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

Re: File No. S7-16-22
SEC Proposal on Investment Company Names
Release Nos. 33-11067; 34-94981; IC-34593 (May 25, 2022)

Dear Ms. Countryman:

Stradley Ronon appreciates the opportunity to comment on the Securities and Exchange Commission's (the "Commission") proposal on Investment Company Names to amend Rule 35d-1 under the Investment Company Act of 1940 (the "Names Rule") that addresses certain broad categories of investment company names that the Commission believes are likely to mislead investors about an investment company's investments and risks (the "Proposal").[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 the Proposal would directly apply to our clients. Although we are generally supportive of the Proposal and its core policy goals, we have concerns with respect to certain aspects of the Proposal and have focused our comments on those aspects below.

1. The Proposed Expansion of Rule 35d-1 is Overly Broad and Vague and Adds Investor Confusion Rather than Investor Protection

A. "Particular Characteristics"

The proposal to expand the requirements of the Names Rule to apply to any fund name with terms suggesting that the fund focuses in investments that have, or investments whose issuers have, particular characteristics, yields expansion of the Rule that is overly broad and vague and will only increase interpretive issues. The expansion, particularly with respect to inherently subjective terms such as "value" and "growth," would create additional compliance costs and impose unnecessary rigidity on funds by requiring them to define and disclose objective criteria with respect to strategies that often incorporate and rely on subjective determinations and characteristics. We are concerned that this aspect of the Proposal would force funds to adopt and disclose overly objective criteria for strategies that traditionally have been managed with, and require, more flexibility and nuance. We are concerned that broadening the Names Rule

[1] SEC Release Nos. 33-11067; 34-94981; IC-34593 (May 25, 2022) ("Release"), *available at* https://www.sec.gov/rules/proposed/2022/33-11067.pdf.

to include new terms and disclosure requirements that will be scrutinized by the Division of Investment Management's Disclosure Review and Accounting Office staff could result in funds having to gradually migrate towards homogenized objective definitions and criteria of subjective strategies to the detriment of investors or would lead to funds to change their names to nondescriptive names that would be outside the purview of the Names Rule. The result would ultimately narrow the available investment options or investors' ability to distinguish between investment options, without adding to investor protections.

We believe the current scope of the Names Rule, combined with its application at the time of investment, appropriately limits the Rule to terms that are more amenable to being defined with specific criteria. The proposed expansion of the Names Rule oversimplifies the difficulties and costs that funds would encounter applying rigid standards and criteria with respect to terms and strategies that are not nearly as quantifiable or static as the current categories of terms subject to the Names Rule. For example, "equity" and "fixed income" investments do not change their categorization due to market declines, cycles or volatility, as compared to a value stock, that, if subjected to only objective criteria, can and does migrate from one category to another.[2] Imposing the procedural and compliance requirements of the Names Rule to such terms would unnecessarily constrain funds and managers that require and rely on subjectivity when determining whether to purchase or sell a security for certain strategies. The result could inadvertently force active funds to behave more like index funds that are periodically and inflexibly rebalanced.

Further, due to the subjective nature of certain terms, defining them and monitoring compliance with quantitative and asset-based tests presents complexities and costs that do not exist for objective terms currently subject to the Names Rule. The definitions of terms such as "value" and "growth" differ throughout the industry, even within organizations, making such terms difficult to define in a meaningful way that would provide useful clarity for investors. For example, it is not uncommon for index providers of widely utilized indices to include the same company in both of their growth and value indices (e.g., a company can be entirely in one index, split evenly between the two, or in both at different percentages, such as 90%/10%). Further, to provide meaningful distinctions may require over-disclosing criteria, which investment advisers may be hesitant to provide to avoid giving away proprietary information. As a result, the Names Rule may force investment advisers to use generic criteria that provide little benefit to investors.

Shareholders that invest their money with specific active managers do so because they believe in the investment manager's philosophy and reputation for choosing stocks that provide returns based on that manager's analysis of a security's value and/or growth potential. Restricting investment advisers' ability to choose securities based on their internal philosophy because a security cannot meet a specific definition of "growth" or "value" that is overly simplified due to the imposition of an 80% policy would force a fund to not be able to meet the investment philosophy that the investor expected when choosing the fund in the first place. Rather than giving shareholders clarity, the imposition of an 80% policy on terms that are subjective, such as "value" and "growth," would inhibit the ability of investors to access a manager's true investment strategy through an investment company vehicle.

In addition, contrary to the stated intention, we believe the proposed expansion will only increase the interpretive issues and amount of time the Division of Investment Management's Disclosure Review and Accounting Office staff spend on Names Rule interpretive issues. For example, under the current scope of the Names Rule, the interpretive issues are limited to a relatively small collection of terms and/or definitions (e.g., ESG-related terms, the term "global" and definitions of capitalization ranges). Expanding the Names Rule to incorporate a vague standard that applies to terms suggesting a fund focuses in investments that have "particular characteristics" is significantly more subjective that the current scope of

[2] See Facebook, Netflix and PayPal Are Value Stocks Now, https://www.wsj.com/articles/facebook-netflix-and-paypal-are-value-stocks-now-11655956472.

the Names Rule. Even the examples provided in the Proposal (e.g., short-term vs. short-duration and income vs. real return) will lead to more interpretive disagreements as to applicability than previously existed.

Moreover, the proposed expansion would subject wide swaths of funds to unnecessary regulatory scrutiny, uncertainty and costs without clear benefits. As noted in the Commission's Request for Comments on Fund Names,[3] absent the expansion of the Names Rule, such funds "are still subject to the general prohibition on misleading names in Section 35(d), as well as other antifraud provisions of the Federal securities laws." In our opinion, any expansion of the Names Rule should be limited in scope and, if expanded, apply to specific terms, as opposed to a vague and broad expansion that will subject funds, many of which have been in operation for decades, to new and unnecessary compliance burdens that provide little benefit or useful information to investors.

B. Index Funds

The Proposal and related guidance introduce unnecessary and overly burdensome requirements on investment advisers to oversee the indexes provided by unaffiliated index providers and may introduce investor confusion. The Proposal states that a fund's name may be materially deceptive or misleading even if that fund complies with the Names Rule. The Proposal continues that, with respect to index funds specifically, the "underlying index may have components that are contradictory to the index's name" and therefore, despite meeting the Names Rule requirements, the fund's name may nevertheless be materially deceptive or misleading.[4]

While investment advisers exercise oversight of index providers in the form of initial and ongoing due diligence, the Proposal and related guidance would necessitate the review of each individual portfolio component daily by investment advisers to ensure that the fund's holdings are not contradictory to its name rather than rely on the index provider's construction of the index. If, based on an adviser's subjective assessment of the index components, a holding is determined to be contradictory to the fund's name, a fund may be required to divest of such holding which would increase tracking error. For example, if a portfolio investment changes from "growth" to "value" prior to the index's rebalance, a fund that tracks a "growth" index and has "growth" in its name may be forced to divest of such investment immediately.[5] This additional oversight and compliance monitoring by an investment adviser could substantially increase the cost of operating the fund as well as increase tracking error, two results that are unfavorable to shareholders.

Further, we believe the Proposal's effect of requiring investment advisers to evaluate a reference index daily to determine whether its components are consistent with, or not contradictory to, a fund's name could introduce investor confusion. The registration statement for an index fund discloses the fund's investment strategy, which includes investing primarily in the components of the index, whether by sampling or replication of the index. The guidance in the Proposal could cause a fund to deviate from its stated investment strategy of investing in the components of the index by forcing the fund to rebalance itself more frequently or divest of portfolio holdings that may be considered contradictory to the fund's name, despite being included in the reference index. Further, this could lead to funds that seek to track the same index having disparate holdings and performance based on the adviser's subjective assessment as to what index components may be contradictory to a fund's name. While we respect the Commission's intent in not misleading investors through a fund's name, we believe this guidance could in fact mislead investors who believe they are investing in a passively managed fund tracking an index. Therefore, we believe the Commission should provide guidance that an index fund will comply with the Names Rule by investing at

[3] SEC Release Nos. IC–33809 (March 2, 2020), *available at* https://www.sec.gov/rules/other/2020/ic-33809.pdf.
[4] Release at 70.
[5] See, for example, footnote 2 herein, referencing the move of Facebook, Netflix and PayPal from "growth" to "value" indices.

least 80% of the fund's assets in the components of an index whose methodology is consistent with the fund's name, provided that the name is not otherwise misleading.

C. Antithetical Investments

In the Proposal, the Commission stated that a fund's name could be materially deceptive or misleading if the fund makes substantial investments that are antithetical to its investment focus. In practice, this concept could effectively result in a 100% standard under the Names Rule rather than an 80% standard, as funds would seek to avoid the risk of second-guessing whether investments in a fund's 20% bucket are antithetical to a fund's name by investing 100% in investments that would meet the 80% test. We do not believe that this is the intended result of the Proposal nor beneficial to shareholders as it would unnecessarily hamper a portfolio managers ability to invest opportunistically in investments that would assist the pursuit of the fund's objective but may not fit squarely within a fund's 80% policy. Rather, funds should be permitted to invest outside of the 80% policy in investments that portfolio managers believe will best help the fund achieve its investment objective, provided such investments are disclosed to shareholders so that shareholders are fully informed as to what investments could comprise the 20% bucket.

Additionally, we believe that the concept of antithetical investments may be difficult to implement from a portfolio management perspective. Determining what is antithetical is largely subjective; it is not a simple task of telling portfolio managers to refrain from buying investments that are antithetical to a fund's name. To implement the requirement, fund managers would likely need to develop a list of potential investments viewed as antithetical for every fund with an 80% policy, which inherently would be flawed as it would be impossible to predict every investment opportunity a portfolio manager may consider as well as the impact of changing market dynamics. Before making a buy decision, portfolio managers would have to consult the list of potential antithetical investments or compliance personnel, the "antithetical" nature of the investment would be considered, differing views would likely be voiced, and in the end the time and resources necessary to make the determination could lead to a lost opportunity as well as extra cost to the fund. The foregoing does not seem like a worthwhile endeavor especially given that reasonable investors could ultimately still differ as to whether the investment itself is antithetical to the fund's name.

Further, this concept is nearly impossible to test from a compliance standpoint. Compliance systems or personnel would need to be coded or armed with a list of what investments could be deemed antithetical to a fund's investment focus, which as noted above, would involve subjective determinations and not be inclusive of all investments as it is impossible to predict investment opportunities and market dynamics. Hindsight decisions by compliance personnel as to whether a particular fund holding is antithetical to a fund's name would be complicated and subjective, and would likely vary among fund groups.

Finally, we have concerns that an evaluation of whether an investment is antithetical to a fund's name is objective enough, as drafted, to be enforced uniformly by the Staff.

For these reasons, we believe that the Staff should exclude guidance related to antithetical investments in any final amendments.

2. <u>The Proposed Rule's Approach to Temporary Departures from the 80% Investment Requirement and Related Cure Period is Overly Restrictive and Could Force Portfolio Management Decisions Against Shareholder Interests</u>

A. "Under Normal Circumstances" and the 30 Days Problem

The Commission proposes amendments to the current requirement that a fund's 80% investment policy apply "under normal circumstances." The Proposal would permit deviation from a fund's 80% investment policy only in certain circumstances, and would require the fund to return to compliance with the policy within 30 consecutive days, with certain limited exceptions.[6] The Proposal states that "[t]his aspect of the current rule was designed to provide funds flexibility to manage their portfolios," and we believe it has done so successfully and necessarily.[7] Requiring funds to return to compliance as soon as reasonably practical and in any case within 30 days of deviation from the 80% investment policy will force buying and selling of portfolio securities against the interests of shareholders. Market dislocations, or departures from "normal circumstances," are by their nature unpredictable in both intensity and duration. Allowing funds only 30 days of defensive positioning could force portfolio managers to buy back into sectors or specific securities 30 days after disruptive events, and could preclude the application of the professional judgment and investment analysis that shareholders seek and pay for when they invest in registered funds. This is particularly true for actively managed funds, for which shareholders may pay a higher management fee in return for proactive and reactive management in response to changing market conditions. The Proposal would curtail management's judgment and flexibility, and give fund shareholders less of what they pay for.

In addition, because of the rigidity of the 30-day cure period, other investors will be able to anticipate the need for a fund, or a group of similarly positioned funds, to buy or sell securities 30 days after a disruptive event. Apart from the detrimental effect on the integrity of the securities markets, other investors buying securities opportunistically days before a fund or group of funds will be forced to buy back into those same securities could artificially drive up their prices before the fund reinvests, thereby harming shareholders of those funds.

B. "At the Time of Investment"

The Proposal would also eliminate the current standard that a fund's 80% investment policy applies at the time of investment, and would instead require continuous testing. We believe that the flexibility afforded by the current standard is necessary, effective, and consistent with other Investment Company Act of 1940 ("1940 Act") tests that measure fund holdings.[8] Continuous testing, in contrast to the current time-of-acquisition test, would force sales of portfolio securities at inopportune times to the possible detriment of fund shareholders. A clear-cut example of this would be a fund with "mid-cap" in its name being forced to sell stock of a company that grew and moved into the large-capitalization category. Under the current standard, the fund could not buy more of the security, but could hold its investment if it believed that doing so served the investment objective of the fund. The Proposal would force the sale of a fund holding that the portfolio managers believe is likely to continue to appreciate, and could generate unwanted capital gains for shareholders. This situation is more problematic in the case of inherently subjective terms, as discussed above, such as "growth" and "value." If a fund with "growth" in its name is forced to sell a security because the fund determines that it has matured into the "value" category, the problems of potential missed appreciation, removal of portfolio manager judgment, and timing of capital gains are again present, but so too is the potential for shareholders to object and possibly sue the fund's adviser under state law for incorrectly deeming the stock "value," and triggering unwanted capital gains. Here, subjectivity and inflexibility combine to threaten shareholder assets rather than to protect them.

[6] Release at 33-34.
[7] Release at 34-35.
[8] Examples of portfolio compliance tests measured at the time of investment include Section 12(d)(1), Section 12(d)(3), and the diversification and industry concentration provisions of Section 5.

An ongoing compliance test, coupled with the 30-day problem referenced herein, would dictate portfolio management decisions at important times, rather than allowing managers to apply the discretion and judgment that shareholders expect when investing in a fund. The Proposal states the Commission's belief that "funds and their shareholders would benefit from the degree of flexibility that the proposed approach would provide…"[9] We believe the significant reduction in flexibility of the Proposal will result in a net detriment to fund shareholders.

C. Board Oversight and Judgment Provide a Reasonable Alternative

As stated above, we believe the Names Rule's current "under normal circumstances" and "time of investment" framework for compliance with an 80% investment policy is both effective and in the best interest of shareholders because it is conducive to the application of asset management expertise that investors seek when they invest in registered funds.

If the Commission amends the existing standards, we believe that the model of board oversight employed by, for example, Rules 18f-4 and 22e-4 under the 1940 Act would appropriately apply board judgment and protection for fund shareholders, and accountability for funds and advisers. Both Rule 18f-4 and Rule 22e-4 recognize the value of a board's oversight of fund management and the best interests of fund shareholders.[10] A fund that deviates from its 80% investment policy for more than a certain number of days (such as 60 days) could be required to notify its board, and present a plan to return to compliance within a reasonable period of time, taking into consideration the best interests of shareholders.[11] The Proposal addresses the benefits of a board approval or notification approach, including additional flexibility to reduce loss during market crises, and mitigation of potential adverse effects that a fund's trading activity may have on the markets for the investments in its portfolio.[12] While we recognize the value in the Commission's stated rationale for not adopting such an approach (potential portfolio "drift" and investor expectations, for example), we believe that, in the aggregate, shareholders would be better served with a more flexible framework supported by the protections of boards acting in their capacity as fiduciaries.

3. The Proposal Should Not Require Unlisted Closed-End Funds and Business Development Companies ("BDCs") to Adopt Fundamental 80% Policies

The Proposal requires unlisted closed-end funds and BDCs that are required to adopt an 80% investment policy to make such a policy a fundamental policy (*i.e.,* a policy requiring changes to be approved by shareholders). We do not believe that such a requirement should be adopted. Unlisted closed-end funds (often interval or tender offer funds) do not typically hold annual shareholder meetings where the adoption of such a fundamental policy could take place. Therefore, to adopt such a fundamental policy, unlisted closed-end funds would be required to hold a special shareholder meeting where shareholders would have the opportunity to vote on the fundamental 80% policy. Shareholder meetings are costly, with

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[9] Release at 124.

[10] See Rule 18f-4(c)(2)(iii)(A) (requiring, for a fund that is not in compliance with the applicable VaR test within five business days, the derivatives risk manager to report to the fund's board of directors and explain how and by when (*i.e.,* number of business days) the derivatives risk manager reasonably expects that the fund will come back into compliance). See also Rule 22e-4(b)(1)(iv)(A), under which the fund's liquidity program administrator must notify a fund's board if the fund holds more than 15% of its net assets in illiquid investments that are assets, and must present the board with a plan to reduce the level of those assets to or below 15% of fund net assets within a reasonable period of time.

[11] Considerations could include investment outlook for the holding, expected time horizon, and capital gains concerns.

[12] Release at 150-151.

such costs typically borne by the fund on matters related to compliance with applicable law, and so ultimately passed down to fund shareholders.[13] Our view is that the Proposal therefore would increase costs for unlisted closed-end fund shareholders. Further, we believe that unlisted closed-end funds would seek to avoid a shareholder meeting to adopt a fundamental policy, and instead would change the fund name to be a name that does not implicate the Proposal. We do not believe this is the intended effect of the Proposal.

We believe there are other ways to inform unlisted closed-end fund shareholders of the adoption or revision of an 80% policy. As noted, unlisted closed-end funds are often structured as interval funds or tender offer funds with periodic repurchase offers. In addition, such funds are required to update their registration statements annually and when changes occur under Rule 486 and Rule 424 under the Securities Act of 1933, respectively. Notice of the adoption or revision of an 80% policy could be included in such shareholder communications sufficiently in advance of the effectiveness of the change such that shareholders would have time to redeem as part of the repurchase or tender offer if they disagree. Alternatively, we believe the Staff should exclude existing unlisted closed-end funds from the scope of the Proposal and not require shareholder approval of any new or revised 80% policies for such existing funds; and have the fundamental policy element be applicable to new unlisted closed-end funds and BDCs effective after the compliance date of any final amendments.

Moreover, it is unclear to us how the application of the Proposal's fundamental policy requirement to BDCs is consistent with the Congressional intent behind the creation of BDCs. Specifically, BDCs are exempted from the restrictions of Section 8 and Section 13 of the 1940 Act, which address respectively, the need to disclose fundamental investment restrictions and the requirement of shareholders to vote on changing investment policies. Instead BDCs are only required to seek shareholder approval (pursuant to Section 58 of the 1940 Act) prior to a BDC ceasing to be a BDC or withdrawing its election to be regulated as a BDC. One logical interpretation of Congress' determination not to subject BDCs to Section 8 and 13 is that Congress intended BDC's to be free of a requirement to disclose fundamental investment restrictions and seek related shareholder approval, and instead intended BDC boards to have the discretion to make investment changes affecting the BDC's investment operations (other than as required by Section 58). We view the Proposal's requirement that impacted BDCs adopt a fundamental 80% policy as inconsistent with Congressional intent and not a matter on which BDC shareholders expect, or even desire, to vote.

4. Suggested Process for Implementation of the Proposal

The Proposal requires funds to evaluate their existing names and existing 80% policies to determine whether a new 80% policy or revisions to an existing 80% policy are required. As part of this evaluation, fund groups will necessarily be required to evaluate whether any changes necessary to come into compliance with the Proposal should be effectuated through a Rule 485(a) or a Rule 485(b) filing. We suggest that the SEC staff provide guidance in any final adopting release that makes it clear that a Rule 485(a) filing is not required in cases where a fund is adopting or revising an 80% policy to come into compliance with the Proposal but is not making any material changes to the fund's strategy. Further, we suggest that the SEC staff provide guidance in any final adopting release that if a fund is making material changes to a fund's strategy to come into compliance with the Proposal, and similar changes are being made to other funds in the fund complex, that a fund's reliance on Rule 485(b)(1)(vii) and the Staff's 2018 Template Filing Relief guidance[14] would be appropriate.

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[13] For data on such expenses, *see* Investment Company Institute's Comments Related to the SEC Roundtable on the Proxy Process at https://www.ici.org/doc-server/pdf%3A19_ltr_fundproxy.pdf.

[14] See ADI 2018-02 - Template Filing Relief at SEC.gov | ADI 2018-02 - Template Filing Relief.

5. The Proposed Rule and the Commission's Statements Regarding Implementation Raise Potential Questions of Retroactivity and Elements of the Rule May be Outside of Congressional Grants of Authority to the Commission

As noted in this comment letter, although we take issue with some of its provisions, we are generally supportive of the Proposal and its core policy goals. We are therefore concerned that in focusing on addressing the scope of the rule, the Commission may not have focused its attention on two potential flaws in the Proposal's structure, that if not appropriately addressed by the Commission, could expose the rulemaking to future challenge. In particular, we are concerned that, as presently conceived, aspects of the Proposal could require impermissible retroactive application of a rule, and that portions of the rule may be outside of the grant of rulemaking authority provided to the Commission by Congress.

As a preliminary matter, "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[15] This axiomatic statement is reflected in Section 551 of the Administrative Procedures Act's definition of a "rule" as "an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency…."[16] "The only plausible reading" of the term "future effect" is that "rules have legal consequences only for the future."[17] The DC Circuit has held that "a rule is retroactive if it 'takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.'"[18] Retroactive rules "alter[ ] the *past* legal consequences of past actions."[19] "However, an agency order that "alters the future effect, not the past legal consequences" of an action, or that "upsets expectations based on prior law," is not retroactive."[20]

We are concerned that the application of the revised rule as presently conceived would, depending on how it was applied, impose new duties and new obligations with respect to transactions already past, or would "alter past legal consequences of past actions."

Section 35(d) of the 1940 Act makes it "unlawful for any registered investment company to adopt as a part of the name or title of such company, or of any securities of which it is the issuer, any word or words that the Commission finds are materially deceptive or misleading."[21] As a result, a registered investment company has a completed violation of Section 35(d) upon the adoption of a name that is materially deceptive or misleading.

The problem, of course, is that every fund presently in existence that has "global" or "international" or "growth" or "value," or indeed has a name that includes any of the other terms that might be deemed to

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[15] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).
[16] 5 U.S.C.A. § 551 (2022) (emphasis added).
[17] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216 (1988) (Scalia, J. concurring).
[18] National Mining Association v. Department of Labor, 292 F.3d 849, 859 (D.C.Cir.2002) (quoting Ass'n of Accredited Cosmetology Schs. v. Alexander, 979 F.2d 859, 864 (D.C.Cir.1992)); Marrie v. S.E.C., 374 F.3d 1196, 1207 (D.C. Cir. 2004); Coal. for Common Sense in Gov't Procurement v. United States, 707 F.3d 311, 317 (D.C. Cir. 2013).
[19] Retroactive rules "alter[ ] the *past* legal consequences of past actions." Mobile Relay Assocs. v. F.C.C., 457 F.3d 1, 11 (D.C. Cir. 2006) (citing Bowen, 488 U.S. at 219, (Scalia, J., concurring) (emphasis in original).
[20] Mobile Relay Assocs. v. F.C.C., 457 F.3d 1, 11 (D.C. Cir. 2006) (internal citations omitted).
[21] 15 U.S.C. § 80a-34s(d) (2022) (emphasis added).

be misleading under the reformulated provisions of Rule 35d-1, has already adopted its name. Reframed in the terminology used by the DC Circuit, each fund's adoption of its name is a "transaction already past."

As a consequence, the implementation of the revised rule by existing funds – as appears to be the Commission's intent and understanding[22] – will either impose the revised rule's new duties and new obligations with respect to transactions already past (assuming a fund complies with the rule) or will cause the fund (assuming a fund does not comply with the rule) to be in violation of Section 35(d), even though the action precipitating that liability – adoption of the name – occurred years, if not decades earlier. Converting what was initially a legal adoption of a name into an illegal adoption of a name appears to be a clear-cut example of a rulemaking that alters the "past legal consequences of past actions."[23] Similarly, imposing the terms of the revised rule would "impose a new duty" on these funds.

Congress has expressly provided the Commission with authority to make rules defining terms that are materially misleading or deceptive for purposes of Section 35(d), but Congress has not expressly granted the Commission with the "power to promulgate retroactive rules" with respect to Section 35(d). The Commission does not appear to have the authority to apply a retroactive rule in this instance.

As a consequence, we are concerned that the Commission may be impermissibly applying a retroactive rule, thus calling into question the validity of the rulemaking itself. We believe, however, that there is an easy fix for this problem. There is nothing on the face of Rule 35d-1 that indicates it is to be applied retroactively. In fact, when it is read together with Section 35(d) (which only refers to the adoption of a name, not its continuing use), the revised rule's scope should only be prospective in nature. Put differently, because Section 35(d) focuses on the time of adoption of the term, and Rule 35d-1 is putatively just a definitional rule, then reading the revised rule as applying only to names adopted after the Rule's implementation makes it clear that the rule is no longer subject to retroactivity concerns. The retroactive nature of the rule stems only from the Commission's position in the Proposal that the rule should have retroactive application. If the Commission merely clarifies that the rule should be understood within the plain English wording of Section 35(d) such that existing funds with existing names already adopted are excluded from the scope of the Proposal and are not subject to the terms of the revised rule, the retroactivity issue evaporates.

This result does not mean that the Commission could not pursue such funds for a potential violation of Section 35(d) by adjudicative order. It could. As the Commission has noted – and has proposed to codify in the revised rule – a failure to comply with the rule does not mean the Commission is estopped from finding a violation of Section 35(d). It could bring an adjudication with no concern of retroactivity.[24] But any such adjudication would likely have to focus on the individual facts surrounding a fund's investment strategies and holdings (*i.e.*, whether a fund's assets and operations are sufficiently in line with the name of the fund). This could be accomplished by meeting the 80% test contained in the revised rule, shorn of the non-definitional, procedural aspects of the rule that do not appear to be integral to defining a term as being materially deceptive or misleading. Any such adjudication would of course be subject to potential judicial review, including a determination that such findings were not arbitrary, capricious, or an abuse of discretion.[25]

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[22] Illustrated by the compliance phase-in.

[23] We recognize that a similar argument could have been made at the time the original names rule was adopted. We do not believe that fact cures the issue; it merely compounds it.

[24] See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216–17, 109 S. Ct. 468, 476, 102 L. Ed. 2d 493 (1988) (Scalia, J. concurring).

[25] 5 U.S.C. § 706 (2022).

Finally, given the ambitious breadth of the Proposal's scope, which includes not only a definition of terms as authorized by Section 35(d) but also imposes positive obligations and limitations that are not purely definitional in nature, we are concerned that the Commission may be acting outside of its rulemaking authority with respect to certain elements of the rule.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[26] The Proposal notes that the Commission "is proposing the amendments to rule 35d-1 under the authority set forth in sections 8, 30, 31, 34, 35, 38, 59, and 64 of the Investment Company Act of 1940." After parsing through these statutory provisions, it is clear that the Commission has statutory authority to define terms within the meaning of Section 35 by rule, adopt rules related to periodic reporting under Section 30, and adopt rules related to record keeping pursuant to Section 31.[27] It is not immediately clear, however, that the Commission has the authority to implement other portions of the rule including mandating that a fund have adopted investment policies (whether fundamental or non-fundamental) that are not expressly mandated by Section 8,[28] making a name change conditional on satisfying substantive notification processes, or otherwise applying substantive procedural obligations under the umbrella of defining whether a term is materially misleading or deceptive. We are mindful that the Commission has broad rulemaking authority under Section 38(a) to "to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the powers conferred upon the Commission elsewhere" in the 1940 Act. However, we are equally mindful that "[a]n agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority" and that a "necessary or appropriate" provision in an agency's authorizing statute does not necessarily empower the agency to pursue rulemaking that is not otherwise authorized.[29] We urge the Commission to consider carefully whether the ambitious scope of the revised rule, including certain procedural requirements that appear to fall outside of simply defining a term, is fully supported by a grant of Congressional authority, such that the rule is fully supported by the statutes cited. We also urge the Commission to consider providing additional discussion and analysis in any adopting release supporting the conclusions that the expansive scope of the rule is fully supported by a grant of Congressional authority, and is not an impermissible grafting of unsupported procedural requirements in the guise of defining a term.[30]

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[26] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 109 S. Ct. 468, 471, 102 L. Ed. 2d 493 (1988).

[27] We note, however, that the Commission may wish to bolster its analysis on the minimizing the compliance burden on the record keeping, as required by Section 31(a)(2) of the 1940 Act.

[28] This is particularly the case for BDCs, which as noted previously are not subject to the concepts contained in Section 8 and Section 13.

[29] New York Stock Exch. LLC v. Sec. & Exch. Comm'n, 962 F.3d 541, 546 (D.C. Cir. 2020).

[30] "The [Supreme] Court makes it plain that the mere reference to 'necessary' or 'appropriate' in a statutory provision authorizing an agency to engage in rulemaking does not afford the agency authority to adopt regulations as it sees fit with respect to all matters covered by the agency's authorizing statute." New York Stock Exch. LLC v. Sec. & Exch. Comm'n, 962 F.3d 541, 554 (D.C. Cir. 2020) *(citing Michigan v. EPA,* 135 S. Ct. at 2706-07).

Thank you for considering our comments. If you have any questions, please contact the following members of the Investment Management Disclosure Committee at Stradley Ronon:

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Very truly yours,

/s/ Stradley Ronon Stevens & Young, LLP

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