors in index funds invest in these funds for exposure to the specific underlying index, not the views of the manager on whether the specific index constituents reflect the name of the index. Indeed, index funds that adjust their portfolio to avoid these "contradictory" investments would incur tracking error versus their index, against the interests and investment objectives of their shareholders. This would require index fund portfolio managers to exercise discretionary authority, which is not within an index fund's mandate or purview.

Should the Commission proceed with amendments to the Names Rule, we strongly urge the Commission to clarify that passively managed funds will meet their obligations under the Names Rule so long as they invest at least 80% of their assets in the constituents of their underlying index and to not require these funds to develop unnecessary, burdensome and costly fundamental analysis capabilities. The burden this level of monitoring and potential for significant tracking error would create is far greater than any possible protection this compliance would offer investors and goes directly against the objective of investors investing in index tracking funds.

III. Departures

We are further concerned with the amendments described in the Proposal with respect to departures from the 80% Investment Policy and the associated time frames for correction. Under the Names Rule as

currently applicable, funds apply their 80% Investment Policy at the time that a security is purchased and "under normal circumstances." The Proposal would eliminate the ability for a fund to adopt an 80% Investment Policy that applied only "under normal circumstances" and would specify the particular circumstances under which a fund may depart from its 80% Investment Policy.[4] Specifically, these departures are allowed (i) as a result of market fluctuations, or other circumstances where the temporary departure is not caused by the fund's purchase or sale of a security or the fund entering or exiting an investment; (ii) to address unusually large cash inflows or unusually large redemptions; (iii) to take a position in cash and cash equivalents or government securities to avoid a loss in response to adverse market, economic, political, or other conditions; or (iv) to reposition or liquidate a fund's assets in connection with a reorganization, to launch the fund, or when notice of a change in the 80% Investment Policy has been provided to shareholders at least 60 days before the change.[5]

In addition to the 80% Investment Policy requiring testing beyond just the time an asset is purchased, funds would be required to bring their investments back into compliance with the 80% Investment Policy within 30 consecutive days, except for fund launches that are permitted within 180 consecutive days.[6] We are concerned that moving away from time-of-purchase testing would impose significant unnecessary and ongoing burdens on funds. Compliance testing as included in the Proposal would be an ongoing event, with funds being required to assess their compliance with their 80% Investment Policy on a daily basis. This would require a reevaluation of each issuer for qualification each day, a significant compliance burden and expense. We believe that such burdens are unnecessary, as compliance testing at time of purchase (and the requirement that any purchases made while outside of compliance contribute toward resolution of the non-compliance) is an effective tool to ensure funds maintain compliance without outsized burdens. In other words, this new Proposal will impose significant costs on funds while providing only a marginal benefit.

We are also concerned that the corrective periods may be insufficient and cause shareholder harm. Transaction costs could be much higher if funds are forced to trade within a given time frame. Further, there are many circumstances in which 30 days is an insufficient amount of time to bring a fund back into compliance with the 80% Investment Policy without sustaining unnecessary losses. For example, during the COVID-19 pandemic in 2020, markets were in flux for far longer than 30 days. Under the Proposal, if a fund is out of compliance with the 80% Investment Policy, it would be forced to make corrective trades in potentially challenging market conditions and where portfolio managers may, in the absence of such a requirement, conclude that such transactions were not in the best interests of shareholders.

We urge the Commission to reconsider these elements of the Proposal and, if the Commission is determined to move forward with amendments to the Names Rule, retain the current "time of purchase" testing regime.

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[4] *Id.* at 17.

[5] *Id.* at 34 and 199; *see* Proposed Rule Section 270.35d-1(b), Operation of policies and related recordkeeping.

[6] *Id.* at 34.

IV. Increase in Scope

A. Application to Investment Focus

We are also concerned that the amendments to the Names Rule to expand the terms in scope will create potentially impossible investment compliance challenges. The Names Rule does not currently apply to fund names that incorporate terms such as "growth" and "value."[7] The Proposal would expand the scope of application, requiring funds to adopt an 80% Investment Policy for these and other terms that suggest the fund focuses or concentrates in investments that the fund believes have those particular characteristics.[8] The expansion would create a burden for portfolio managers to review all existing funds containing the newly included terms. This review could involve potentially seeking board approval to revise strategies, providing advanced notice to shareholders, or requiring a 485(a) filing with the Commission – all time-consuming and costly.

The challenge created by this expansion is that these terms are necessarily subjective. Even indices may have different definitions of these terms. A "growth" investment to one portfolio manager may be a "value" investment to another. Thus, an 80% Investment Policy either would be wholly subjective (*i.e.*, the fund will invest 80% of its assets in securities that the fund's manager determines are qualifying) or would have to reference an independent objective source (*e.g.*, a third-party index). For example, for a fund with "growth" in its name, the test will end up being either subjective and include issuers that the manager determines to be "growth" or objective and include issuers within a specific growth index. In the first case, compliance with the 80% Investment Policy would depend on the subjective assessment of the fund's portfolio manager, and there can be no available data source that could validate whether an investment did or did not actually qualify. There is no pre-trade compliance test that can be done as a subjective test since it is inherently unknowable. In the second case, the ability for the portfolio manager to make investments would be constrained by the determinations of the independent source, limiting the ability for the portfolio manager to actively manage the fund.

B. Newly Included Terms

In addition to including "growth" and "value," this expansion would also apply to funds with other previously excluded terms in their names such as "sustainable," "global," "international," "income" or "intermediate term (or similar) bond."[9] None of these terms have objective, consistently applicable definitions. These terms are subjective and are thus not suited to objective compliance tests – we agree it would be nearly impossible to quantifiably measure subjective terms in an asset-based test as required by the 80% Investment Policy.[10] However, the expansion does not apply to names that represent certain characteristics of a portfolio as a whole or elements of an investment thesis.[11] The Commission lists examples of excluded terms, which are (i) names regarding a certain "duration," or that the fund is "balanced," as well as names that reference (ii) an investment technique, such as "long/short," (iii) a possible result, such as "real return," or (iv) a retirement target date.[12] The Commission states that these

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[7] *Id.* at 13.
[8] *Id.* at 197; *see* Proposed Rule Section 270.35d-1(a)(2), Names suggesting an investment focus.
[9] *Id.* at 24.
[10] *Id.* at 22.
[11] *Id.* at 24.
[12] *Id.*

names indicate fund objectives, but do not specify the investments, and are therefore permitted to be excluded from the 80% Investment Policy.[13]

The result of this requirement would be an additional severe compliance burden. The Proposal states that any terms used in a fund's name that suggest an investment focus must be consistent with the terms' "plain English meaning[s]" or "established industry use."[14] However, the Proposal even acknowledges that there are different approaches that each fund could take to determine if a given security is tied to the named industry.[15] Many of the newly included terms have subjective and ambiguous definitions, even with regard to their "plain English meaning[s]" and industry practice. Even if funds adequately defined these terms in their prospectuses, the subjective nature of these terms would lead to different funds having different definitions, which result in investor confusion. Distinguishing names that represent a portfolio as a whole or elements of an investment thesis from names that indicate an investment focus will cause confusion in fund naming. The difference between types of investments and investment strategies is a distinction that investors do not make when assessing fund names.

We believe that these changes are unnecessary. WTAM uses detailed names for each of the investment funds it advises, and we have not received complaints or reports of confusion from any shareholders to date. When we have changed fund names in the past, we have done so to adequately represent the strategy of the fund.

Should the Commission determine to proceed with the Names Rule amendments described in the Proposal, we request that the Commission confirm that funds may establish the definitions of such terms for purposes of compliance with the 80% Investment Policy in their disclosure documents and that funds will be permitted to use any reasonable definitions that have an appropriate nexus to the plain English definitions of such terms. For example, the Proposal states that the amended Names Rule would apply to terms such as "global," "international," "income," "intermediate term (or similar) bond" and "dividend" without giving any guidance on interpretations. We request confirmation that if the Proposal is implemented, funds would be permitted to provide their own definitions of these terms for the purposes of their 80% Investment Policy in their disclosure documents, provided that these definitions are clearly disclosed.

V. N-Port Requirements

Regarding the N-PORT reporting requirements, we are concerned about the administrative burden that would be caused by such increased disclosure requirements on Names Rule compliance. As described in the Proposal, Form N-PORT would be amended to require funds to report (i) the value of the fund's 80% basket as a percentage of the value of the fund's assets, and, if applicable, (ii) the number of days that the value of the fund's 80% basket fell below 80% of the value of the fund's assets during the reporting period.[16] Funds subject to the 80% Investment Policy requirement would also be required to indicate whether each new portfolio investment is included in the fund's 80% basket.[17]

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[13] *Id.*
[14] *Id.* at 27.
[15] *Id.*
[16] *Id.* at 96.
[17] *Id.* at 19; *see* Proposed Rule Section 270.35d-1(b)(3).

This would be extremely burdensome and costly. To ensure compliance, funds would either, as noted above, refer to an independent objective source or fundamentally assess every investment with respect to the relevant characteristic (*e.g.*, “growth”). As discussed above, for subjective terms such as “value” or “growth” this is extremely difficult, as such designation is based on a subjective evaluation by managers. If funds are creating their own definitions, what is a “growth” investment to one fund may not be to another. Funds already designate their investments at time of purchase, and report to their boards as necessary while retaining documentation to reflect investment status. Requiring a re-examination and a certification for every single security on Form N-PORT is a costly, time-consuming, and expensive burden that has no benefit to shareholders.

We do not believe that this change is necessary or appropriate. We have read the Investment Company Institute’s comment letter and agree with its proposal for a blanket certification if a certification requirement is to be added. Should the Commission proceed with the Proposal, a requirement for certification that the fund meet the 80% Investment Policy is a substantially more reasonable reporting requirement.

VI. Conclusion

As discussed above, we are concerned that the amendments to the Names Rule discussed in the Proposal would create significant new compliance burdens and compliance costs for funds and their managers. These burdens and costs would serve as powerful disincentives for funds to adopt descriptive names and may result in more funds adopting generic names such as “Harborview ETF” and relying on marketing materials to describe the scope of the fund’s investments. We do not believe that such generic names would be beneficial to shareholders, and we believe that these requirements would effectively result in the opposite of what the Commission is trying to achieve with the Proposal: fund names that provide relevant information to investors. If the Commission proceeds with the Proposal, we respectfully request that the Commission provide that the 80% Investment Policy for index funds be applicable at the index level, and only at the index level, such that funds will be in compliance with the Names Rule if 80% of their assets are invested in their tracking index. We further request the removal of the forced transaction requirement and the retention of the current time-of-purchase test, to ensure that compliance and costs associated with compliance do not negatively impact the fund and its shareholders.

Kind Regards,

/s/ Joanne Antico

General Counsel
WisdomTree Asset Management, Inc.