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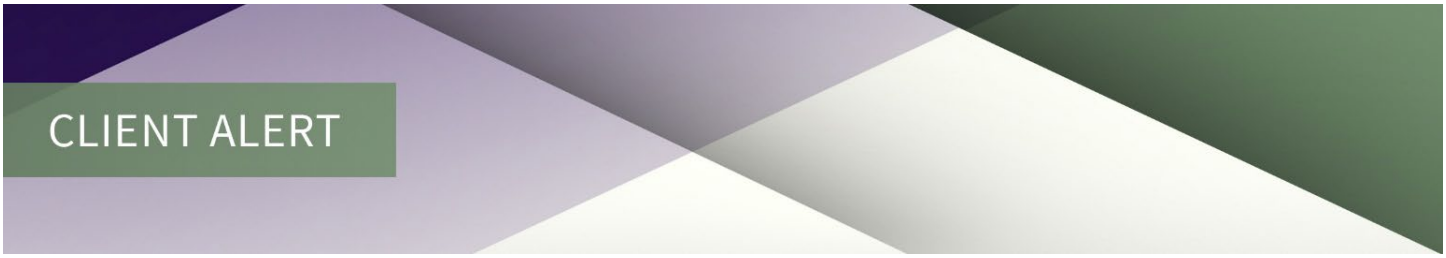

What's in a Name (and What Does it Say about Your Fund)?

The SEC's Amended 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]

Prior to the amendments, the Names Rule generally required a registered investment company or business development company ("BDC," and together with registered investment companies, "Funds") with a name suggesting 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[2] 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 and related amendments to certain registration and reporting forms also impose additional disclosure, compliance testing and SEC

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

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

reporting requirements. The amended Names Rule reflects a number of changes from the amendments proposed by the SEC in 2022 (the "proposal").[3]

Below is a summary of the Names Rule amendments, followed by an in-depth overview.

- *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").

- *Enhanced Prospectus Disclosure*. The SEC adopted amendments to registration forms 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*. 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. The amended Names Rule also adds a new requirement for a Fund to review the investments invested in accordance with its 80% investment policy (the "80% basket") at least quarterly. The amended Names Rule generally allows a Fund 90 days to get back into compliance if it 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.

- *Unlisted Closed-End Funds and BDCs*. Subject to one exception (discussed below), 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.

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[3] *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).

- *Notice, Reporting and Recordkeeping Requirements*. The amended Names Rule updates the requirement that shareholders receive notice of a change in a Fund's 80% investment policy and subjects Funds to specific recordkeeping requirements documenting compliance with the amended Names Rule. The SEC also amended 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.

I. EXPANDED SCOPE OF THE NAMES RULE

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, in addition to names suggesting that the Fund focuses in investments in particular types of investments, industries or geographic regions as required under the current Names Rule.[4] This expanded scope applies irrespective of whether the particular characteristics describe an investment security or an investment strategy. While the term "particular characteristics" is not defined, the Adopting Release highlights the SEC's view that "particular characteristics" will be understood to mean any feature, quality, or attribute that suggests an investment focus. The amended Names Rule provides a non-exclusive list of examples of "particular characteristics," including Fund names with terms such as (i) "growth" or "value";[5] (ii) terms indicating that the Fund's investment decisions incorporate one or more ESG factors (such as the use of the term "sustainable" or "socially responsible"); or (iii) terms that reference a thematic investment focus. The Adopting Release also provides that if terms in a Fund's name can reasonably be understood to reference either the characteristics of a Fund's individual investments or the intended result of a Fund's portfolio investments in the aggregate, the Fund will be required to adopt an 80% investment policy.

Growth or Value. The Adopting Release states that terms such as "growth" and "value" create reasonable expectations among investors that Funds with those terms in their name will invest predominantly in companies that exhibit "growth" or "value" characteristics. The Adopting Release notes that expanding the scope of the 80% investment policy requirement to include these names will help ensure Funds have portfolios that reflect the investment focus their name suggests. The

[4] As used in this Client Alert and the Adopting Release, consistent with amended Rule 35d-1(a)(2), "investment focus" means a focus in a particular type of investment or investments, a particular industry or group of industries, particular countries or geographic regions, or investments that have, or whose issuers have, particular characteristics. Adopting Release at 23, n.56.

[5] The SEC previously took the position that Fund names that incorporate terms such as "growth" connote an investment objective, strategy, or policy, and are therefore not within the scope of the 80% investment policy.

SEC recognizes that Funds may have different approaches to selecting investments that have growth or value characteristics. Accordingly, a Fund would be required to describe to investors how it defines "growth" or "value."

ESG Funds. The Adopting Release states that "ESG" and similar terms are "expansive, incorporating three broad categories of interest (environmental, social, and governance issues) for investors and asset managers, with differing levels of focus on each particular issue, and different perspectives on what attributes of an issuer or investment fit within this terminology."[6] It also states that ESG terms in Fund names communicate to investors that the Fund will invest in issuers that have particular characteristics.[7] The Names Rule amendments thus require Funds that use ESG terms in their name to adopt an 80% investment policy.

- ESG Integration Funds. Notably, the SEC did not adopt its proposal that the use of ESG terms in the names of ESG "integration" Funds would be materially deceptive and misleading if the name included terms indicating that the Fund's investment decisions incorporated one or more ESG factors. Integration Funds 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.[8] 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.

- ESG Uplift Funds. The Adopting Release also discusses the amended Names Rule's application to so-called ESG "uplift" Funds. As described in the Adopting Release, ESG uplift Funds begin with a given universe of investments and do not add new investments to this universe, but rather systematically over- or under-weight investments within the given universe based on ESG criteria, with the objective of achieving a more favorable ESG profile at an aggregate Fund level, as compared to the benchmark or investment universe, within a specific tracking error target. ESG uplift Funds invest on a relative basis at the portfolio level, rather than focusing their investments in companies that objectively exhibit strong ESG characteristics, and include terms in their names intended to communicate this investment approach (*e.g.*, "ESG Aware"). The Adopting Release suggests that the names of ESG uplift Funds communicate information to investors about the overall characteristics of the Fund's portfolio, rather than particular investments in the portfolio, and therefore will not necessitate an 80% investment policy under the amended Names Rule.[9]

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6 Adopting Release at 51.

7 *Id.* at 52.

8 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.

9 Adopting Release at 41-42.

Thematic Funds. The Adopting Release notes an increase in filings by Funds that use "thematic" terms in their name and states that certain thematic terms may be viewed as clearly suggesting an investment focus in a type of industry or group of industries, and thus require an 80% investment policy (*e.g.*, terms suggesting a focus in cybersecurity, health and wellness, or travel and tourism).[10] The SEC, however, acknowledges there could be reasonable questions about whether other thematic terms suggest an investment focus "because a thematic term may be narrower or more expansive than an 'industry' may be commonly understood (*e.g.*, drones, 'smart cities,' 'metaverse,' 'big data')."[11] The SEC further states that there are certain thematic terms that "most practitioners would not consider to suggest a focus in a type of investment, or a focus in a particular industry or group of industries (*e.g.*, terms suggesting demographic characteristics such as 'millennial' or 'Gen Z,' or political, economic, or historical themes such as 'biothreat,' 'gig economy,' 'meme stocks,' or 'post-Corona')."[12] In addition to evaluating whether a thematic term supports an investment focus, Funds should also consider the compliance burden in establishing a reasonable nexus between certain securities and its thematic investment focus.

Funds with Multiple Terms. For Funds that have names with multiple elements, the 80% investment policy must address all of the elements of the name, individually or in the aggregate. For example, a Fund with a name that references two or more distinct investment focuses, like technology and growth, could have an investment policy that provides that each security included in the "80% basket" must be in both the technology sector and must meet the Fund's growth criteria. Alternatively, such a Fund could instead have an investment policy that provides that 80% of the value of the Fund's assets will be invested in a mix of technology investments and growth investments, with some technology investments, some growth investments, and some investments in both of these categories, with no minimum or maximum investment requirements specified for either category. In any event, it will be important for the Fund's prospectus disclosure to appropriately describe the application of the 80% investment policy.

Terms that Do Not Require an 80% Investment Policy. The SEC clarified in the Adopting Release that there are certain terms that do not communicate to investors an investment focus and for which an 80% investment policy will not be required. Such names include:

- Names communicating information about the overall characteristics of the Fund's portfolio, such as:
    - *names that suggest a portfolio-wide result to be achieved* (*e.g.*, real return, balanced, or managed risk);
    - *names that suggest a particular investment technique* (*e.g.*, long/short or hedged);
    - *names that reference asset allocation determinations that evolve over time* (*e.g.*, retirement target date or sector rotation); and

[10] *Id.* at 32.
[11] *Id.* at 31.
[12] *Id.* at 32.

- *names with terms like "intermediate term"* in describing a bond Fund.

- Names including global and international, because they "describe a Fund's approach to constructing a portfolio, but do not communicate the composition of the Fund's portfolio with any particularity (unlike, for example, 'Japan' or 'Europe') and therefore on their own suggest no particular investment focus."[13]

- Names indicating negative or exclusionary screening processes for investment (*e.g.*, fossil fuel free).

- Names referencing specific population of investors, well-known organizations or affinity groups (*e.g.*, Generation Z).

Fund of Funds. A Fund that operates as a "fund of funds" is permitted to include the entire value of its investment in an underlying Fund when calculating compliance with its 80% investment policy as long as the underlying Fund has an 80% investment policy that is consistent with the investment focus of the investing Fund.

II. ADDITIONAL CONSIDERATIONS

Temporary Departures from 80% Investment Policy

The Names Rule amendments permit departures from the 80% investment policy.

Time of Investments. The SEC retained the current Names Rule's requirement that a Fund must determine at the time that it invests whether the investment is included in the 80% basket.

Quarterly Compliance Testing. The SEC is adopting a new requirement that, at least quarterly, a Fund with an 80% investment policy review its portfolio investments for compliance with its 80% investment policy.

90 Days to Return to Compliance. The Names Rule amendments include specific time frames—generally 90 consecutive days, as opposed to 30 days as proposed—for getting back into compliance if a Fund departs from its 80% investment policy, either intentionally in other-than-normal circumstances, or as identified by the Fund as a part of its quarterly review or otherwise.

[13] *Id.* at 42-43. Note that while the SEC has not required a Fund using the term "global" or "international" to adopt an 80% investment policy, the SEC's disclosure review staff has historically commented on the use of "global" and "international" in a Fund's name and required Funds to adopt certain investment policies tied to those terms. In the case of Funds using the term "global," for example, the staff has suggested that Funds should adopt policies of investing at least 40% of the Fund's assets (or the Fund's overall portfolio) in issuers domiciled in countries outside the United States or investing in issuers domiciled in at least three countries, including the United States (*See* Investment Company Institute Memorandum re: Staff Comments on Fund Names (Rule 35d-1) (June 4, 2012)). The Adopting Release notes that previous staff letters are being reviewed and may be rescinded.

"Under Normal Circumstances." Funds must comply with the 80% investment policy "under normal circumstances," leaving Funds with discretion to determine what constitutes something other-than-normal circumstances. A Fund may, in other-than-normal circumstances, choose to invest in a manner that is not consistent with the Fund's 80% investment policy for a limited period of time.

Other Temporary Departures. Funds also are permitted under the amended Names Rule to temporarily depart from their 80% investment policies in connection with:

- a reorganization (for which the amended Names Rule does not specify a required time frame for accompanying temporary departures);
- a Fund launch (in which the departure may not exceed 180 consecutive days); or
- when a notice of a change in a Fund's 80% investment policy in certain circumstances has been provided to Fund shareholders.

In addition, a Fund can seek exemptive relief from the SEC under Section 6(c) of the Investment Company Act if the Fund believes it would be appropriate and consistent with the protection of investors for the Fund to depart from its 80% investment policy for a limited additional period beyond 90 days.

If circumstances are such that a Fund is unable to bring its portfolio back into compliance with its 80% investment policy within the required 90-day period (*e.g.*, events exist that preclude the ability of a Fund to make investments or sell assets that would not be in the best interest of the Fund), the Fund would need to change its name to better reflect the realities of its portfolio and the Fund must provide shareholders with notice of that change. The amended Names Rule effectively tolls the time for the Fund to get back into compliance following a departure from its 80% investment policy if a notice of a change in the Fund's policy has been provided to shareholders. Once such a notice has been provided to shareholders, shareholders have a period of 60 days to determine whether they would like to redeem their shares before the change in policy takes effect.

Considerations Regarding Derivatives in Assessing Names Rule Compliance

Inclusion of Derivatives within 80% Investment Policy and Possible Amendments to Current 80% Tests. A Fund may include in its 80% basket a derivatives instrument that provides investment exposure to one or more of the market risk factors associated with the investment focus suggested by the Fund's name.[14] To help determine whether a derivatives instrument provides investment exposure to one or more of the market risk factors associated with a particular asset, a

[14] *Id.* at 94. The Adopting Release notes that, in addition to using derivatives as direct substitutes for cash market investments, some Funds use derivatives instruments to hedge exposures or to obtain exposure to market risk factors associated with the Fund's investments (*e.g.*, interest rate risk and credit spread risk).

Fund generally should consider whether the derivative provides investment exposure to any explicit input that the Fund uses to value the asset, where a change in input would change the value of the asset.

Use of Notional Amount. The amended Names Rule clarifies that Funds must use the notional amount[15] of a derivatives instrument, rather than its market value, for the purpose of determining compliance with the 80% investment policy. Currently, many Funds use the market value of a derivatives instrument when determining compliance with their 80% investment policy, which will no longer be permissible under the amended Names Rule.

In calculating notional amounts, the amended Names Rule requires certain adjustments to particular derivatives, including:

- converting interest rate derivatives to their 10-year bond equivalents;
- delta adjusting the notional amounts of options contracts; and
- valuing each physical short position using the value of the asset sold short.[16]

Funds are required to exclude derivatives that hedge the currency risk associated with a Fund's foreign currency-denominated investments from the 80% basket if (1) the derivatives are entered into and maintained by the Fund for hedging purposes and (2) the notional amounts of the derivatives do not exceed the value of the hedged investments (or the par value thereof, in the case of fixed-income investments) by more than 10 percent. In addition, a Fund may also exclude:

- any cash and cash equivalents, and U.S. Treasury securities with remaining maturities of one year or less, up to the notional amount of the derivatives instrument(s) and the value of asset(s) sold short; and
- any closed-out derivatives positions if those positions result in no credit or market exposure to the Fund.

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[15] The SEC in the Adopting Release states that the term "notional amount," which is also used in Rule 18f-4 under the Investment Company Act, is "understood by market participants and used as a means to reflect the market exposure a derivatives creates—meaning, for example, that if a derivative provides a return based on the leveraged performance of a reference asset, the notional amount must reflect the application of the leverage factor." (*See id.* at 82, n.247) (*citing* Use of Derivatives by Registered Investment Companies and Business Development Companies, Investment Company Act Release No. 34084 (Nov. 2, 2020)).

[16] As an example, the Adopting Release explains that if a Fund sold short one share of a security for $100, the market value of the position would be $0 because the Fund has $100 in short sale proceeds, as well as a liability in the form of the obligation to return a share worth $100. If the Fund had obtained the same short exposure via a swap, the notional amount would be $100. Valuing the physical short position at $100 provides consistent values for Names Rule purposes for the swap and physical short sale in this example. Adopting Release at 97-98.

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. This requirement is based on a shareholder in an unlisted closed-end Fund or BDC having no ready ability to dispose of their shares if the Fund were to change its investment policy and the new investment focus indicated by the Fund's name no longer meets the shareholder's objective. 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. However, because unlisted closed-end Funds and BDCs frequently invest in illiquid assets and conduct limited tender offers for liquidity purposes, conducting a tender offer sufficiently large to ensure no oversubscription may not be practical, which could in effect require such Funds to obtain shareholder approval to change the 80% investment policy.

Index Fund Consideration

In the Adopting Release, the SEC confirms 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 amended Names Rule. However, the Adopting Release also states that the SEC continues to believe that a Fund that is invested 80% or more in an index included in the Fund's name can be materially deceptive and misleading if a meaningful nexus does not exist between the components of the underlying index and the investment focus suggested by the index's name. Further, 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.[17]

Unit Investment Trusts

In a modification from the proposal, the Names Rule amendments provide that the 80% investment policy and recordkeeping requirements will apply to unit investment trusts ("UITs") only at the time of initial deposit. This modification is designed to accommodate the practical realities that UITs would encounter if required to comply with the new provisions in the Names Rule amendments that require periodic review and potential rebalancing of a Fund's portfolio. As a result, UITs that have names that are implicated by the Names Rule amendments and whose initial deposit occurs after the compliance date of the amendments will need to adopt an appropriate 80% investment policy, including making such a policy fundamental or providing notice to investors in the event of a change of the policy, if appropriate. However, such UITs will not be required to engage in the monitoring and other requirements associated with the Names Rule

[17] *Id.* at 108-109.

amendments' temporary departure requirements nor will they be required to keep records under the amendments beyond the initial deposit.[18]

Terms Used Within Fund Names

For Funds that are required to adopt an 80% investment policy, the amended Names Rule requires that any terms used in the Fund's name that suggest either an investment focus or that such Fund is a tax exempt fund must be consistent with those terms' plain English meaning or established industry use. The Adopting Release states that a variety of sources may determine whether a Fund is using a term consistent with its plain English meaning or established industry use, including, but not limited to, the dictionary, prior public disclosures, industry codes or classifications, and/or a colloquial understanding of the term.[19] The amended Names Rule provides Fund managers with flexibility to ascribe reasonable definitions for the terms used in a Fund's name and flexibility to determine the specific criteria the Fund uses to select the investments that the term describes.[20] The SEC noted that, for many terms, there will be various reasonable means of implementing an 80% investment policy that incorporates a definition or understanding of terminology that differs from another Fund whose name incorporates the same terminology. When determining whether a Fund's investment qualifies for inclusion in its 80% basket, there "must be a meaningful nexus between the given investment and the investment focus suggested by the [Fund's] name."[21] The Adopting Release provides a non-exclusive list of acceptable methods of determining whether a sufficient nexus exists between certain securities and a Fund's investment focus.[22]

Modernizing the Notice Requirement

The Names Rule amendments reflect changes in the requirement to provide shareholders with notice of a change in a Fund's 80% investment policy (if not fundamental). In addition to a prominent statement regarding a change in the Fund's 80% investment policy, the notice must describe, as applicable, the Fund's 80% investment policy, the nature of the change to the 80% investment policy, the Fund's old and new names, and the effective date of any investment policy and/or name changes. The Names Rule amendments clarify that the prominent statement be included: (1) on the notice and envelope, if applicable, for notices delivered in paper form; and (2) in the subject line of the email communication, or equivalent indication, if delivered in electronic form.

18 *Id.* at 145.
19 *Id.* at 118.
20 *Id.* at 33.
21 *Id.* at 44.
22 *See id.* at 46-47.

Compliance with the Names Rule Not a Safe Harbor from Section 35(d)

Section 35(d) of the Investment Company Act prohibits a Fund from adopting as part of its name or title any word or words that the SEC finds are materially deceptive or misleading.[23] The amended Names Rule codifies existing SEC guidance by providing that a Fund's name may be materially deceptive or misleading under Section 35(d) of the Investment Company Act even if the Fund complies with the amended Names Rule's requirement to adopt and implement an 80% investment policy.

The Adopting Release states that a Fund's name could be materially deceptive or misleading for purposes of Section 35(d) if the Fund were to invest in a way such that the source of a substantial portion of the Fund's risks or returns is materially different from that which an investor reasonably would expect based on the Fund's name, regardless of the Fund's compliance with the requirements of the amended Names Rule. The SEC offers as an example, a "green energy and fossil fuel-free" Fund using its 20% basket to make a substantial investment in an issuer with fossil fuel reserves likely being considered to have a name that is materially deceptive or misleading under Section 35(d).[24]

Disclosure and Reporting Requirements

Summary and Statutory Prospectus Disclosure. In addition to the Names Rule amendments, the SEC adopted amendments to Funds' registration forms—specifically, Form N-1A, Form N-2, Form N-8B-2, and Form S-6 (collectively, the "Forms"), mandating that each Fund that is required to adopt an 80% investment policy include disclosure in its prospectus that defines the terms used in its name, including the specific criteria the Fund uses to select the investments that the term describes, if any.[25] For purposes of the new disclosure requirements, "terms" under the amended Forms means "any word or phrase used in a Fund's name, other than any trade name of the Fund or its adviser, related to the Fund's investment focus or strategies."[26] The SEC noted that, similar to other prospectus disclosures, this disclosure should follow the general instructions of Form N-1A, which requires funds to avoid "excess detail, technical or legal terminology, and complex language."[27]

As discussed above, Funds have flexibility to use reasonable definitions of the terms that their names use. A Fund's use of reasonable definitions of the terms used in the Fund's name, however, may not be inconsistent with their plain English

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23 15 U.S.C. 80a-34(d). BDCs are subject to the requirements of Section 35(d) pursuant to Section 59 of the Investment Company Act [15 U.S.C. 80a-58].

24 Adopting Release at 106-107.

25 This requirement replaces the current Names Rule requirement for Funds with names suggesting investment in particular countries or geographic regions to disclose the specific criteria used to select investments that meet its 80% investment policies (*see* Rule 35d-1(a)(3) under the Investment Company Act).

26 Funds must tag this new information using Inline eXtensible Business Reporting Language (XBRL).

27 Adopting Release at 113, n.334.

meaning or established industry use. In addition, open-end Funds registered on Form N-1A must disclose the definitions of terms in the Fund's name in the summary section of the prospectus and in the statutory prospectus.[28]

N-PORT Disclosure. The SEC also adopted amendments to Form N-PORT to include a new reporting item for Funds, other than money market Funds and BDCs, regarding 80% investment policies. A Fund subject to the new Form N-PORT reporting requirements will be required to report: (1) whether each investment in the Fund's portfolio is in the Fund's 80% basket; and (2) the value of the Fund's 80% basket, as a percentage of the value of the Fund's assets. In addition, the SEC is adding a new reporting item to Form N-PORT to include the definitions of terms used in the Fund's name.

The final Form N-PORT amendments modify the proposed reporting approach by requiring reported information for the third month of each quarter, instead of for every month. This reporting period will align with the Names Rule amendments requiring Funds to review their portfolios for compliance with their 80% investment policy no less than quarterly.

Recordkeeping Requirements

The Names Rule amendments require a Fund that is required to adopt an 80% investment policy to maintain the following written records documenting its compliance with its 80% investment policy:

- written records, at the time the Fund invests its assets, documenting (1) whether the investment is included in the Fund's 80% basket and, if so, the basis for including that investment in the 80% basket; and (2) the value of the Fund's 80% basket, as a percentage of the value of the Fund's assets;
- written records documenting the Fund's review of its portfolio investments' inclusion in the Fund's 80% basket, to be conducted at least quarterly, including whether each investment is included in the Fund's 80% basket and the basis for including each investment in the 80% basket;
- if during this review or otherwise the Fund identifies that the 80% requirement is no longer met due to drift, written records documenting the date this was identified and the reason for any departures from the 80% investment policy;
- if there was a departure from the 80% investment policy in other-than-normal circumstances, written records documenting the date of any such departure and reason why the Fund departed (including why the Fund determined that circumstances are other-than-normal); and
- any notice sent to the Fund's shareholders pursuant to the amended Names Rule.

[28] The SEC originally proposed to require Funds to provide this disclosure solely in the summary section of the prospectus.

The Names Rule amendments require Funds to maintain these records for at least six years following the creation of each required record (or, in the case of notices, following the date the notice was sent), the first two years to be maintained in an easily accessible place. In a modification from the proposal, the Names Rule amendments do not include the proposed requirement for Funds that do not adopt an 80% investment policy to maintain a written record of their analysis that the policy is not required under the Names Rule.

Effective Date and Compliance Period

The amended Names Rule (along with amended Forms) will be effective on December 11, 2023.[29] 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.[30]

Key Considerations and Next Steps

Inventory. Fund management will need to conduct an inventory of Fund names to determine the impact of the amended Names Rule on each Fund.

- Funds with an 80% investment policy will need to review their current names and 80% investment policies (and identify whether any of those policies are fundamental and require shareholder approval to change).[31]
- Funds without an 80% investment policy will need to review their current names to determine whether they will be required to adopt an 80% investment policy or if a change to the Fund's name is necessary.
- Funds ultimately covered by the amended Names Rule will then need to determine "reasonable" definitions for terms included in their 80% investment policies and ascertain which investments (including derivatives) will be included for purposes of the 80% basket and which will be excluded.

Process for Requisite Filings and Approvals. The SEC did not directly address the process by which an existing Fund should reflect in its registration statement and other disclosures any changes in response to a determination that its name

[29] The Adopting Release was published on the Federal Register on October 11, 2023.

[30] Adopting Release at 146, n.434.

[31] Determining the scope of such changes will be key in determining a timeline for implementation, including updating compliance policies, completing any required filings with the SEC, coordinating board meetings to seek any requisite approvals, mailing shareholder notices and, if necessary, holding shareholder meetings to seek approval of such changes.

now requires the adoption or modification of an 80% investment policy under the amended Names Rule. Funds will need to carefully consider the materiality of any changes to their existing disclosure. For example, open-end Funds should consider whether a change in their 80% investment policy would require a post-effective amendment pursuant to Rule 485(a) under the Securities Act of 1933, which would be subject to review by the SEC staff.

Revisions to Current Practices and Policies and Procedures. Funds will want to assess their compliance, reporting and recordkeeping policies and procedures, in addition to reviewing their disclosure. As with other recent rulemakings (*e.g.*, fair valuation and derivatives risk management), it is likely that upon the compliance date of the amended Names Rule and related Forms, the SEC staff will take the opportunity to review compliance by the Funds with such requirements.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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