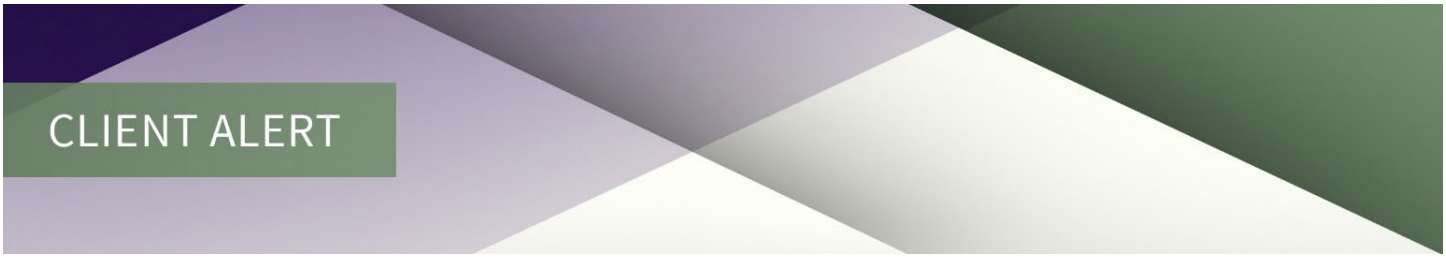

SEC Adopts Amendments to Investment Company Act "Names Rule"

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On September 20, 2023, the U.S. Securities and Exchange Commission (the "SEC") voted to adopt amendments to Rule 35d-1 (often referred to as the "Names Rule") under the Investment Company Act of 1940 (the "Investment Company Act") and amendments to certain registration and reporting forms in connection with the Names Rule amendments.[1] The amended Names Rule reflects a number of changes from the amendments proposed by the SEC in 2022 (the "proposal").[2]

The Names Rule generally requires a registered investment company or business development company ("BDC," and together with registered investment companies, "Funds") with a name that suggests it has a focus in particular types of investments, industries or geographic regions, or whose distributions are tax-exempt, to adopt a policy to invest at least 80% of the value of its assets[3] in investments that are consistent with its name (an "80% investment policy"). The amended Names Rule expands the scope of Fund names that require Funds to adopt 80% investment policies. As a result, Funds will need to determine whether the expanded scope of the amended Names Rule will require them to revise or adopt 80% investment policies or change their names. The amended Names Rule also imposes additional disclosure, compliance testing and SEC reporting requirements.

[1] *See* Investment Company Names, Investment Company Act Release No. 3500 (Sept. 20, 2023) (the "Adopting Release"), available here.

[2] *See* Investment Company Names, Investment Company Act Release No. 34593 (May 25, 2022), available here. The SEC initially requested comment to the current Names Rule in 2020 (*see* Request for Comment on Fund Names, Investment Company Act Release No. 33809 (Mar. 2, 2020), available here).

[3] "Assets" means net assets, plus the amount of any borrowings for investment purposes (*see* Rule 35d-1 under the Investment Company Act).

The following is a summary of the key aspects of the amendments:

- *Expanded Scope*. The amended Names Rule expands the scope of Fund names required to have an 80% investment policy to include names with terms suggesting that the Fund focuses in investments that have (or whose issuers have) particular characteristics. This includes Fund names with terms such as "growth" or "value" or terms that suggest a Fund's investment decisions incorporate one or more ESG factors (such as the use of the term "sustainable" or "socially responsible"). For Funds that have names with multiple elements, the 80% investment policy must incorporate all of the elements of the name, individually or in the aggregate. Fund names including the terms "global" and "international," however, without an additional term that suggests an investment focus such as "fixed income" or "growth," will not require an 80% investment policy under the amended Names Rule.

- *Enhanced Prospectus Disclosure.* The SEC adopted amendments to registration forms[4] that require a Fund to define in its prospectus the terms used in its name that are covered under the amended Names Rule, including the criteria the Fund uses to select the investments that each term describes. The amended Names Rule provides Funds with flexibility to ascribe reasonable definitions for the terms used in their names and the flexibility to determine the specific criteria used to select the investments that each term describes. The amended Names Rule also requires that any terms used be consistent with those terms' plain English meaning or established industry use.

- *Temporary Departures from 80% Investment Policy.* In a significant change from the proposal, which would have required a Fund to continuously monitor compliance with its 80% investment policy, the amended Names Rule retains the current requirement for a Fund to invest in accordance with its 80% investment policy "under normal circumstances," and for the 80% investment policy to apply at the time a Fund invests its assets. Funds have some discretion in determining what constitutes a departure from normal circumstances. In an additional change from the proposal, the amended Names Rule adds a new requirement for a Fund to review the positions included in its "80% basket" at least quarterly. Like the proposal, the amended Names Rule includes specific time frames—generally 90 days, as opposed to 30 days as proposed—for getting back into compliance if a Fund departs from its 80% investment policy as a result of drift or in other-than-normal circumstances.

- *Treatment of Derivatives*. The amended Names Rule clarifies that Funds must use the notional amount of a derivatives instrument (with certain adjustments), rather than its market value, for the purpose of determining compliance with the 80% investment policy. In a change from the proposal, the amended Names Rule requires a Fund to exclude from the calculation certain derivatives that hedge the currency risk associated with the Fund's foreign currency-denominated investments.

[4] Specifically, Form N-1A, Form N-2, Form N-8B-2, and Form S-6.

- *Unlisted Closed-End Funds and BDCs*. The amended Names Rule limits unlisted closed-end Funds and BDCs in their ability to change their 80% investment policy without approval of a majority of the outstanding voting securities of the Fund. In a modification from the proposal, the amended Names Rule permits these Funds to change their 80% investment policies without shareholder approval if: (1) the Fund conducts a tender or repurchase offer with at least 60 days' prior notice of the policy change, (2) that offer is not oversubscribed, and (3) the Fund repurchases shares at their net asset value.

- *Index Fund Considerations*. In the Adopting Release, the SEC confirmed that the terms in a market index referenced in an index Fund's name would not be subject to an 80% investment policy test that would be in addition to the Fund's policy to invest at least 80% of its assets in the index's components required under the Names Rule. The SEC also stated that, consistent with Rule 38a-1 under the Investment Company Act, index Funds should generally adopt and implement written policies and procedures reasonably designed to ensure that the index selected by a Fund does not have a materially misleading or deceptive name itself.

- *Notice, Reporting and Recordkeeping Requirements*. The amended Names Rule updates the shareholder notice requirement and subjects Funds to specific recordkeeping requirements documenting compliance with the Names Rule. The SEC also is amending Form N-PORT to require disclosure regarding whether each investment in the Fund's portfolio is included in the 80% basket and the value of the Fund's 80% basket as a percentage of the value of its assets.

- *No Safe Harbor.* The amended Names Rule codifies that compliance with the Rule is not dispositive of compliance with the prohibition on materially misleading or deceptive names in Section 35(d) of the Investment Company Act.

Notably, the SEC is not taking action on its proposal regarding the use of ESG terms in the names of ESG "integration funds" (i.e., Funds that consider one or more ESG factors alongside other non-ESG factors in the Fund's investment decisions, where those ESG factors are generally no more significant than other factors in the investment selection process, such that ESG factors may not be determinative in deciding to include or exclude any particular investment in the portfolio).[5] Under the proposal, the names of ESG integration funds would have been defined as materially deceptive and misleading if the name includes terms indicating that the Fund's investment decisions incorporate one or more ESG factors. In the Adopting Release, the SEC indicated that it would consider whether to address ESG integration funds under the Names Rule in connection with any determination on the Proposed ESG Rules.

[5] The Names Rule was proposed simultaneously with the SEC's proposed rules and amendments for ESG disclosures for investment advisers and investment companies (the "Proposed ESG Rules"), but the SEC has not yet scheduled a vote on the Proposed ESG Rules.

Effective Date and Compliance Period

The amended Names Rule (along with amended reporting forms) will be effective 60 days after publication in the Federal Register. The compliance date is 24 months following the effective date for larger entities, and 30 months following the effective date for smaller entities. The Adopting Release defines larger entities as Funds that, together with other investment companies in the same "group of related investment companies" (as that term is defined in Rule 0-10 under the Investment Company Act) have net assets of $1 billion or more as of the end of the most recent fiscal year, and smaller entities are Funds that together with other investment companies in the same "group of related investment companies" have net assets of less than $1 billion as of the end of the most recent fiscal year.

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