U.S. Chamber of Commerce

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August 12, 2022

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Proposed Rule, Securities and Exchange Commission; Investment Company Names; 87 Fed. Reg. 36594; Release Nos. 33-11067, 34-94981; IC-34593; File No. S7-16-22; (June 17,2022)

Dear Ms. Countryman:

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness ("Chamber") appreciates the opportunity to share our views on the Securities and Exchange Commission's ("Commission") Proposed Rule on "Investment Company Names" ("Proposal"). The Proposal seeks to amend the Rule 35d-1 ("Names Rule") of the Investment Company Act of 1940, adopted in 2001, for the purpose of ensuring that a fund's name accurately reflects the fund's investments and risks.

Investors respond to fund names. Therefore, it is important that a fund name properly reflects its underlying investments so it does not mislead investors. As the Proposal correctly states, asset managers "give considerable thought to the fund names they choose in light of their goals in communicating to investors."[1]

The long-term approach of the Commission and federal securities laws, and one which we have supported, has been to make sure investors have material information they need and to ensure that information is not fraudulent. The Chamber is generally supportive of updating rules in light of market developments and to address investor protection issues. However, we are very concerned by the unnecessary, sweeping changes to the Names Rule when the Commission has not identified specific problems or abuses to warrant additional rulemaking beyond the existing rules.

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[1] Securities and Exchange Commission, Release No. 33-11067; 34-94981; File No. S7-16-22 (May 25, 2022), p. 12, available at https://www.sec.gov/rules/proposed/2022/33-11067.pdf ("Proposal").

The Proposal constitutes a substantial extension of the rule to include fund names that suggest investments with particular characteristics. Knowing these funds are difficult to define, and for which investor perceptions may differ, this core change to the Names Rule would make enforcement of fund names highly subjective, potentially opening funds to value judgments and second-guessing by the Commission. The Proposal also would establish a 30-day time period in which any deviation from the 80% investment requirement must be rectified. Further, the new compliance provisions would require substantial and costly reporting and recordkeeping.

Although the Proposal states that the new rules "are designed to increase investor protection,[2]" due to the subjectivity in defining investment focused funds, we question whether investors would truly have comparable, decision-useful information to compare funds. The additional, extensive proposed disclosures, on top of the disclosures investors already receive, may result in investor confusion instead of bringing greater clarity to their investment choices. Moreover, by proposing a strict time limit for any deviations from the 80% rule, the Commission is increasing the risk that investors will be worse off by prioritizing an arbitrary 30-day time limit over an adviser's obligation to act in an investor's best interest. The sweeping changes outlined in the Proposal are meant to protect investors against fraudulent behavior, but it should be noted that the Commission already has existing authority to address misleading or fraudulent activity regarding fund names and marketing.

The Proposal would impose unnecessary regulation that is not likely to meet its objectives. Instead, the new rules would create substantial new compliance costs for funds and investors, while ultimately providing little benefit to investors. We urge the Commission to reconsider the Proposal in its entirety.

The Chamber makes the following observations and recommendations regarding the Proposal:

I. **The Names Rule should not be extended to names suggesting an investment focus.**

II. **Time limits on deviations from the 80% rule are unnecessarily rigid.**

III. **The Commission risks increasing greenwashing through a related proposal.**

IV. **The sweeping changes associated with the Proposal would be costly, complex, and time-consuming.**

V. **The SEC has not provided the public with a sufficient amount of time to comment on such a consequential proposed rulemaking.**

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[2] Proposal, p.1.

The Names Rule should not be extended to names suggesting an investment focus.

The Names Rule currently requires that if a fund's name suggests a focus in a particular type of investment, a particular industry or geographic focus, or securities that pay tax-free dividends, then the fund must adopt a policy to invest at least 80% of the value of its assets suggested by its name ("80% rule").[3] In this way, a fund name will be representative of the fund's investment strategy and the portfolio that aligns with it.

In the twenty years since the Names Rule was adopted, the Commission has never applied the rule to fund names that connote an investment objective, strategy or policy. As a result, fund names such as "growth," "value," "income," and "core," have not been subject to the Names Rule.

Under the Proposal, the Commission seeks to expand the scope of the Names Rule to fund names that suggest an investment focus, including those that suggest they incorporate Environmental, Social, or Governance ("ESG") factors. As a result, investment focused funds would be required to comply with the 80% rule. In addition, all funds subject to the Names Rule would be required to make multiple new disclosures, such as in their prospectuses, to include the definitions of the terms used in a fund's name, as well as the criteria used to select investments that fit the name. The Proposal purports to require that the definitions provided by fund managers use reasonable, plain English, established by industry use.

However, there is an important reason why the Commission has in the past excluded names that suggest a strategy from the regulatory requirements of the Names Rule. Concepts such as "growth," "core," "duration," and "income," among others, describe the portfolio as a *whole*, rather than a particular type of investment instrument. In fact, even by industry use and convention, these terms inherently do not have a single meaning or definition. Even if a strategy is well-defined, the fund may not be able to stay in a single category at all times, since such funds may undergo reasonable fluctuations. For example, the securities that comprise a growth fund may not always be exhibiting growth due to various market circumstances. Further, the Proposal would put the Commission in the difficult position of determining what constitutes "growth," "value" or other terms when describing a security.

While the Commission has thrown a wide net to try to expand the scope of the Names Rule, it seems clear that the animating purpose behind this proposed rule change is to ensure that ESG factors are covered by the 80% rule. [4] The Proposal explains that certain terms in fund names, such as "ESG," "green," "sustainable" or "socially responsible," warrant a review and amendments to the Names Rule due to the substantial growth in funds with an ESG investment

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[3] Proposal, p. 8.

[4] The Proposal was issued on the same day the Commission released another proposal specific to ESG Disclosures for Investment Advisers and Investment Companies. In addition, the first example provided in the Names Rule Proposal (see Proposal, p. 7) of a situation where an investor could be misled about a fund's investment focus centered on ESG criteria.

focus.[5] However, like other investment strategies, terms such as "ESG" and "sustainability," and other climate-related terms, are subject to widespread interpretation. In particular, the individual "E," "S," and "G" components can each represent fundamentally different meanings. Even the Commission acknowledged in a separate proposal on ESG Disclosures for investment companies[6] the lack of uniformity surrounding definitions for ESG factors.

Although the Commission is requiring definitions "established by industry use,"[7] we know that the industry and portfolio managers have not agreed upon one single way to define certain terms. Because of the challenge in defining investment strategies, expanding the 80% rule to include investment focused funds would result in the reporting of fund information based on subjective criteria and definitions. Fund managers would reasonably question whether they are ever truly in compliance with the rule. Fund managers exercise their expert judgment in building funds that provide an investment opportunity for investors.

The Proposal further requires that a fund must tag information using eXtensible Business Reporting Language ("XBRL") regarding the fund's 80% investment policy and the terms used in its name, including the specific criteria the fund uses to select the investments. [8] The purpose of reporting using XBRL is to enable comparability by investors. However, describing the characteristics of a fund using XBRL may also be a challenge for funds to use and investors to understand. Securities may change characteristics over time, which would create a challenge for tracking and reporting of those securities. Another complication in tracking investment characteristics is that some securities may have two characteristics at one time. For example, a security can be both "growth" and "value." As a result, we question whether the changes under consideration by the Commission would actually bring greater decision-useful information, comparability, and clarity to investors as they consider investment options.

The overriding concern with the application of the Names Rule to investment focused funds is how subjective the new requirements would be. Although the Proposal would allow funds the flexibility to define the fund name and describe the characteristics of the fund, the Commission has made it clear that funds can be second-guessed during examinations. The Proposal would codify the longstanding view of the Commission that the 80% rule does not provide funds with a safe harbor. The Proposal specifically opines that even if a fund has appropriately met the 80% rule, a fund name may still be materially misleading if a fund invests the other 20% in investments that are antithetical to the fund's purpose.[9] The example provided in the Proposal involves a fossil fuel-free fund making a substantial investment in an issuer with fossil fuel reserves.[10] In that example, would the Commission make an allowance for a situation in which the fossil fuel entity has made certain pledges to transition to "net zero"?

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[5] Proposal, p. 14.
[6] Securities and Exchange Commission, ESG Disclosures for Investment Advisers and Investment Companies, (87 FR 36654).
[7] Proposal, p. 27.
[8] Proposal, p. 76.
[9] Proposal, p. 69.
[10] *Id.*

This example demonstrates how easily it could be for the Commission to get into the business of making value judgments about the composition of funds.

We share Commissioner Peirce's concern that the Commission's enforcement of the Names Rule may be highly subjective and lead to "Monday morning asset managing."[11] It is abundantly clear that the liability risk for fund managers would increase since they may not be able to fit funds associated with investment strategies into precisely defined terms. Even if there is sound disclosure, even if there is no fraud, even if there are no material misstatements or omissions, the Commission could make substantive determinations to render a fund name inappropriate based upon its own judgments about the definitions and explanations provided by the fund manager. The Commission's approach to enforcing these proposed new rules would be largely dependent upon the continuously evolving views of the staff, rather than clear and understandable standards.

The Chamber is concerned that fund managers, in an effort to minimize the risk of the Commission second-guessing their investment decisions, may move towards lowest common-denominator standardization of investment portfolios. Investors, however, would be worse off, as they would find fewer unique offerings to meet the variety of investment objectives pursued by investors.

Due to these many concerns, the Chamber urges the Commission not to expand the Names Rule to investment focus funds. The current framework for the Names Rule, which excludes investment strategies, works because those funds involve descriptions that are not easily quantified and calculable. The Commission should defer to the expert judgment of fund managers as to how to best disclose information about investment focused funds.

Furthermore, inasmuch as the Proposal would broaden the coverage of the Names Rule to fund names that suggest an investment focus, the amended rule would also seem to require an inappropriate degree of oversight or supervision of index providers. While fund managers conduct initial and ongoing periodic oversight of index providers, on a day-to-day basis, they rely on the index provider to construct and maintain the index. An index fund, therefore, may deviate on a daily basis from the 80% requirement (through no fault of its own). This level of oversight of index providers and an index's constituent holdings is not appropriate and is inconsistent with the Names Rule.

[11] Commissioner Hester M. Peirce, Statement on Investment Company Names (May 25, 2022), available at https://www.sec.gov/news/statement/peirce-fund-names-statement-052522.

Time limits on deviations from the 80% rule are unnecessarily rigid.

Under the current Names Rule, a fund must apply the 80% investment policy at the time the fund invests its assets. Subsequently, funds are permitted to deviate from the 80% rule "under normal circumstances," leaving it to funds to determine what constitutes something other than normal circumstance.

The Proposal would amend this provision to permit funds to deviate from the 80% investment requirement only under four circumstances: (1) due to market fluctuations; (2) to address unusually large cash inflows or unusually large redemptions; (3) to take a position in cash or cash equivalents in response to an adverse market or events; or (4) to reposition a fund's assets in connection with a reorganization.[12] Further, a fund would have only 30 days to come back into compliance with the 80% rule whenever the fund deviates.

Although the Proposal asserts that the new approach "is designed to permit appropriate flexibility to depart temporarily from the 80% investment requirement,"[13] the Chamber does not believe it improves the Names Rule to mandate an arbitrarily proposed deadline for portfolio managers to ensure the fund meets the 80% requirement. The prescribed 30 days is an unreasonably short period of time and could lead funds to take extraordinary action to come into compliance, oftentimes at a cost to their investors. Examples of the recent volatility in the markets and geopolitical stresses should discourage the Commission from setting any arbitrary time limit on a fund to meet the 80% requirement.

Moreover, this provision is unnecessarily rigid, forcing fund managers to adhere unduly strictly to an investment strategy even when it may not be in the best interest of investors. This Proposal does not recognize or defer to the expertise of a fund manager who is in the best position from which to manage the interests of a fund. Instead, the 30-day provision would unreasonably limit the decision-making of a fund manager who (if the provision is made final) may be forced to make redemptions at depressed prices or to buy illiquid securities that are not in the best interest of investors.

The 30-day provision would create unnecessarily difficult investment choices for fund managers in times of acute market stress by putting them in the position of having to choose between acting in a manner that is in the best interest of their investors or complying with an arbitrary time-limit to remain in compliance with the Names Rule. The Commission should not be proposing new rules that potentially lead to fire sales or other unexpected actions that undermine an investor's interest and return on investment.

The Commission has failed to put forward a compelling rationale in proposing such a change to the Names Rule. The Commission asserts that a primary concern for investors is the

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[12] Proposal, pp. 33-34.
[13] Proposal, p. 35.

ongoing consistency with the investment focus suggested by a fund's name.[14] According to the Proposal, the proof for this assertion is the increasing preference by investors for passive investment vehicles. We see no causality between these two statements. There are many other reasons why an investor would prefer an index fund or an ETF (i.e., diversification, low costs, return on investment). A fund name or certain investment focus can be an important consideration when an investor chooses a fund; however, equally (or more) important considerations for investors include the ability of a fund manager to deliver on strategies, investment objective, and return on investment. The Chamber questions that the average investor would prioritize an unbending commitment to the 80% threshold over a fund manager's taking steps to ensure that fund returns do not plummet.

Another concern relevant to this provision is the proposed change from allowing funds to make a determination of the 80% requirement at the time of purchase (under current rule) to requiring a fund to get back into compliance with the 80% requirement whenever a deviation occurs. Under the Proposal, the Commission is asking a fund to maintain records for any departures from the 80% requirement and the dates of any such departures. To comply with this recordkeeping provision, funds would be required to take on the additional burden of modifying compliance and support systems to monitor the fund on a daily basis against the 80% guidepost.

A portfolio manager will develop a fund based on a particular investment objective. As an example, consider an "income" fund. Even if the strategy is well-defined, there could be fluctuations following the time of purchase that may make a security income-producing at one point, but non-income producing at another point. However, this same security could return to being an income-producing security after a period of time. Similarly, a stock that was widely considered to be a "growth" stock could be considered by some to evolve into a "value" stock after the portfolio manager makes an initial investment – even if the manager still believes its original classification is accurate. Since a portfolio manager has developed a fund with certain goals in mind, such fluctuations are reasonable, and any changes to a fund should be effectuated at the discretion of the fund manager in accordance with that fund's objective. However, the 30-day requirement under the Proposal would add unnecessary complexity to the management of a fund.

The Chamber questions the strict adherence to an 80% requirement at the expense of a fund manager's expertise and the fund's investment goals. We encourage the Commission to retain the current rules for deviations from the 80% policy "under normal circumstances" as determined at the time a fund invests its assets instead of establishing a 30-day period for compliance. The current rules are appropriate to allow fund managers, who are the experts in the fund's management and who are required by statute to have an investor's best interest at heart, to determine how and when to safely bring a fund back into compliance with the 80% rule.

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[14] Proposal, pp. 36-37.

The Commission has not provided sufficient reason to amend the current, effective approach. In fact, our members have explained that historically, if their funds have experienced any deviation from the 80% requirement for the funds currently subject to the Names Rule, any such deviations are of a short duration. Furthermore, our member firms are aware that they are already subject to additional regulations regarding fiduciary duties, disclosure obligations, and securities fraud. The Commission can already enforce any instances of fraud in fund names.

The Proposal also recommends a separate, 180-day time limit on deviations from the 80% requirement in the case of a fund launch. The Commission does recognize the challenges inherent in launching a fund, including the "likelihood that it can take longer for funds to find investments during their start-up."[15] However, there are a sufficient number of products that need significantly more than 180 days to be in compliance. In the case of illiquid funds, for example, the fund launch can have a ramp-up period of more than a year on funded commitments. The proposed 180-day provision on fund launches is another example where absolute time limits are not necessary. We recommend that the Commission remove the proposed 180-day limit for fund launches. It is in the best interest of the fund manager to find sufficient investments to fully establish the fund as soon as practicable. To the extent the Commission determines more clarity is warranted, it could instead allow the fund to disclose the ramp up period.

<u>The Commission risks increasing alleged greenwashing and investor confusion through a related proposal.</u>

Integration funds are funds for which ESG factors are considered alongside, but have not more significance than, non-ESG factors in the fund's investment decisions. The term "integration fund" is based on the parallel and related Commission proposal that would establish new ESG disclosures for investment advisers and investment companies.[16]

This Proposal on the Names Rule would "define the names of 'integration funds' as materially deceptive and misleading if the name includes terms suggesting that the fund's investment decisions incorporate one or more ESG factors" if the identified ESG factors do not play a central role in the fund's investment strategy. [17] The Chamber agrees that the growth in ESG-labeled funds warrants a closer look by regulators to ensure funds are not misleading investors with claims about their use of E, S or G factors.

However, as we explain in our letter to the Commission in response to the ESG Disclosure proposal, we believe that the creation of an ESG-Integration Fund is too broad and would create misperceptions for investors about the extent to which funds use ESG criteria or

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[15] Proposal, p, 38.

[16] Securities and Exchange Commission, Release No. 33-11068; 34-94985; File No. S7-17-22 (May 25, 2022), available at https://www.sec.gov/rules/proposed/2022/33-11068.pdf.

[17] Proposal, p. 81.

standards. A fund may consider ESG factors among many other factors. Further, any E, S, or G security is just one of many securities among others in a fund. If a fund has to include information in its prospectus, as is called for in the ESG Disclosure proposal, the Commission risks overstating the importance of those E, S, or G factors to investors, and thus could heighten alleged greenwashing, instead of minimizing it per the Commission's objective.

The sweeping changes associated with the Proposal would be costly, complex, and time-consuming.

The Chamber is concerned about the burden to funds associated with complying with the Proposal. The sweeping changes under consideration would be costly, complex, and time-consuming. Fund managers and compliance teams would have to undertake significant efforts to update a wide range of systems and compliance structures to address the new proposed recordkeeping and reporting obligations under Form N-1A, Form N-2, Form N-8B-2, Form S-6, and Form N-PORT.

The Proposal would include significant new recordkeeping provisions that would require a fund to maintain documentation for at least six years. Compliance would include written record of the investments that comprise the 80% portion of the fund, the rationale for the securities that are included in the 80% bucket, the value of the fund's 80% basket as a percentage of fund assets, reasons for any departures and the dates of those departures, and any notices sent to shareholders relevant to updates pursuant to the Names Rule. Even funds that do not adopt an 80% investment policy would be required to maintain a record of the analysis proving that the fund is not subject to the rule.

We question the Commission's proposed use of Form N-PORT as a compliance tool. Under the Proposal, Form N-PORT would be amended to include new reporting items, including the value of the fund's assets and any deviation from the 80% rule. In addition, fund managers would be required to tag every security in the portfolio that is a part of the 80% component, a process that would be highly burdensome, logistically complicated, costly, and time-consuming. Form N-PORT is not an appropriate reporting mechanism for this information, as it is not a compliance tool.

To meet the Proposal's new reporting and recordkeeping requirements, a fund would have significant work to complete internally. Fund managers would have to review fund methodologies, add policies to test the names of funds, evaluate a wide range of securities to properly categorize them, and develop and adopt systems to monitor a fund's compliance with the 80% rule. Many funds could be forced to change fund names, investment strategies, and adopt new 80% investment policies. It is important that any such changes are adopted following a deliberative process that fully considers and ensures the best interest of investors. Fund compliance teams would also have to update a wide range of complex compliance structures to address the new recordkeeping and reporting obligations. Funds would incur high costs to address all of these changes, and some, if not all, of those costs may be passed on to

investors. This extensive process would be made more challenging as the work would likely – if the proposals are made final – compete with the implementation of other new compliance requirements described in other Commission proposals.

The Proposal recognizes that many of the benefits and costs are difficult to quantify;[18] however, we question the necessity of so much additional reporting and whether investors would benefit. This Proposal includes extensive disclosures, many of which are not material to investors and may actually create more confusion. For example, we question why an investor would require the detail surrounding the analysis to determine whether individual investments meet the 80% target. Another possible cost to investors would occur if funds are required to strictly adhere to the proposed 30-day time frame to return to compliance with the 80% rule, at the expense of an investors' best interest.

The SEC has not provided the public with a sufficient amount of time to comment on such a consequential proposed rulemaking.

The Chamber and many other organizations have consistently registered our concerns over the unusually short comment periods the Commission has been providing to respond to the wide array of new and complex proposals. Most of these proposals are hundreds of pages in length and collectively ask thousands of questions on highly technical and complex matters. We urge the Commission to slow down the pace of its regulatory agenda and provide the public with more time to analyze rule proposals and provide informed feedback.

As many of the Commission's proposals are interconnected, it is more important that the Commission get regulation "right" and ensure that any new rules are justified, than it is to simply advance a high volume of divisive and controversial mandates. Although the Commission provided a 60-day comment period for this Proposal, it also requested comments by the same day on a related proposal on ESG Disclosure for Investment Advisers and Investment Companies. There is clear overlap in the two proposals, particularly regarding the provisions concerning integration funds and the need for additional disclosures that would include ESG-focused funds.

The Commission has also not conducted any kind of analysis to determine the cumulative impact of its regulatory agenda upon economic activity or capital formation. Regulated entities would have to divert substantial resources to comply with a host of new rules in a condensed time frame. The aggregate burden of coming into compliance with the Commission's fusillade of rulemaking would exhaust compliance department resources currently devoted to the identification and mitigation of actions that could harm investors. Given that the SEC is embarking on its most aggressive regulatory agenda in years, a more holistic examination of this agenda is warranted.

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[18] Proposal, p. 171.

The Chamber provides these comments based upon our initial assessment of the Proposal and our best estimation for how it would work in practice. However, providing more time for the public to consider and analyze the Proposal's mandates – particularly in their relation to other unfinished rulemakings – would improve the rulemaking process.

Conclusion

As explained throughout this letter, the Chamber is concerned that the Commission has not properly justified or considered the wide-ranging consequences of its expansive new proposed mandates for funds. We are also concerned that the Commission has once again sought to limit the public's deliberation and feedback on the rule, which weakens the Commission's rulemaking process and raises the likelihood of unintended consequences with any final rule. We urge the Commission to re-think the Proposal in its entirety along with its relation to other proposals prior to issuing a final rule.

Sincerely,

Kristen Malinconico
Director
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce