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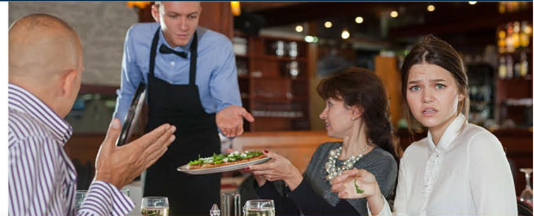

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Client Alert | Investment Management

The Names Rule Pizza Shop: No Sushi for You!

The U.S. Securities and Exchange Commission (SEC) adopted amendments on Sept. 20 (the Release) to Rule 35d-1 (the Names Rule or Rule) under the Investment Company Act of 1940 (the 1940 Act).[1] The Rule addresses the names of registered investment companies and business development companies (collectively, funds)[2] that the SEC considers to be materially misleading or deceptive unless used in accordance with provisions of the Rule. As described by SEC Commissioner Hester Peirce, when someone walks into a pizza shop, there is a general expectation that they are not going to get sushi. The revised Names Rule is designed to provide the same experience to investors.

With the expansion of the Names Rule's scope, it is estimated that approximately 75% of all funds will be affected by the Release in some manner. The final amendments to the Names Rule include:

- Expanding the scope of the Names Rule to include terms suggesting an investment focus in investments that have, or whose issuers have, "particular characteristics" (e.g., growth, value or terms indicating that a fund's investment decisions incorporate one or more environmental, social or governance (ESG) factors, and/or terms that reference a thematic investment focus).
- Requiring ongoing (i.e., at least quarterly) testing of portfolio investments for purposes of determining compliance with a fund's 80% investment policy.
- Specifying time periods (generally 90 days) for funds to come back into compliance in connection with temporary departures.
- Incorporating requirements for purposes of valuing and including derivatives in a fund's 80% investment policy.
- Requiring impacted funds to incorporate prospectus disclosure defining the terms used in a fund's name, including specific criteria used to choose the investments described by the terms.

Expanded Scope of the Names Rule

The Release expands the scope of the Names Rule to require a fund to adopt a policy to invest at least 80% of its assets in accordance with any fund name that suggests an "investment focus." The definition of "investment focus" includes investments in "a particular type of investment or investments, a particular industry or group of industries or particular countries or geographic regions" – all terms that were previously subject to the Names Rule. The definition, however, was expanded to include terms that suggest that a fund is focused on "investments that have, or investments whose issuers have,

1 Investment Company Names, Investment Company Act Release No. 35000 (Sept. 20, 2023).

2 The Names Rule was also modified to require that the 80% investment policy and recordkeeping requirements will only apply to unit investment trusts at the time of initial deposit.

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particular characteristics." The SEC noted the expansion does not distinguish between a type of investment and an investment strategy because a fund name might connote a particular investment focus and result in reasonable investor expectations regardless of whether the fund's name describes a strategy (e.g., growth or value) as opposed to a type of investment (e.g., equity or fixed income).

The SEC declined to provide an enumerated list of terms that would be included in the expanded scope in an attempt to make the Names Rule evergreen. The SEC did, however, note that the primary terms it anticipated that would be brought within the scope of the expanded Names Rule would include terms such as "growth" and "value," terms with ESG- or sustainability-related characteristics and terms that reference a thematic investment focus.

Expanded Scope

Names that suggest an "investment focus"

- Broadened to include terms suggesting that the fund focuses on investments that have or investments whose issuers have particular characteristics.
- Particular characteristics not defined but described as any "feature, quality or attribute."

Non-exclusive examples

- Growth or value.
- Terms indicating that the fund's investment decisions incorporate one or more ESG factors.
- Terms that reference a thematic investment focus (e.g., drones, metaverse, big data, gig economy and Gen Z).

Additional examples

- While the SEC declined to specifically highlight additional examples of terms that suggest a fund focuses on investments that have, or investments whose issuers have, particular characteristics, funds should consider the applicability of the amendments to other terms that the SEC's disclosure staff have historically noted should include 80% investment policies (e.g., "income," "dividend" and "credit").

Terms That Continue to Be Excluded

Terms that reference and/or suggest

- Characteristics of the portfolio as a whole
  - Duration
  - Maturity-related terms (i.e., intermediate-term)
  - Global or international
- Negative or exclusionary screening process
  - Fossil-fuel-free funds may not require an 80% investment policy.
  - Section 35(d) concerns (i.e., should not invest in issuers with fossil fuel reserves).
- Results of portfolio investments in the aggregate
  - ESG "uplift" or "aware" funds that systematically overweight or underweight investments within the given universe based on ESG criteria.

- Portfolio-wide result:
    - Real return, balanced or managed risk
- Investment technique
    - Long/short or hedged
- Asset allocation determinations
    - Retirement or sector rotation funds
- Well-known organizations, affinity groups or specific populations of investors

<u>Note:</u> All funds, however, continue to be subject to Section 35(d)'s prohibition on materially misleading or deceptive names.

Consistent with the Proposal,[3] when a fund's name suggests an investment focus that has multiple elements (e.g., the XYZ Technology and Growth Fund), the fund's investment policy must address each of those elements. The SEC noted that a fund could but is not required to have 80% of its assets invested in each term of the name. Alternatively, the SEC noted that the adviser retains discretion in determining how best to allocate investments under such an 80% policy, going as far as noting that a fund could have "no minimum or maximum investment requirements specified for either category." Moreover, even if a fund has a term in its name that does not require an 80% investment policy alongside one that does (e.g., the Technology and Real Return Fund), the fund still must adopt an 80% investment policy for the term that does require a policy.

For funds of funds, the SEC confirmed that an acquiring fund is permitted to include the entire value of the underlying fund in calculating compliance with its 80% investment policy without looking through to the underlying fund's investments. The SEC provided an example indicating that an acquiring fund can count an underlying fund with an 80% policy in a subsection of the industrial sector as part of the acquiring fund's 80% policy in the industrial sector. However, the SEC noted it would not be reasonable to ignore situations where the fund of funds knows that an underlying fund is not investing consistent with its investment focus, which may be the case in investments made in affiliated funds.

[3] Investment Company Names, Investment Company Act Release No. 34593 (May 25, 2022) (the Proposal).

Key Takeaways

- The primary impact of the expansion is that a larger percentage of funds will now become subject to the Names Rule (i.e., absent modifying their names), which will create new ongoing compliance costs and additional requirements, as described below, that may impact how such funds manage their portfolios.
- Fund managers should start to evaluate their fund names and strategies to confirm the impact of the amendments and to ensure they have a sufficient amount of time to come into compliance, which may require board action and related notifications to shareholders. Fund managers who determine to change fund names in light of the amendments should consider intermediary relationships and marketing implications.
- In an attempt to provide flexibility, the SEC included guidance for funds whose names suggest an investment focus that has multiple elements, noting that a fund could have "no minimum or maximum investment requirements specified for either category." This flexibility may lead to unintended consequences and ultimately be reined back in through subsequent guidance or the disclosure review process. For example, it is unlikely the SEC intended to provide "U.S. equity" funds with the flexibility to adopt an investment policy with no minimum percentage in U.S. issuers or equity securities. Nevertheless, fund managers should always be cognizant of Section 35(d)'s requirement that a fund's name may not be materially deceptive or misleading.
- The Release focuses on thematic funds, which may have names for which the investments may be hard to track for purposes of the Names Rule. Therefore, fund managers may need to carefully craft the names of these funds so that they are descriptive to investors but do not present a compliance risk with respect to complying with Section 35(d) and the Names Rule.
- A number of terms remain subject to interpretation under the Names Rule. We expect that the SEC disclosure staff's review process will continue to be a driver of determining what names are subject to the Rule despite the stated objective in the Release to eliminate the disclosure staff's ad hoc interpretations (i.e., investment strategy versus type of investment).

Compliance Testing and Policies and Procedures

In a change from the Proposal, under which funds would have been permitted to depart from an 80% investment policy only under specified circumstances, the Release retained the requirements that a fund's 80% investment policy applies under normal circumstances and at the time the fund invests its assets. To limit the potential for long-term drift, the amended Rule, however, will require:

- **Quarterly testing**: The Names Rule will require that a fund review, at least quarterly, each portfolio investment for purposes of determining compliance with the fund's 80% policy, as opposed to requiring a fund to continuously reassess its portfolio investments. To the extent that a fund identifies as part of the quarterly review that the characteristics of the fund's existing investments are inconsistent with the fund's 80% investment policy, the fund must address this in accordance with the Rule's requirements for temporary departures.

- **Temporary departures:** Once a fund determines it is not in compliance with its 80% investment policy, it must come back into compliance as soon as reasonably practicable, but no later than 90 consecutive days. This can be done by selling investments that fall outside of a fund's 80% basket and/or by purchasing securities that fall within it. The 90 days are measured from the time the fund identifies a departure (i.e., as a part of its quarterly review or otherwise) or the time the fund initially departs from its policy in other-than-normal circumstances.
- **Repeated deviations:** The Release noted that if a fund were to deviate serially or frequently from its 80% investment policy, it may suggest that those circumstances are, in fact, normal and may raise questions regarding the appropriateness of the fund's name.

Identification of a fund's departure from an 80% investment policy outside of the quarterly review process is an area subject to nuance that fund managers will need to address. For example, if an adviser to Fund A learns that a stock held by Fund A is no longer a "value" stock when Fund A seeks to add to the stock's position, does the 90-day clock start then? Must the adviser evaluate all other funds it manages for compliance with an 80% investment policy in light of its knowledge that the stock is no longer a value stock?

Special Fund Events:
In the following circumstances, funds would be permitted to deviate from their 80% investment policies for longer than 90 days:

Fund Launches:
A fund will be permitted 180 days to ramp up and come into compliance with its 80% investment policy.

Reorganizations:
A fund will be permitted to deviate from its 80% investment policy to reposition or liquidate the fund's assets in connection with a reorganization (no time period is given).

Notice to Shareholders:
A fund will be permitted to deviate from its 80% investment policy, where notice was provided to shareholders regarding a change in the fund's 80% investment policy.

Additionally, as proposed, the Release stated that a fund's name may be materially deceptive or misleading under Section 35(d) even if the fund complies with the Names Rule. The SEC noted this could occur if a fund were to invest in such a way that the source of a substantial portion of the fund's risk or returns is materially different from that which an investor would reasonably expect based on the fund's name or if the fund used its 20% basket to invest in assets that are materially inconsistent with the investment focus or risk profile reflected by the fund's name.[4] The SEC did not adopt the Proposal's amendment to define the names of ESG "integration funds"[5] as materially deceptive and misleading if the name includes terms indicating that the fund's investment decisions incorporate one or more ESG factors.

[4] The SEC provided two specific examples of a "green energy and fossil-fuel-free" fund making a substantial investment in an issuer with fossil fuel reserves, or a "conservative income bond" fund using the 20% basket to invest in highly volatile equity securities that introduce significant volatility into a fund that investors would expect to have lower levels of volatility associated with a lower-yielding bond.

[5] The Proposal had described integration funds as funds that consider one or more ESG factors alongside other, non-ESG factors in the fund's investment decisions, but those ESG factors are generally no more significant than other factors in the investment selection process.

The Release noted that a tax-exempt fund that applies the income test to determine compliance with its 80% policy would be required to review the portfolio at least quarterly to determine whether the fund's assets are invested so that at least 80% of the income that it distributes will be exempt from federal income tax or from both federal and state income tax.

With respect to funds' compliance policies and procedures, the Release reiterated the SEC's expectation that funds' written compliance policies and procedures, which generally are required to be designed to prevent violations of the federal securities laws, should cover the Names Rule and Section 35(d). Further, with respect to index funds, the SEC also noted that funds should adopt and implement written policies and procedures reasonably designed to ensure that the indexes selected by a fund do not have materially misleading or deceptive names themselves.[6]

Key Takeaways

- While the Release provided more flexibility than the Proposal, the quarterly testing requirement will incorporate a new compliance test that will require funds to evaluate prior investments on an ongoing basis, which could potentially force a fund to sell investments it would not otherwise have.
- The compliance testing required by the Release puts additional responsibilities on compliance departments and may necessitate hiring additional compliance staff or third-party vendors.
- To the extent not already adopted, funds should review their compliance policies and procedures to ensure they cover compliance with Section 35(d) and the Names Rule. The SEC noted that these policies should address all funds, not just those subject to the Names Rule.
- While funds have always been subject to Section 35(d)'s requirements, to the extent a fund is subject to the Names Rule, the Release signals that the SEC may put an increased focus on funds' 20% baskets. Accordingly, funds should confirm that they have processes in place to monitor and evaluate what investments/risks/exposures are included in the 20% baskets of funds subject to the Names Rule.

Derivatives Calculations in a Fund's 80% Investment Policy

One aspect of the Proposal that drew less pushback from the industry and that was adopted largely as proposed was the valuation of derivatives instruments for purposes of determining compliance with a fund's 80% investment policy, as well as the derivatives that a fund may include in its 80% basket.

- **Use of derivatives notional amounts, with currency hedging exclusion.** The Release will require a fund to use the notional value of a derivative instrument rather than its market value to determine compliance with its 80% investment policy. The Release noted the amendments were intended to increase comparability regarding how funds value derivatives for purposes of determining compliance with the Names Rule (e.g., some funds were valuing their derivatives at notional value, while others would use market values). The SEC chose notional value because it believes notional value better reflects a derivative instrument's investment exposure.[7]

[6] Index providers typically provide no guarantee as to the accuracy of the indexes they publish and are not subject to the same rules as investment advisers and funds, which raises concerns that an investment adviser and/or fund could be held responsible for the accuracy of the index providers.

[7] The Release also provided guidance noting that, when calculating the notional amount of a fund's derivatives, interest rate derivatives must be converted to their 10-year bond equivalents and funds must delta adjust the notional amount of options contracts.

In a change from the Proposal, the Release requires a fund to exclude from its 80% investment policy calculation certain currency derivatives that hedge the risks associated with one or more specific foreign-currency denominated investments held by a fund if:

- It is entered into and maintained by the fund for hedging purposes, and
- The notional amounts of the derivatives do not exceed the value of the hedged investments (or the par value, therefore, for fixed-income investments) by more than 10%.[8]

The SEC adopted this modification in response to concerns that utilizing the notional value of derivatives could limit funds' use of derivatives for hedging purposes. For example, consistent with the Names Rule, a U.S. equity fund may utilize its 20% basket to invest in foreign stocks and utilize derivatives to hedge the currency risk. If the notional value of those currency derivatives were included in the denominator of a fund's 80% compliance calculation, they could have a high notional amount and put the fund out of compliance, even though the derivatives were being used to reduce the fund's exposure to foreign securities risks. Accordingly, the modification was adopted to address these concerns and avoid limiting the use of derivatives for hedging purposes.

- **Deduction of cash and cash equivalents and certain U.S. Treasuries.** As adopted, the Names Rule will permit, but not require, a fund to deduct cash and cash equivalents and U.S. Treasuries with remaining maturities of one year or less from assets up to the notional amounts of the fund's derivatives investments. This was a welcome change from the Proposal, which would have allowed the deduction but limited it to cash and cash equivalents. Commenters expressed concerns that the Proposal would exclude a number of investments that funds may use as collateral for derivatives (e.g., U.S. Treasuries maturing in under five years, investment-grade corporate bonds and repurchase agreements), but the SEC ultimately only broadened the scope for U.S. Treasuries maturing in one year or less.
- **Deduction of closed-out derivatives positions.** In a change from the Proposal, the Release specifically permits a fund to exclude any closed-out derivatives positions when calculating assets for purposes of determining compliance with its 80% investment policy if these positions result in no credit or market exposure to the fund. Closed-out positions are not required to be closed out with the same counterparty[9] in order for a fund to exclude them from the calculation of its assets.
- **Inclusion of derivatives in the 80% basket.** As adopted, the Names Rule will permit a fund to include in its 80% basket derivatives instruments that provide investment exposure to one or more of the market risk factors associated with the investment focus suggested by the fund's name. This approach will allow derivatives instruments to be included in a fund's 80% basket if:
  - They function as a substitute for direct investments in the securities suggested by the fund's name; or
  - They are used to facilitate the fund's investment in those securities by increasing or decreasing the fund's exposure to risk factors associated with those securities (e.g., interest rate derivatives).

[8] The SEC declined to extend the exclusion to interest rate derivatives, noting they are difficult to distinguish from transactions that create exposures to (or detract from) the investment focus that a fund's name suggests.

[9] Some commenters had noted that Rule 18f-4 does not allow netting offsetting positions across different counterparties for purposes of determining whether a fund qualifies as a limited derivatives user; however, the SEC noted the same concerns underlying the approach of Rule 18f-4 do not apply for the Names Rule.

For purposes of determining whether a derivative provides exposure to one or more of the market risk factors associated with a fund's name assets, the fund generally should consider whether the derivative provides investment exposure to any explicit input that the fund uses to value its name assets (e.g., where a change in that input would change the value of the security).

- **Valuation of short positions.** Funds must value each physical short position using the value of the asset sold short.

Key Takeaways

- The SEC specifically notes in the Release that including derivatives in a fund's 80% basket to the extent that they negate the primary market risk factor associated with the fund's name could result in a fund's name being materially deceptive and misleading, notwithstanding the fund's adoption of an 80% investment policy and compliance with the requirements of the Names Rule.
- The SEC's disclosure staff have historically provided comments requesting that funds use the market value of derivatives for purposes of testing compliance with their 80% investment policies. As a result, many funds test compliance with their 80% investment policies based on the market value of derivatives. Accordingly, such fund groups should evaluate whether impacted funds remain in compliance with their 80% investment policies when using a derivative's notional value.

Disclosure Requirements

Prospectus disclosure. The Release included new amendments to funds' registration forms (i.e., Form N-1A, Form N-2, Form N-8B-2 and Form S-G) that will require prospectus disclosure defining the terms used in the fund names that are subject to the Names Rule (excluding any trade name of a fund or its adviser), including the specific criteria used by a fund to select the investments that the term describes, if any.[10] The SEC noted the requirements are designed to help investors better understand how the fund's investment strategies correspond with the investment focus that the name suggests, as well as to provide additional information about how the fund's management seeks to achieve the fund's objective.

The Release noted a fund would have the flexibility to use "reasonable" definitions of the terms included in its names; however, these definitions need to be consistent with the terms' plain English meaning(s) or established industry use.[11] The SEC noted that the definition must have a "meaningful nexus" between the term used in the fund's name and the fund's investment focus and could be derived from a variety of sources (e.g., the dictionary, prior public disclosures, industry codes or classifications, and/or a colloquial understanding of the term).[12] In addition, the SEC noted that in situations where a term that is not subject to the Names Rule is in a fund's name (i.e., therefore does not need to be defined), such term can still provide context for a term in the fund's name that is subject to the Names Rule. This context may modify an investor's expectations with respect to the fund's investment focus (e.g., the

[10] "Terms" are any word or phrase used in a fund's name related to the fund's investment focus or strategies.

[11] Funds will also be required to tag information that will be included under the Release in their prospectus, using structured data language. This requirement will also apply to unit investment trusts, which are not currently subject to structured data tagging requirements.

[12] The Release states that the use of text analytics to assign issuers to industries based on the frequency of particular terms in an issuer's disclosures was not, in and of itself, sufficient to create a reasonable nexus. The Release also addressed funds that offer strategies that seek exposure to issuers that are likely to generate significant revenue from certain industries in the future, stating that the funds could signal to investors this strategy by using the terms "emergent," "future" or another similar term in the fund's name. However, the SEC endorsed the 50% revenue or income test in the Release as reasonable.

Emergent Technology Fund), which can be relevant for purposes of defining the fund's name and for determining which securities are properly allocated to the fund's 80% basket.

To address concerns regarding the difficulty with defining terms that may involve more subjectivity than terms that have traditionally been subject to the Names Rule and how to allocate investments to such 80% baskets, the SEC provided certain examples in the Release. For example, the SEC provided an example of two "Latin American" funds (i.e., geographically focused funds that are subject to the Names Rule) and noted that, while the funds could have different definitions of what "Latin America" means for their fund, the SEC believed both definitions were consistent with the term's plain English meaning or industry use.

Key Takeaways

- While this aspect of the Proposal did not generate as much pushback as others, it does create a new disclosure requirement for funds subject to the Names Rule.
- The new requirements replace the prior disclosure requirements applicable to funds that focus their investments, in particular countries or geographic regions.
- The Release did not address commenters' concerns that the inclusion of a new disclosure requirement could subject funds to unequal levels of scrutiny by SEC disclosure staff with respect to their definitions of terms and their disclosed criteria.

Notice requirement. Consistent with the current requirements, the Names Rule will continue to require that, unless a fund's 80% policy is a fundamental policy, 60 days' notice must be provided to shareholders of any change in the fund's 80% policy. The Release, however, modernizes and clarifies the requirement in several ways:

- **Must be provided separately.** The notice cannot be built into the fund's prospectus or other required shareholder communications. If the notice is delivered in paper form, it may be provided in the same envelope as other written communications.
- **Legend requirements.** The fund must prominently indicate to investors in the notice legend any changes made to its name that accompany a change in investment policy, in addition to changes made to the policy itself.
- **Content requirements.** 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.
- **Allow for electronic delivery.** Notices may be provided electronically to those investors who opt-in to electronic delivery. For these notices, the Release requires that the statement appear on the subject line of the email communication that includes the notice. Funds will not be permitted to post notices to their websites as an alternative to sending the notice directly to shareholders.

Form N-PORT reporting. The Release also adds the following new reporting requirements to Form N-PORT applicable to registered management investment companies and exchange-traded funds organized as unit investment trusts (UITs) (i.e., other than money market funds or small business development companies (BDCs) that adopt an 80% investment policy:

- Identify each investment in a fund's portfolio that is in the fund's 80% basket.
- Report the value of a fund's 80% basket, as a percentage of the value of the fund's assets.

- Report the definition of the terms used in a fund's name, including the specific criteria the fund uses to select the investments the term describes, if any.

In a change from the Proposal, this information will need to be reported for the third month of each quarter instead of every month. The frequency of this reporting is designed to correspond with the new quarterly review requirement. In a change from the Proposal, the Release does not require that funds report the number of days that the value of a fund's 80% basket fell below 80% of the value of the fund's assets during the reporting period.

Key Takeaways

- Funds may face significant costs to comply with these disclosure requirements and may need to hire additional staff or third-party vendors to assist.
- If a fund determines in its quarterly assessment that it has fallen out of compliance with its 80% investment policy, it may be unable to come back into compliance prior to its Form N-PORT filing obligations and, therefore, will be alerting the SEC and investors of a compliance issue.

Unlisted Registered Closed-End Funds and BDCs

Under the amended Names Rule, an unlisted registered closed-end fund or BDC subject to the Names Rule is prohibited from changing its 80% investment policy unless authorized by a vote of the majority of the outstanding voting securities of the fund. However, in a modification from the Proposal, such a fund would be permitted to change its policy without a vote if:

- The fund conducts a tender or repurchase offer in advance of the change;
- The fund provides at least 60 days' prior notice of any change in the policy in advance of the offer;
- The offer is not oversubscribed; and
- The fund purchases shares at their net asset value.

The requirement that any tender or repurchase offer must not be oversubscribed to avoid a shareholder vote to change an 80% policy of an unlisted closed-end fund or BDC puts those funds in a tough position, as whether the offer is oversubscribed would not be known in advance when the 60 days' notice of the 80% policy change is required. In addition, some unlisted registered closed-end funds frequently have oversubscribed repurchase offers and may therefore not be able to take advantage of this flexibility.

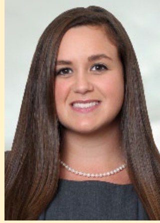
Recordkeeping

The Release will require funds that are subject to the 80% investment policy requirement to maintain certain records documenting their compliance with the Names Rule, including with respect to temporary departures. In a change from the Proposal, the Names Rule will not require 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 Rule.

Compliance Dates

The effective date of the Release is Dec. 11, 2023. The compliance dates will be Dec. 11, 2025, for larger fund families and June 11, 2026, for smaller fund families.

For more information, contact:



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