



The Forum for Sustainable and Responsible Investment

August 16, 2022

Vanessa A. Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

RE: Investment Company Names (File No. S7-16-22)

Dear Ms. Countryman:

On behalf of US SIF: The Forum for Sustainable and Responsible Investment, I welcome the opportunity to provide this comment letter in response to the Notice of Proposed Rulemaking (the “Release”) “Investment Company Names” (File No. S7-16-22) (the “Proposal”).

US SIF is pleased to support the Commission’s recognition that fund names offer important signaling for investors in assessing their investment options. The Commission’s proposed steps in combating materially deceptive and misleading fund names provides additional transparency for investors and importance guidance for funds.<sup>1</sup> While US SIF supports most of the Proposal, we believe there are some aspects that need additional clarity and flexibility to be workable for fund compliance, and importantly, to provide clear, consistent, and uniform information available to investors.

US SIF is the leading voice advancing sustainable investing across all asset classes. Our mission is to rapidly shift investment practices toward sustainability, focusing on long-term investment and generating positive social and environmental impacts. Our members include investment management and advisory firms, mutual fund companies, asset owners, research firms, financial planners, advisors, and broker-dealers, representing more than \$5 trillion in assets under management or advisement. US SIF members incorporate environmental, social, and governance (“ESG”) criteria into their investment decisions and take seriously their responsibilities as shareowners, including in voting proxies and engaging with companies. US SIF has a long history of encouraging greater transparency by fund managers as well as promoting best practices in the sustainable investment field.

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<sup>1</sup> For the purpose of this comment letter, we only refer to the *funds* that are subject to rule 35d-1 and discussed in the Proposal.

Due to its global significance, as well as its positive influence on financial performance, sustainable investing continues to be increasingly popular, year after year, among both institutional and retail investors. Sustainable investing assets account for \$17.1 trillion—or 1 in 3 dollars—of the total US assets under professional management, according to the US SIF 2020 Trends Report.<sup>2</sup>

As investor demand for sustainable products has increased, so have fund offerings in this space. This development, however, has also led to instances of misleading fund names and in some cases greenwashing.<sup>3</sup> Recently, the Commission’s Division of Examinations released its 2022 Priorities which included monitoring ESG-related advisory services and investment products.<sup>4</sup> Specifically, the Division shared that greenwashing in advertising and marketing by advisers and funds is an area of focus for its reviews in 2022.<sup>5</sup> To combat greenwashing, the Commission has proposed amendments to rule 35d-1 (the “Names Rule” or “Rule”)<sup>6</sup> which, if implemented, would tackle misleading or deceptive fund names.

The Commission first adopted the Names Rule in 2001 to address certain investment company names “that are likely to mislead an investor about a company’s investment emphasis.”<sup>7</sup> While the Commission warned that “investors should not rely on investment company names as a sole source of information about a company’s investment...,”<sup>8</sup> fund names remain an essential piece of information on which investors often rely when considering and assessing their investment options. With the continued growth of sustainable investing, fund names must provide accurate signaling for investors.

## Overview

The Proposal seeks to expand and modernize the Names Rule to broaden its scope and provide clarity considering the market changes in the last two decades. This includes bringing under the Rule certain fund names that fell outside of the original scope of the 2001 rule adoption.<sup>9</sup> Further, the Proposal seeks to enhance transparency in fund names.

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<sup>2</sup> US SIF Foundation, *Report on US Sustainable and Impact Investing Trends 2020* at 9, available at <https://www.ussif.org/trends>.

<sup>3</sup> *Greenwashing* in the asset management space generally “refers to the practice of misrepresenting sustainability-related practices or ...features of investment products.” IOSCO, *Recommendations on Sustainability-Related Practices, Policies, Procedures and Disclosure in Asset Management* at 14 (Nov. 2021), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD688.pdf>.

<sup>4</sup> See US SECURITIES AND EXCHANGE COMMISSION DIVISION OF EXAMINATIONS, *2022 Examination Priorities* at 12, available at <https://www.sec.gov/files/2022-exam-priorities.pdf>.

<sup>5</sup> *Id.* at 13.

<sup>6</sup> Rule 35d-1 under the Investment Company Act of 1940. 17 C.F.R. § 270.35d-1 (2001).

<sup>7</sup> Investment Company Names, 66 Fed. Reg. 85,09, 85,09 (Feb. 1, 2001), available at <https://www.federalregister.gov/documents/2001/02/01/01-1967/investment-company-names>.

<sup>8</sup> *Id.*

<sup>9</sup> The 2001 adopting release to the Names Rule made clear the Names Rule does not apply to fund names that use investment strategy terms like growth and value. See *Id.* at 85,14.

Under the Names Rule as it now exists, funds are prohibited from adopting a name that the Commission finds materially misleading. The Rule generally requires that if a fund's name suggests a focus on a particular investment type, industry, or focus, two requirements must be met: (i) the fund adopts a policy that it will invest at least 80% of the value of its assets in the type of investment, industry, or focus suggested by the name; and (ii) the fund's policy is a "Fundamental Policy" or the fund has a policy in place to provide shareholders with at least 60 days' notice prior to any change in policy. The rule similarly provides requirements for funds focused on investments in certain geographic locations and funds that claim tax-exempt distributions.

Among the proposed amendments to the Rule is an update to the 80% investment policy requirement to broaden its scope. In effect, the types of fund names covered by the Rule would expand to include those that focus on investments and issuers with particular characteristics. Consequently, funds with names that include "growth," "value," or "sustainable" would be subject to the rule. While the proposed rule text is broadly written, the Release makes clear that funds using sustainable, ESG, or similar terms (e.g. green, impact, or socially responsible among others) would be subject to the 80% rule. In addition, the Proposal includes a requirement that if a fund departs from the 80% threshold, the fund has 30 days to come back into compliance with the 80% policy requirement. Importantly, departure from the 80% threshold cannot be the result of a fund's purchase or sale of security or entering into or exiting an investment.<sup>10</sup>

Additionally, the Proposal adds a new paragraph (d) specific to the use of ESG terms in fund names separate from the 80% policy requirement. Although "*integration fund*" appears in the preamble of the Release, it does not appear in the proposed rule text. The proposed text, however, effectively provides that an integration fund—a fund that considers one or more ESG factors alongside other non-ESG factors—which uses ESG terms in its name, but does not treat or use ESG factors more significantly than other non-ESG factors in its investment decisions, would have a materially deceptive and misleading name.

While there are several other proposed changes, there are two additional meaningful changes worth highlighting. First, paragraph (a)(2)(iii) creates a requirement that funds use terms that are consistent with those term's plain English meaning or established industry use. Second, paragraph (c) clarifies that a fund may comply with the 80% policy requirement yet still be materially deceptive and misleading (the "Effect of Compliance paragraph"). Paragraph (c), as explained in the Release, is meant to capture funds that meet the 80% policy requirement but may invest a portion of its remaining assets in investments that are antithetical to the fund's

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<sup>10</sup> The Proposal provides for a departure from the 80% threshold under certain circumstances including due to market fluctuations or other conditions, unusually large cash inflows or redemptions, to take cash positions to avoid losses stemming from economic or political conditions, and to liquidate or reposition fund assets in connection with a reorganization or other circumstances. Investment Company Names [Proposed Rule], 87 Fed. Reg. 36,594, 36,649 (Jun. 17, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-06-17/pdf/2022-11742.pdf>.

name and investment policy or substantially differ from what a reasonable investor would expect based on the fund's name.<sup>11</sup>

US SIF supports the Commission's steps to promote transparency in investment products and practices in relation to fund names. In particular, US SIF is pleased the Commission recognizes all funds should be in compliance with the 80% policy requirement of the Names Rule, not just those which have specific sustainability or ESG triggering language in their name. These amendments allow the Rule to capture not only sustainable strategies, but all strategies purporting specific types of investments. Finally, US SIF also welcomes the Commission's addition of the plain English requirement coupled with the Effect of Compliance paragraph to prevent fund names that comply with 80% policy requirement but are nonetheless misleading.

### **Considerations and Recommendations**

To ensure the final rule accomplishes robust transparency in fund names as well as provides a workable process for funds to maintain compliance, US SIF recommends the following considerations and changes:

- The Commission should change "Use of ESG terms in fund names" to "Use of sustainability terms in fund names" in paragraph (d). The term *ESG* investing is relatively new and increasingly viewed as not being the right rubric to capture the range of sustainable investing strategies. In fact, the term *ESG* more correctly refers to the data points used in sustainable investment strategies, not the actual investments and strategies themselves. Moreover, neither the Commission nor financial industry have adopted a universal definition of *ESG*. Thus, US SIF strongly recommends that the Commission use the term *ESG* only to refer to the environmental, social, and governance factors. This will also assist end investors who may not understand the term *ESG* but do largely understand what is referenced by the term "sustainable."
- The Commission should revise and relocate the proposed paragraph (d) *Use of [sustainability] terms in fund names*. As proposed, paragraph (d) is a stand-alone paragraph addressing ESG terms in fund names which is duplicative of the proposed text of paragraph (a)(2). Funds which use ESG terms in their names will already be subject to proposed paragraphs (a)(2) and (c). Together, paragraphs (a)(2) and (c) provide that funds which use ESG terms in their names need to comply with the 80% policy requirement and use plain English terms, and are also subject to the Effect of Compliance paragraph prohibiting investments antithetical to the fund's name and investment strategy.

While US SIF agrees with the Commission that additional guidance is required for sustainability-related terms in fund names under the rule, we believe such guidance should be revised and relocated within the rule text. Specifically, phrases used in the

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<sup>11</sup> The Release text provides an example of an 80% "fossil fuel-free" fund that makes a substantial investment in an issuer with fossil fuel reserves. *Id.* at 36,610-611.

proposed text of paragraph (d) such as “one or more ESG factors” and “generally no more significant than” are overly broad and vague. As written, these phrases create confusion and provide for subjectivity by funds attempting to comply with the rule. As such, paragraph (d) should be revised for clarity. Additionally, US SIF believes this clause should be moved creating a new paragraph (a)(4) so as to not be separated from the operative materially deceptive and misleading language in paragraph (a). Clarifying this language and moving it under paragraph (a) could possibly look like the below:

- (4) *Use of sustainability terms in fund names.* A fund name that includes sustainability terms or ESG factors will be considered materially deceptive and misleading if:
- (i) The fund does not satisfy the 80% policy requirements as described in paragraph (a)(2) of this section; or
  - (ii) The fund considers ESG factors, but such ESG factors do not describe or are not considered the Fundamental Policy or principal goal of the fund’s investment strategy.

- The Commission should add an additional clause to the 30-day obligation for funds to come back into compliance upon departure from the 80% policy requirement for flexibility in unforeseen circumstances. As proposed, if a fund departs from the 80% threshold, the fund has 30 days to come back into compliance with the 80% policy requirement. There may be extenuating circumstances which does not allow a fund to comply within 30 days.<sup>12</sup> US SIF proposes the Commission adopt additional language providing for a *comply or explain why* approach under paragraph (b)(1) for other circumstances:

In a circumstance where a fund may be unable to come back into compliance with the 80% policy requirement within 30 days (subject to the limitations on reasons for departure as described in paragraphs (b)(1)(i)-(iv), the fund would submit notice to its board of directors and shareholders explaining (1) why it is unable comply within 30 days, (2) its plan and anticipated steps to come back into compliance, and (3) the anticipated length of time needed to come back into compliance. If 80% compliance is not met within [90] days (or some other reasonable period of time as the Commission deems appropriate), the fund would need to change its name and notify its investors of the change or the fund would be in violation of the 80% policy requirement.

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<sup>12</sup> An example of such a circumstance would be if a fund invests in portfolio company that purportedly planned meet certain ESG metrics and failed to do so or the portfolio company misled investors about its ESG plans. If the fund needs to divest from that portfolio company to maintain compliance with the 80% policy requirement, 30 days may not be enough time to make such a divestment particularly if divestment during those 30 days would be disadvantageous to fund investors.

All communications and documentation about and relating to this extension would be subject to the proposed recordkeeping requirements in paragraph (b). Additional flexibility to the 30 days return to compliance period would provide reassurance to funds and their advisers that there may be some contexts not contemplated in the rule that require a more nuanced approach to compliance. This approach, or something similar, would also assure open and timely communication by funds with investors.

## **Conclusion**

This Proposal will bring more clarity and guidance in the fund space and contribute to protecting investors and ensuring meaningful fund compliance. This Proposal takes the important step of facilitating transparency in assessment of all investment strategies.

Thank you for considering these comments. Please let us know if we can provide any additional information or answer any questions.

Sincerely,

A handwritten signature in black ink that reads "Lisa N. Woll". The signature is written in a cursive, flowing style.

Lisa Woll  
CEO