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August 16, 2022

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Request for Comment on Proposed Amendments to Rule 35d-1 under the Investment Company Act of 1940 and on Enhanced Disclosure and Reporting Requirements Regarding Fund Names
File No. S7-16-22

Dear Ms. Countryman:

Seward & Kissel LLP ("Seward & Kissel")[1] submits this letter in response to the specific requests of the Securities and Exchange Commission (the "Commission") in Release No. IC-34593 (the "Release")[2] for comment on, among other things, proposed amendments to: (1) rule 35d-1 ("Rule 35d-1," the "Names Rule," or the "Rule") under the Investment Company Act of 1940 ("ICA"); (2) prospectus disclosure requirements, including proposed new instructions to the applicable fund registration forms; and (3) Form N-PORT requiring (i) registered investment companies ("funds"), other than money market funds, to report certain information regarding their compliance with the Names Rule and (ii) funds to report, for each portfolio investment, whether that investment is included in the fund's "80% investment basket" (collectively, the "Proposed Amendments"). The Proposed Amendments would, among other things, expand the current requirement for certain funds to adopt an investment policy to invest at least 80% of their assets in accordance with the investment focus suggested by their name, impose new enhanced disclosure and reporting requirements, and establish new recordkeeping requirements.

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[1] Seward & Kissel LLP is a leading U.S. law firm with offices in New York City and Washington, DC. We represent a comprehensive range of asset management organizations, including serving as counsel to registered funds, and independent directors and trustees of such funds, as well as investment advisers to these funds.

[2] Investment Company Names, Securities Act Release No. 11,067, Exchange Act Release No. 94,981, Investment Company Act Release No. 34,593, 87 Fed. Reg. 36,594 (proposed May 25, 2022) [hereinafter Release].

We appreciate the opportunity to comment on the Proposed Amendments and other aspects of the Release and respectfully request that the Commission consider these comments before adopting the Proposed Amendments. We represent a number of clients that would be affected by the adoption of the Proposed Amendments. The views expressed in this letter are our own and do not necessarily reflect those of our clients.

While we generally support the Commission's efforts in developing the Proposed Amendments to ensure a fund's name accurately reflects the fund's investments and risks, we are concerned that various aspects of the Proposed Amendments would increase confusion among investors and advisers, while other aspects are unnecessary and burdensome to funds. As a fundamental matter, we do not believe that proposed Rule 35d-1 meets the statutory obligation under Section 35(d) of the ICA imposed by Congress on the Commission to *define* fund names or titles that are materially deceptive or misleading and further believe that the Proposed Amendments would expand significantly the scoping challenges of the Rule. We also believe that the transformation of the 80% investment policy requirement from the current and well understood incurrence test to a maintenance test (with limited exceptions) is inconsistent with the application of most provisions of the ICA and unnecessary, and will likely have profound and unintended effects on funds. In addition, we believe that the proposed "plain English or established industry use" standard applicable to terms used in certain fund names is unnecessary, unclear, potentially contradictory and will likely cause confusion for advisers and investors, as opposed to providing improved clarity. Finally, we believe that the amendments to Form N-PORT and the new recordkeeping requirements are unwarranted, unduly burdensome and will be costly to implement and maintain.

I. Purpose of the Proposed Amendments and Summary of Relevant Proposed Amendments for Purposes of this Letter

Rule 35d-1 was adopted in 2001. As stated in the Release, since adoption of the Rule, the Commission staff, members of the Fund industry, and investor advocacy groups have identified several challenges in applying the requirements of the Rule. The Release notes that, in the Commission's Request for Comments on Fund Names published in March 2021,[3] commenters generally agreed that a fund's name is an important piece of information that investors should consider in selecting a fund and that the Rule has been largely effective in limiting the use of misleading and deceptive fund names. Some commenters, however, suggested further improvements to the Rule, while the Commission staff noted that the current scope of the Rule has caused various interpretive issues to arise. The Release suggests that the potential investor protection issues raised by these interpretive scoping considerations are particularly evident in the treatment of funds with names suggesting an investment focus in companies that pursue certain "ESG" standards. Other potential investor protection issues identified in the Release include the continued use of an acquisition or incurrence test (as opposed to a maintenance test) for compliance with the 80% investment policy requirement of the Rule and the treatment and inclusion of derivatives for purposes of complying with the 80% investment policy of a fund.

[3] *See* Request for Comments on Fund Names, Investment Company Act Release No. 33,809, 85 Fed. Reg. 13,221 (Mar. 2, 2020) [hereinafter Request for Comments on Fund Names].

The Proposed Amendments, which seek to address these and other potential issues cited by the Commission, would:

- substantially expand the circumstances requiring an 80% investment policy to apply to any fund with a name with terms suggesting that the fund focuses in investments that have, or whose issuers have, particular characteristics, including fund names with ESG and similar terminology;

- change the current requirement that applies a fund's 80% investment policy at the time of investment (and under normal circumstances) to apply continuously, except in limited circumstances with limited duration;

- require that any term or terms used in the name of a fund suggesting an investment focus be consistent with the plain English meaning or established industry use of that term or terms;

- include a new reporting item in Form N-PORT requiring a fund subject to the 80% investment policy requirement to indicate, with respect to each portfolio investment, whether the investment is included in the fund's "80% investment basket;" and

- amend the recordkeeping requirements (i) to require that a fund with an 80% investment policy document its compliance with the requirement and (ii) to require that a fund without such a policy maintain a written record documenting its determination that such a policy is not required under the Rule.

II. Statutory Authority and Scope

Under Section 35(d) of the ICA ("Section 35(d)" or the "Section"), it is:

> 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. The Commission is authorized, by rule, regulation, or order, to ***define such names or titles as are materially deceptive or misleading***.[4]

In our view, this provision imposes two obligations on the Commission in adopting any rule under this Section. First, the Commission must make a finding that the "word or words" are materially deceptive or misleading. Second, when the Commission adopts a regulation under the Section, it must do so by *defining* the names or titles using *such word or words* that are materially deceptive or misleading.

[4] 15 U.S.C. § 80a-34(d) (emphasis added).

The Proposed Amendments fail to meet these two important statutory obligations. The approach adopted by the Commission in the Rule and the Proposed Amendments, which is inconsistent with these obligations, treats any word or words as potentially materially deceptive or misleading and establishes conditions for determining when a word or words may not be materially deceptive or misleading.[5] Although this approach was employed in 2001, the Commission now seeks to reinforce its approach by expanding the conditions to apply "to any fund name with terms suggesting that the fund focuses in investments that have, or investments whose issuers have, particular characteristics." The Proposed Amendments expand the conditions for determining when a word or words assumed to be potentially materially misleading or deceptive can be treated as not materially deceptive or misleading. We do not believe that this approach to the Rule and Proposed Amendments meets the statutory obligations imposed by Congress on the Commission as it does not incorporate a finding by the Commission that a word or words are materially deceptive or misleading.

Congress employed the specific phrase "any word or words" in adopting the Section initially and retained that usage when adopting amendments to Section 35(d) in the National Securities Markets Improvement Act of 1996 ("NSMIA"). Prior to NSMIA, the Commission was required to declare by order that a particular name was misleading and, if necessary, obtain a federal court injunction prohibiting further use of the name. In adopting amended Section 35(d), Congress provided the Commission rulemaking authority to address potentially misleading names but did not abandon the use of the specific "word or words" phrase (which it could have eliminated or amended) and tied that phrase to the obligation of the Commission in exercising its rulemaking authority.[6] The use of "such" in the sentence added by NSMIA clearly refers back to the "word or words" used in a name and for which the Commission is required to make a finding.

We think the appropriate reading of Section 35(d) is that Congress used "such" in amending the Section to ensure that funds subject to the prohibitions of the statute (and any regulations adopted thereunder) could provide, through the notice and comment process, comments on the specific "word or words" proposed by the Commission to be deemed materially deceptive or misleading.[7] In this regard, the consequences of such a designation – that a fund

[5] Even when complying with the conditions of the Rule (as proposed to be amended), a fund has no assurance or guarantee that the word or words used in its name are not misleading, despite the lack of a finding to that effect under the statute. Proposed Rule 35d-1(c) would state that a fund's name may be materially deceptive or misleading under Section 35(d) even if the fund adopts an 80% investment policy and otherwise complies with the rule's requirement to adopt and implement the policy. As discussed below, the Proposed Amendments would impose new recordkeeping obligations on all funds – even those with no plausible nexus to the requirements of Rule 35d-1 – to analyze and document if the fund is required to adopt a policy under the Rule. *See* Release, *supra* note 2, at 36,649.

[6] The Senate Report accompanying the NSMIA amendments to Section 35(d) indicates that the Commission must make a "finding that the name or title or any part of the title is deceptive or misleading." S. REP. NO. 104-293, at 22 (1996).

[7] Our reading of the statutory construction reflects a narrower approach to applying the requirements of Section 35(d). In contrast, the Commission's approach disregards the use of "word or words" and "such" in the Section. As the Release indicates, the Rule and Proposed Amendments address "certain *broad categories* of investment company names that are likely to mislead investors about an investment company's investments and risks." *See* Release, *supra* note 2, at 36,594 (emphasis added). At a minimum, we believe the authority provided to the

name is, essentially, misleading – are severe. The requirement for a Commission finding (that a specific fund name contains words that make it materially deceptive or misleading in light of its investments) has a purpose – it provides clarity in the application of the prohibition to funds. While Section 35(d) does not give rise to an implied private right of action by fund shareholders, an argument alleging violation of the Section could form the basis for a similar claim that a fund's name is misleading and violates the anti-fraud provisions of the federal securities laws.[8]

The Commission asserts that the Proposed Amendments are designed to address the "scoping" challenges referenced in the Release, noting that the Rule has created interpretive issues and that these issues are "evident in the treatment of funds with names that suggest an investment focus in companies that meet certain ESG" criteria.[9] While amended Section 35(d) provided the Commission rulemaking authority to define fund names it finds materially deceptive or misleading, we believe the Proposed Amendments exceed the scope of such authority, by proposing to amend Rule 35d-1 to declare an overly broad, arbitrary and undefined group of fund names containing certain words as presumptively (and by default) "materially deceptive and misleading" unless the fund in question adopts an 80% investment policy.[10] In fact, we believe that the Proposed Amendments will expand significantly the scoping challenges of the Rule and require dedication of further scarce staff resources in interpreting the Rule, as amended.

The Proposed Amendments would subject funds to an inconsistent and arbitrary regulatory process. The Commission staff is not well-suited to apply the Rule to ever-changing

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Commission pursuant to Section 35(d) should be interpreted more narrowly than is contemplated by the Commission in proposing the Proposed Amendments.

[8] *See* Request for Comments on Fund Names, *supra* note 3, at 13,222 n.17 (stating that names describing a fund's objective, strategy or policies are still subject to the general prohibition on misleading names under Section 35(d), as well as other antifraud provisions of the federal securities laws).

[9] *See* Release, *supra* note 2, at 36,597. Another interpretive issue that the Commission cites is its position that, with respect to Rule 35d-1 as currently applied, fund names that incorporate terms such as "growth" and "value" connote an investment objective, strategy or policy and are therefore not within the scope of the 80% investment policy requirement. This has resulted in some fund names being excluded from this requirement because the name contains a term suggesting an investment strategy, even if the name also suggests an investment "focus" to investors. The Commission fails to cite any evidence that the use of the words "growth" and "value" (which have been used in fund names for many years) has created investor confusion or misunderstanding, such that those words could be "materially deceptive or misleading." We agree, however, that the tension between words suggesting a "type of investment" versus those suggesting an "investment strategy" has resulted in the Rule being inconsistently applied, especially with respect to funds using thematic strategies.

[10] In this regard, we believe that the Commission's exercise of its rulemaking authority under Section 35(d) in this manner would violate the Administrative Procedure Act ("APA"), which prohibits agencies from taking actions that are arbitrary or capricious or that are in excess of the agency's statutory discretion. *See* 5 U.S.C. § 706. Section 706 of the Administrative Procedure Act states, in relevant part, that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *See id*. In reviewing an agency's construction of a statute, a court must reject those constructions that are contrary to clear Congressional intent. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); Foothill Presbyterian Hosp. v. Shalala, 152 F.3d 1132, 1134 (9th Cir. 1998) ("In reviewing an administrative agency's construction of a statute or regulations, we must reject constructions that are contrary to clear congressional intent or that frustrate the policy that Congress sought to implement.").

"buzzwords" of the day that the staff can identify or determine without input from funds, especially when that determination could result in potential liability for a fund. It is clear from the Release and the contemporaneous actions of the Commission that the primary regulatory focus of the Proposed Amendments is on "ESG investing."[11] We believe that the Commission can address the primary concerns it has identified with respect to "ESG investing" by finding, as required by statute, the "word or words" that are materially deceptive or misleading in such context and subjecting those proposed words to full notice and comment in accordance with the APA. This could be accomplished, for example, by amending the current provision of Rule 35d-1(a)(2) (which provision identifies names that qualify as materially deceptive and misleading) to include the proposed requirement relating to "Use of ESG terms in fund names" cited in proposed Rule 35d-1(d) and revising that provision to include the word or words found by the Commission to refer to ESG factors and which are deemed to be materially deceptive or misleading. By doing so, the Rule could be founded on appropriate authority and focused more narrowly on "ESG integration funds" than under the Proposed Amendments.

III. Shift to a Maintenance Test

The Proposed Amendments would also transform the 80% investment policy requirement from an initial incurrence test (which applies at the time of investment) to a maintenance test (which requires a fund to maintain a certain level of investment) with certain exceptions. Such a modification is inconsistent with the application of most provisions of the ICA and unnecessary. It will likely have profound and unintended effects on funds, including unwarranted interference with the management of investment portfolios and imposition of significant compliance and brokerage costs. In addition, the proposed exceptions addressing departures from the 80% investment policy lack sufficient flexibility. For these and other reasons, we do not believe that a maintenance test is necessary to protect fund investors.

Inconsistency with the ICA. Adoption of a maintenance test would conflict with the approaches that Congress and the Commission have historically taken with respect to other requirements of the ICA and the rules thereunder.[12] Most provisions of the ICA apply an

[11] We note that: (i) the text of proposed Rule 35d-1(a)(2) – which requires funds using certain fund names to comply with an 80% investment policy in order to avoid being considered materially deceptive and misleading – provides as a specific example fund names with terms indicating that the fund's investment decisions incorporate one or more ESG factors, and (ii) proposed rule 35d-1(d) defines the names of "integration funds" as materially deceptive and misleading if the name includes terms indicating that the fund's investment decisions incorporate one or more ESG factors. We further note that the Commission's regulatory focus on ESG Funds is evidenced by a rule proposal relating to ESG disclosures for investment companies and investment advisers announced on the same day as the Release. *See* Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, Securities Act Release No. 11,068, Exchange Act Release No. 94,985, Investment Advisers Act Release No. 6,034, Investment Company Act Release No. 34,594, 87 Fed. Reg. 36,654 (proposed May 25, 2022). Lastly, the Request for Comments on Fund Names highlighted funds with ESG or sustainable mandates as an area of particular concern, noting significant growth in that area. *See* Request for Comments on Fund Names, *supra* note 3.

[12] *See* Use of Derivatives by Registered Investment Companies and Business Development Companies, Investment Company Act Release No. 31,933, 80 Fed. Reg. 80,884, 80,925 n.319 (proposed Dec. 11, 2015) ("This acquisition test (in contrast to a maintenance test) [for the proposed three-day liquid asset minimum] reflects approaches that Congress and the Commission have historically taken in other parts of the Investment Company Act and the rules thereunder.").

incurrence test, including those related to diversification, industry concentration, affiliated transactions, and investments in other investment companies. Furthermore, we do not believe that the Commission has made a compelling argument for differentiating the proposed requirement from those for which an incurrence test has been effectively used for many years without issue.

Unwarranted. The Commission cites "portfolio drift" as one of its bases for proposing the imposition of a maintenance test. This position is not supported by the facts. Indeed, there is little evidence cited by the Commission suggesting that "portfolio drift," which could occur under the current incurrence test approach, has significantly harmed investors or is materially misleading or deceptive.[13] In this regard, we note that a slight drift from the 80% threshold required under the Rule would still likely result in a significant amount of a fund's net assets continuing to be invested in investments suggested by the fund's name and that a fund would still be subject to the general prohibition on misleading names under Section 35(d), as well as the antifraud provisions of the federal securities laws. Moreover, the public policies underlying the prohibitions of Section 35(d) are no greater than those underlying the prohibitions of other provisions of the ICA (including those cited above) that apply an incurrence test.

Restriction on Portfolio Management. The current 80% investment policy requirement, which applies under "normal circumstances," provides portfolio managers appropriate flexibility to manage fund investments. The standard permits investment companies to take temporary defensive positions to avoid losses in response to adverse market, economic, political, or other conditions, such as in the case of unusually large cash inflows or redemptions. The implementation of a maintenance test that permits only temporary departures under certain time-limited circumstances (in most cases, within a maximum time period of 30 days) could have unintended and profound negative consequences for a fund and its investors – the various parties that the Proposed Amendments are intended to protect. For example, a fund might be required to make investments or dispose of securities during unfavorable market circumstances solely to achieve compliance with its 80% investment policy. In addition, forced securities purchases to ensure compliance with the 80% requirement could also interfere with a fund's obligations and procedures to meet redemptions required to be made in cash.

We favor a principles-based approach to afford portfolio managers sufficient flexibility to address situations not identified in the Proposed Amendments, as exist today. For example, we note that a fund could also breach its 80% investment policy due to the issuer of an underlying security changing its operational focus over time or in connection with significant acquisitions or divestitures or in response to market developments. The breach of the 80% requirement under these circumstances would not be due to the portfolio manager's acquisition of securities nor a change in the fund's investment strategy.

Compliance and Brokerage Costs. The adoption of the Proposed Amendments would impose additional, significant compliance costs on funds. Funds would have to create new compliance policies and procedures and associated technology tools to manage compliance with

[13] In fact, the Commission requests comment in the Release on the extent to which "portfolio drift" exists. *See* Release, *supra* note 2, at 36,604.

a maintenance test, the cost of which would make no contribution to portfolio management or investment performance. A fund could also incur significant brokerage transaction costs in connection with portfolio transactions intended solely to return it to compliance with its 80% investment policy, particularly in times of high market volatility, such as during the COVID-19 pandemic. For funds that invest in accordance with a strategy that includes a low portfolio turnover component, causing the fund to incur brokerage costs for this purpose could be inconsistent with the strategy and would likely outweigh any perceived benefits.

Proposed Time Periods for Returning to Compliance Are Insufficient. We believe that the proposed exception time periods for returning to compliance with the Rule are insufficient, particularly during periods when entire sectors or geographic markets may be significantly disrupted. Issuers, governmental authorities and regulators take time in responding to market events. Portfolio managers require time to gather and digest information on issuers and responses to events before deciding how best to reallocate portfolios. We believe that the proposed time periods would essentially serve as windows to lock in portfolio losses during times of market stress. For fully-transparent exchange-traded funds, this would be particularly harmful. In short, the decreased portfolio flexibility contemplated by the proposed requirements could force a portfolio manager to make investment decisions that may not align with his or her planned execution of a fund's investment strategy nor be in the best interests of the fund and its shareholders.

IV. The Plain English/Established Industry Use Requirement and Application to Investment Focus

The standard contemplated by proposed Rule 35d-1(a)(2)(iii) would require that any terms used in the name of a fund suggesting an investment focus be consistent with the meaning of the plain English term or established industry use. We believe that the current approach under the Rule, which generally allows an investment company to use any *reasonable* definition of the terms used in its name, is appropriate.

We acknowledge, as the Commission does, that certain interpretations with respect to the Rule are inconsistent, somewhat unpredictable, and require significant attention from Commission staff, and from funds as well. Whether the Rule, and the related 80% investment policy, applies to a particular fund name is important to investors, and it is also important to funds. When two funds have similar names and only one of them is subject to an 80% investment policy, inconsistent outcomes can result for both investors, who may have less certitude in what a fund invests, and for funds, which can be placed at a competitive disadvantage because an 80% investment policy restricts an adviser's investment discretion.[14]

1. Unnecessary, Potentially Contradictory and Vague and Confusing

We believe that the "plain English *or* established industry use" standard is unnecessary, potentially contradictory and vague, and will likely cause confusion for the fund industry

[14] For advisers that offer thematic strategies, this disadvantage is particularly present, but the Proposed Amendments would do nothing, in our view, to address this matter.

participants, including investors.[15] We note that the Commission's "plain English" standard[16] *already applies* to all prospectus disclosures, thereby making the proposed requirement unnecessary. At a minimum, an explanation of how the proposed "plain English meaning" standard operates in this context, *i.e.*, as applied to terms used in the fund's name, should be better explained and distinguished from the existing standard.

The meaning of, and the relationship between, the two separate standards (*i.e.*, "plain English" and "established industry use") is potentially contradictory and opaque at best. The proposed standard would appear to permit a fund to select either the "plain English" component or "industry use" component of the standard. We fail to see how this approach would be helpful in comparing funds with names using the same terms. Moreover, we believe the "established industry use" component is open to various interpretations, making its application potentially confusing. It also may be difficult to determine which terms are deemed consistent with established industry use. For example, different advisers describe the same investment approach in varying ways (see below for the discussion on value and growth funds), the use and meaning of terms will vary over time, and not all companies have a single focus (including companies that may be leaders in industries that are not their primary sources of revenues).

2. Application to Investment Focus

The Proposed Amendments would impose the 80% investment policy requirement on a fund based on the words that connote an "investment focus." In this context, investment focus means focus in a particular type of investment, a particular industry or group of industries, particular countries or geographic regions, or investments that have particular characteristics. For a fund with multiple words in its name falling within the scope of "investment focus," the 80% investment policy would need to address all of those words.[17]

It is not apparent how the plain English/established industry use standard would better ensure that fund names are more consistent with a reasonable investor's likely understanding of a fund's investment focus than the current "reasonable definition" approach or how the proposed standard offers more meaningful protection to investors. This is particularly the case when the term or terms used in a fund name are succinctly and clearly defined in the prospectus disclosure (which many funds now typically do even in the absence of a formal requirement).

While we agree with the Commission that a term in the fund's name should not be used in a manner that does not match the fund's investments, we do not agree with the assertion that

[15] *See* Release, *supra* note 2, at 36,600 ("Consistent with the current names rule, funds would be able to define terms used in their names in a reasonable way . . ."); Release, *supra* note 2, at 36,611 (In adopting the Names Rule, "the Commission also stated that, generally, a fund may use any reasonable definition of the terms used in its name and should define the terms used in its name in discussing its investment objectives and strategies in the prospectus.").

[16] *See* SEC, FORM N-1A, at General Instructions B.4(c), available at https://www.sec.gov/files/formn-1a.pdf (last visited Aug. 10, 2022) (indicating that the plain English requirements of rule 421 under the Securities Act of 1933 apply to prospectus disclosure in Part A of Form N-1A).

[17] *See* Release, *supra* note 2, at 36,598 n.33. We also think that understanding of the final Rule would be enhanced if the Commission addresses the relationship between the 80% basket under the proposed Rule and the concentration policy disclosure requirement contained in Section 8(b)(1)(E) of the ICA.

the proposed standard would better address concerns that a fund sponsor might subvert an investor's reasonable expectations based on a fund's name by defining a given term in the name in prospectus disclosure that is inconsistent with the fund's investments.[18] In support of its proposed standard, the Commission states, as an example, that a fund that calls itself a "solar energy fund" would not be able to use disclosure to qualify the name in the prospectus by stating that the fund's 80% basket includes investments in the securities of any type of alternative energy company.[19] But under the current "reasonable definition" approach, the staff could also find that using explanatory prospectus disclosure for the fund name in such a way is not logical or sensible (given the lack of meaningful nexus between alternative energy companies broadly and a focus on solar energy companies as suggested by the fund name) and that the fund name is materially deceptive or misleading even if the fund's related prospectus disclosure defines the given term in the name to match the fund's investments. In this regard, from a regulatory standpoint, a fund with a name that does not reflect its investments would clearly not be compliant with its 80% investment policy and would violate the current Names Rule (and Section 35(d)), irrespective of any disclosure that seeks to "cure" the disconnect between the fund name and its investments. Thus, determination of a potential violation of Rule 35d-1 under these circumstances would not be dependent on or facilitated by an analysis under a plain English/established industry use standard.

Moreover, we think that adoption of the proposed standard would likely produce less helpful fund disclosures. For example, under this standard, funds using terms such as "value" or "growth" in their names would be considered to have names suggesting an investment focus and therefore would be subject to the proposed standard. As the Release recognizes, advisers define terms such as value and growth differently; one adviser may consider a factor or factors that another manager does not, and advisers may weigh factors differently. Reasonable definitions for these terms could potentially be questioned under the proposed standard, and implementation of the standard could potentially lead to the broad and unnecessary reconsideration (and perhaps even removal) of disclosures in order to increase conformance to an "established industry use" standard. Some advisers might change or remove disclosures to more closely mimic a proposed standard even though their investment strategy has not changed. This could result in less transparent and accurate disclosures and increased use of less informative boilerplate disclosures. Adoption of the proposed standard would likely extend to fund names for which there is no indication that investors are being misled with respect to the investment focus of such funds (unlike ESG or those with similar meanings, as indicated by the Commission).

3. Other Concerns with the Proposed Standards

- We think that the proposed standard may discourage use of fund names that may be more descriptive in favor of more generic, or less descriptive and accurate names, particularly with respect to markets or sectors that are not fully mature. For example, the definition of "green bonds," which are relatively new, may represent an investment universe that may be defined differently (perhaps significantly so) among advisers but could be better explained through prospectus disclosure. With adoption of the proposed standard, a fund

[18] *See* Release, *supra* note 2, at 36,613.

[19] *See id*.

investing in such bonds might opt to adopt a broader and more recognizable fund name that captures such "green" investments but is less descriptive of the fund's core investments and thus less useful to potential investors.

- It is not uncommon for a fund to include in its name words that reflect a sector or industry (or sub-industry), with further explanation in the summary prospectus and statutory prospectus of what types of issuers the fund considers to be within that sector or industry, consistent with the Commission's well-developed existing fund disclosure regime.[20] Referencing "established industry use" without recognition that industries can change, and industry terminology can evolve, seems like a recipe for perpetuating ambiguity and debate. Furthermore, investors in a fully-transparent ETF can clearly see the companies in which the fund invests. Fund investors should not be restricted from access to evolving issuers or industries because of limitations imposed by compliance with the Rule. We encourage the Commission to reconsider whether this is the best approach to the problem. In our view, the better approach – and the one supported by Section 35(d) – is to identify specific fund names that are misleading and address them accordingly.

- Another interpretive issue arising from the "investment focus" requirement would seem to perpetuate the disclosure quagmire that already results when industry terms are used in a fund name. In some cases, specific references to issuer categorization by industry, such as by SIC code, NAICS code or GICS classification (which are not likely to be recognized by the retail investors that the Proposed Amendments are primarily designed to protect) will not be particularly helpful to an investor.

- This approach also assumes that all issuers fall into a single category for investment focus purposes. This is simply not the case. While there are many companies that engage primarily in a single line of business, there are also many companies that engage in multiple lines of business, which may be vertically or horizontally connected and may also be unconnected by industry or sector but may have other synergies, such as geographic location, technology (hardware or software) overlaps, or other features.[21]

[20] We note that while the summary prospectus was intended to be short, even with a layered hyperlink approach, it is not uncommon for non-index funds to have more than one page of summary prospectus disclosure explaining core elements of the fund's investment strategy. In some cases, this disclosure is the explanation of the fund's name and is provided more in response to staff comments than out of concern to avoid investor confusion.

[21] For example, Tesla Inc. identifies itself as having two separate lines of business, each of which falls into a different industry, (i) automotive and (ii) energy generation and storage. It would be strange to say that Tesla could be in the 80% basket for a fund with an automotive term in its name, but not for a fund in the energy sector, notwithstanding that Tesla has innovated several significant alternative energy production and storage products and acquired the largest domestic residential solar energy generation company. Similarly, Honeywell International, Inc. is a market leader in its four separate lines of business, which are (i) aerospace, (ii) building technologies, (iii) performance materials and technologies and (iv) safety and productivity solutions. Among other things, they make products, software and services for aircraft, defense and space contractors, chemicals, advanced software, sensors, switches, control systems and energy management systems, materials for bullet-resistant armor and packaging, nylon, computer chips, cyber-defense technologies, PPE, apparel, footwear, warehouse management equipment and safety equipment, used in oil and gas, refining, pulp and paper, industrial power generation, chemicals and

These companies can come within multiple industry categorizations, depending on how a manager evaluates the company. For these types of companies, relying on a percentage threshold of revenue or income to assign them to a particular industry is unduly restrictive; deployment of capital, allocations of resources, locations of assets and resources devoted to a product line may be more indicative of where a company best lies (and these factors may be particularly important for long-term and thematic investors).[22] Permitting the adviser to describe why it considers certain companies to be within a particular strategy is a far more effective way of addressing the disclosure issue raised by conflicts between a fund's name and its investment program than requiring advisers to categorize investments into a 80% basket.

- A further concern arises from the current approach to fund names that use more than one term that could be perceived to have an "industry focus." The Release offers as an example the "ABC Wind & Solar Power Fund" and asks whether a fund should be required to have a mandatory minimum investment at all times in both industries suggested by the terms in the fund's name.[23] We believe that funds should retain the flexibility to adjust between the categories of companies suggested by terms in the fund's name based on their investment strategies. Requiring a fund to hold positions in a certain sector or industry, which may have a limited number of issuers, to meet a percentage test for fund names is not helpful to investors.[24]

- For a fund with a name connotating investment in a specific country, or geographical region, the staff has consistently required that disclosures explain how the fund's investments will relate to that geographic region (typically, that issuers will be economically tied to the country or region). The word "global" should not be viewed as a country or region in a fund name. Some funds use the term "global" in a fund's name to convey that the fund will invest in both U.S. and non-U.S. issuers. Other funds use the term "global" to convey that they invest in issuers, wherever located, that conduct business around the world, or make products or services used around the world. The staff should not impose a percentage ownership in non-U.S. companies if this word is used in a fund name because of such usage alone and should not require funds using the term

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petrochemicals, biofuels, life sciences, and metals, minerals and mining industries. It would be strange that only a fund focused on Honeywell's largest contributing industry could treat Honeywell as within its 80% basket.

[22] It seems particularly restrictive to require a 50% revenue, income or profits threshold here, because companies do not necessarily expect to see immediate profits, or income from new lines of business. Imposing that so-called "pure play" type standard on every company for an 80% policy would inappropriately restrict funds' investment options.

[23] *See* Release, *supra* note 2, at 36,600.

[24] If the staff is inclined to pursue this approach, at least some quantitative tests should be imposed so that all funds are on a level playing field. For example, a company could be considered within a particular industry if a certain percentage of its resources – such as 15% – are allocated to activities in that industry, or a percentage of its revenues or profits are derived from that industry. The threshold number should be meaningful but not excessive and some alternative recognition event should be permitted to replace the quantitative test. Threshold numbers should be relatively low because it can take time for new business lines to produce results. At the same time, the goal is not to impose an overly complicated regime that would prevent funds from implementing their best investment ideas because of compliance issues around an issuer's categorization for purposes of the Rule.

"global" in their name to adopt an 80% investment policy with respect to this word alone. Instead, the staff should continue its current approach of ensuring that funds explain to investors what they mean when they use this word in a fund name or in describing an investment strategy.

V. Form N-PORT Requirement

As noted above, the Proposed Amendments would add a new reporting item for funds subject to the 80% investment requirement. This new item would require a fund to report on its Form N-PORT (i) the value of the fund's 80% basket, as a percentage of the value of the fund's assets and (ii) if applicable, the number of days that the value of the fund's 80% basket fell below 80% of the value of the fund's assets during the reporting period. This item would also require the fund to indicate with respect to each portfolio investment whether the investment is included in the fund's 80% basket.

For the reasons set forth above, we believe that these Proposed Amendments are unwarranted, unduly burdensome and will be costly to implement and maintain – costs which will ultimately be passed on to investors. The primary purpose cited by the Commission in proposing these requirements is to assist it in evaluating compliance with the Proposed Amendments.

For larger fund complexes with multiple investment companies and series of investment companies with overlapping portfolio holdings, the task of identifying each portfolio investment as a component of the 80% basket with respect to each fund will require significant system developments and other requirements, the costs of which will be borne by shareholders. In light of the foregoing, this requirement should be eliminated from any final Rule.

VI. Recordkeeping Requirements

The Proposed Amendments would require a fund to maintain written records documenting either (i) its compliance with the 80% investment and operational policies ("Name Policy") requirements of the Rule or (ii) its analysis that the Name Policy is not required under the Rule. As to the avenue described under clause (i), the written records supporting compliance would include (a) a record of which investments are included in the fund's 80% basket and the basis for including each such investment in the fund's 80% basket, (b) the value of the fund's 80% basket, as a percentage of the value of the fund's assets, (c) the reasons for any departures from the 80% investment policy, (d) the dates of any departures, and (e) any notice sent to the fund's shareholders.

Written Records of Analysis That the Name Policy Is Not Required. The Proposed Amendment would require funds not subject to the substantive requirements of Rule 35d-1 to analyze and document that such is the case – in effect, to have to prove a negative. As a result, all funds would, in one way or another, be subject to the requirements of Rule 35d-1. We believe that adopting such a requirement is not authorized by Section 35(d). In any event, such a requirement would require these funds to incur unnecessary costs and expenses (associated with the initial determination and documentation, compliance policy amendments and other ongoing recordkeeping costs), which far outweigh any benefit from implementing the requirement. These costs would be borne ultimately by shareholders of these funds.

Written Records Supporting Compliance. The recordkeeping provisions impose substantial new compliance burdens on funds that adopt an 80% investment policy. We think that certain provisions would be costly and unduly burdensome, particularly to the extent that compliance with such requirements may not be easily automated, such as the requirements to include a basis for including each investment in the fund's 80% basket and the reasons for any departures from the fund's 80% investment policy. Such burdens could impose significant obligations on fund personnel, depending on the frequency and nature of the particular fund's investment activity.

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We appreciate the opportunity to comment on the Proposed Amendments. If you have any questions regarding this letter, please contact Paul M. Miller (202-661-7155), Robert M. Kurucza (202-661-7195), Alexandra Alberstadt (212-574-1217) or Lancelot A. King (202-661-7196) at the telephone number indicated.

Very truly yours,

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