

Simpson Thacher & Bartlett LLP

900 G STREET NW
WASHINGTON, D.C. 20001

Direct Dial Number

E-mail Address

SUBMITTED ELECTRONICALLY

August 30, 2022

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

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NW
Washington, D.C. 20549

Dear Ms. Countryman:

Simpson Thacher & Bartlett LLP appreciates the opportunity to submit this comment letter with respect to the proposal (the “Proposal”) by the U.S. Securities and Exchange Commission to amend Rule 35d-1 (the “Names Rule”) under the Investment Company Act of 1940, as amended (the “1940 Act”).¹ Our firm represents many registered funds, fund directors and asset management firms that advise and sponsor funds. We are writing to provide our views on select aspects of the Proposal because we believe the Proposal imposes unnecessary and inequitable restrictions on certain types of funds.

Among other things, the Proposal, if enacted in its current form, would require an unlisted registered closed-end investment company (a “closed-end fund”) or business development company (a “BDC”) that is subject to the Names Rule to adopt its 80% investment policy as a fundamental investment policy.^{2, 3} As a result, unlisted closed-end funds and BDCs would not be permitted to change their 80% investment policies without shareholder approval.⁴ As counsel to many unlisted closed-end funds and BDCs, including funds that make periodic repurchase offers under Rule 23c-3 under the 1940 Act (“interval funds”) or conduct issuer tender offers under Rule 13e-4 of the Securities Exchange Act of 1934, as amended (“tender offer funds”), we agree that a fund name can be an important piece

¹ Investment Company Names, Release No. 33-11067; 34-94981; IC-34593 (May 25, 2022) (“Proposing Release”), available at <https://www.sec.gov/rules/proposed/2022/33-11067.pdf>.

² Under proposed rule 35d-1(g)(6), a “fundamental investment policy” would be a policy adopted under section 8(b)(3) of the 1940 Act or, if the fund is a BDC, a policy that is changeable only if authorized by the vote of a majority of the outstanding voting securities of the fund.

³ Proposing Release at 65-66.

⁴ Proposing Release at 66.

of information that investors consider when making investment decisions. However, we are concerned that the foregoing requirement would unnecessarily impede such funds' ability to make strategy changes without incurring significant costs for funds and their shareholders, even when a fund's board of directors and investment adviser believe that change is in the best interest of that fund and its shareholders.

The Proposal would require that a fund's 80% investment policy be a fundamental investment policy if the fund is an unlisted closed-end fund or BDC. As a result, unlisted closed-end funds and BDCs—including interval funds and tender offer funds—would not be permitted to change their 80% investment policies without shareholder approval. The rationale for this aspect of the Proposal rests in large part on unlisted closed-end funds and BDCs not issuing redeemable shares and not listing their shares on a national securities exchange. Consequently, their shareholders do not have “ready recourse, such as the ability to redeem or quickly sell their shares, if such a fund were to change its investment policy and the investment focus that the fund's name indicates.”⁵

Under the Proposal, in order to change a fundamental investment policy, a fund would be required to hold a special shareholder meeting where shareholders would have the opportunity to vote on the proposed change. The costs of a special shareholder meeting would ordinarily be borne by shareholders. However, it is not clear that investors who seek investment opportunities in interval funds or tender offer funds would prefer to pay increased fund expenses and decrease their potential returns in exchange for a right to approve any modification to their fund's 80% investment policy. In addition, we believe that limiting a fund's ability to change its investment policy could disadvantage shareholders by limiting an investment manager's ability to take advantage of changing markets and other investment opportunities.

In view of the significant downsides associated with seeking shareholder approval to change a fundamental investment policy, we respectfully believe that the SEC has overstated the risk to investors, specifically investors who seek investment opportunities in interval funds or tender offer funds that offer periodic liquidity events for their investors. Unlisted closed-end funds and BDCs prominently disclose in their registration statements information regarding repurchase intervals or anticipated tender offers. As a result, shareholders that invest in such funds do so with full knowledge that such funds do not issue redeemable securities and offer a different approach to shareholder liquidity.⁶ Investors pursue investments in these funds based on all of the information available, and may wish to “trade” relative illiquidity for the potential for greater income or capital accumulation.

If the Commission's key interest with respect to unlisted closed-end funds and BDCs is in providing investors the ability to disapprove of a change to a fund's 80% investment policy, we believe such aim is sufficiently addressed through the ability of investors to participate in the fund's next periodic liquidity event, prior to the implementation of such a change. The Commission could require an unlisted closed-end fund or BDC to provide notice of the adoption or modification of its 80% investment policy sufficiently in advance of the

⁵ Proposing Release at 66.

⁶ Proposing Release at 66, n. 99.

effectiveness of the change to provide shareholders with the opportunity to participate in the fund's next ordinary course repurchase or tender offer. Such notice could, for example, be required to be communicated to shareholders on or before the date of the commencement of a fund's next tender offer or repurchase offer, as applicable, and the effective date of the change to the fund's 80% investment policy could be no earlier than the payment date for such tender offer or repurchase offer. As an additional protection, the Commission could require the fund to seek shareholder approval of the change if the fund's next repurchase or tender offer is oversubscribed, which could indicate that a significant number of shareholders disapprove of the change. Accordingly, the fund and its shareholders would only be required to shoulder the expense of seeking shareholder approval if withdrawal activity indicates that shareholders might not agree with the proposed change.

We strongly encourage the SEC to reconsider the shareholder vote requirement, regardless of the extent of the change or other circumstances, in respect of unlisted closed-end funds and BDCs that are interval funds or tender offer funds. We believe investors seek out these products with a full understanding of their investment strategies and liquidity mechanisms. In place of the shareholder vote requirement, we propose the Commission instead require that interval funds and tender offer funds be required to provide advance notice to shareholders of changes to their 80% investment policies in connection with the fund's next liquidity event. If a fund's next ordinary course repurchase offer or tender offer, as applicable, is not oversubscribed, we believe that the combination of advance notice and opportunity to withdraw before the change becomes effective serve as the same type of indicator of shareholder approval of the change as is present in an open-end registered fund that provides notice of a proposed change, and therefore provides an appropriate level of protection for investors. We also believe that this framework would reduce unnecessary costs for these funds and their shareholders.

We appreciate the opportunity to provide feedback on the Proposal and look forward to further dialogue with you on this important matter. If you have questions, or if we can be of assistance in any way, please contact Rajib Chanda or Benjamin Ruano at their firm telephone numbers or email addresses.

Very truly yours,

/s/ Simpson Thacher & Bartlett LLP

Simpson Thacher & Bartlett LLP