INVESTMENT COMPANY INSTITUTE®

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July 31, 2023

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

Re: *Investment Company Names (File No. S7-16-22)*

Dear Ms. Countryman:

The Investment Company Institute[1] is writing to supplement our views on the Securities and Exchange Commission's proposal to amend Rule 35d-1 ("Names Rule"), the rule that governs fund names ("Proposal").[2] In doing so, we recognize, and express support for, Chair Gensler's willingness to consider comments received after the close of formal comment periods.[3] Given the

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $30.1 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $8.8 trillion in regulated fund assets managed outside the United States. ICI also represents its investment adviser members in their capacity as managers of certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

[2] *See* Rule 35d-1 under the Investment Company Act of 1940 ("1940 Act") and Investment Company Names, SEC Release No. IC-34593 (May 25, 2022), available at https://www.sec.gov/rules/proposed/2022/ic-34593.pdf ("Proposing Release"). We provided initial comments on several aspects of the Proposing Release in a letter submitted on August 16, 2022. *See* Letter from Eric J. Pan, President & CEO, ICI, and Susan M. Olson, General Counsel, ICI, to Vanessa A. Countryman, Secretary, SEC, dated August 16, 2022 ("2022 Letter"), available at https://www.ici.org/system/files/2022-08/22-ici-cl-names-rule.pdf. We provided supplemental comments relating to certain tax-exempt funds in a letter submitted on May 22, 2023. *See* Letter from Dorothy M. Donohue, Deputy General Counsel, Securities Regulation, ICI, to Vanessa A. Countryman, Secretary, SEC, dated March 22, 2023, available at https://www.ici.org/system/files/2023-05/23-cl-proposed-names-rule-amend.pdf.

[3] *See* Testimony of Chair Gary Gensler Before the United States House of Representatives Committee on Financial Services, April 18, 2023, available at https://docs.house.gov/meetings/BA/BA00/20230418/115751/HHRG-118-BA00-Wstate-GenslerG-20230418.pdf ("With the closing of a formal comment period, staff begins its work to account for this important public input but continues to receive additional comments, which the Commission may consider. We greatly benefit from public input and consider adjustments that the staff, and ultimately the Commission, think are appropriate.");*id.*, available at

Commission's volume and pace of rulemaking, it is particularly important for the public to have the ongoing opportunity to comment on proposed rulemakings.[4]

We recognized in our 2022 Letter that the name of a fund is a tool for communicating with investors. At the same time, we pointed out that investors should not place undue reliance on a fund's name because it can only be a *starting point* for investors and must be read in conjunction with other important, more detailed, information about a fund. Our surveys of mutual fund-owning households confirm that the overwhelming majority of investors look beyond a fund's name when making investment decisions. For example, investors focus on investment strategies, performance, and fees, information that appears in regulatory and marketing materials.

This letter provides additional information for the Commission to consider in evaluating the quantity and quality of information that fund investors may receive about the fund concurrently with seeing a fund's name. We also supplement our comments related to the Commission's authority under Section 35(d) of the 1940 Act. Finally, we submit that a fund's name is important protected commercial speech, and as such, we express doubts about the consistency of the Proposal with the First Amendment to the US Constitution.

I. Regulatory Processes and Requirements Already Exist to Ensure that Fund Communications Contain Key Information.

We support the Commission continually improving and modernizing fund disclosure and believe doing so is an effective approach to help enhance investor understanding of funds. Rather than applying a new set of prescriptive limitations and reporting obligations in connection with fund names, the Commission should more closely consider the value of the multitude of fund communications.

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https://archive.org/details/CSPAN2_20230419_080500_Securities__Exchange_Commissioner_Testifies_Before_House_Financial.../start/7800/end/7860 ("We often consider comments well beyond that period of time and continue to receive comments."). *See also*, Market Data Infrastructure, SEC Release No. 34-90610 at 23 (Dec. 9, 2020), available at https://www.sec.gov/rules/final/2020/34-90610.pdf ("The Commission has considered all comment letters received to date, including comments that were submitted after the comment deadline had passed.").

[4] We, along with several other trade organizations, previously expressed concerns about "exceedingly short comment periods associated with numerous concurrent potentially interconnected rule propos[als] that touch on significant changes to the operational and regulatory regime applicable to financial firms." See Letter to SEC Chair Gensler from Alternative Credit Council (ACC); Alternative Investment Management Association (AIMA); American Bankers Association (ABA); American Council of Life Insurers (ACLI); American Investment Council (AIC); Banking Policy Institute (BPI); Bond Dealers of America (BDA); FIA Principal Traders Group (FIA PTG); Financial Services Forum (FSF); Institute of International Bankers (IIB); Institute for Portfolio Alternatives (IPA); Investment Adviser Association (IAA); Investment Company Institute (ICI); Loan Syndications and Trading Association (LSTA); Managed Funds Association (MFA); National Association of Corporate Treasurers (NACT); National Association of Investment Companies (NAIC); National Venture Capital Association (NVCA); Real Estate Roundtable (RER); Risk Management Association (RMA); Securities Industry and Financial Markets Association (SIFMA); Securities Industry and Financial Markets Association Asset Management Group (SIFMA AMG); Security Traders Association (STA); Small Business Investor Alliance (SBIA); and U.S. Chamber of Commerce (the Chamber) Center for Capital Markets (CCMC) (April 5, 2022), available at https://www.ici.org/system/files/2022- 04/22-ici-letter-to-sec-chair-gensler.pdf.

Summary prospectuses communicate to investors the relationship between a fund's name and its investment strategies, and that disclosure is subject to the Commission's staff review before a fund is sold to investors and periodically thereafter.[5] This may be one of the reasons that there is a general lack of enforcement actions or investor lawsuits alleging materially misleading fund disclosure, including misleading fund names.[6]

Funds also communicate with investors via sales materials (including websites), which often provide, or link to, additional information about a fund. The Commission and Chair Gensler have referred to this Proposal and the regulation of fund names as "truth in advertising"[7] and have expressed concern, in particular, about this concept in the context of ESG fund strategies and perceived "greenwashing."[8] We submit that the Financial Industry Regulatory Authority (FINRA), review process, described below, already effectively protects investors from misleading fund sales material and request that the Commission consider the FINRA review process before finalizing any amendments to Rule 35d-1.

Much of the sales materials that funds use must be submitted to FINRA for review.[9] Rule 2210 requires funds to file certain retail communications[10] with FINRA within 10 business days of first use or publication. FINRA staff then reviews the filed materials for compliance with applicable FINRA rules, which require, among other things, that all communications be fair and balanced and not misleading.[11]

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[5] *See, e.g.*, Tailored Shareholder Reports, Treatment of Annual Prospectus Updates for Existing Investors, and Improved Fee and Risk Disclosure for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements, SEC Release No. IC-33963 (Aug. 5, 2020) at notes 288 and 289 (explaining that a "fund typically must file a post-effective amendment to its registration statement that includes material changes at least 60 days prior to the time the amendment is effective" and that "the staff reviews post-effective amendments to fund registration statement that contain material changes."). In addition, certain fund filings are reviewed no less frequently than every three years pursuant to Section 408 of the Sarbanes-Oxley Act of 2002.

[6] The Commission too seems to have recognized that overreliance on fund names is a low-risk area. Each year, the Commission's Division of Examinations issues priorities for the coming year, and our review of the priorities for the past four years revealed that fund names were not included as a priority area. *See, e.g.*, Securities and Exchange Commission, 2022 Examination Priorities, available at https://www.sec.gov/files/2022-exam-priorities.pdf. We found one reference to compliance with the Names Rule in the Division of Examinations "2021 Observations from the Registered Investment Companies Examinations." There, without any additional detail, the staff merely stated that they had observed that some funds and their advisers had "inadequate policies and procedures" for "monitoring portfolios for compliance with the 80% rule." We agree that monitoring is appropriate but it does not serve as a valid basis for the scope of the Proposal.

[7] *See, e.g.*, Prepared Remarks Before the Asset Management Advisory Committee, Chair Gary Gensler, SEC (July 7, 2021), available at https://www.sec.gov/news/speech/gensler-amac-2021-07-07; Proposing Release at 82 (stating that the Proposal's approach to ESG integration funds is "designed to promote 'truth in advertising' in fund names").

[8] *See, id.*

[9] *See* FINRA Rule 2210.

[10] "Retail communication" is defined to mean any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period.

[11] *See* FINRA Rule 2210(d)(1).

Importantly, FINRA has prioritized review of any fund ESG-related communications with the public. The 2023 Report on FINRA's Examination and Risk Monitoring Program highlighted FINRA's focus on fund communications promoting ESG factors and listed certain areas of examination and review focus.[12] We further understand from discussions with senior FINRA staff that they review ESG-related communications to ensure that the materials are consistent with fund prospectus disclosure and that there is sufficient balancing language and risk disclosure to satisfy FINRA requirements. We understand that they also closely review any claims regarding fund rankings, ratings or awards, particularly in the ESG space. This vigorous review system works well to ensure that funds engage in "truth in advertising," including with respect to ESG-related communications.

We urge the Commission additionally to consider its own robust set of requirements that govern fund marketing materials,[13] which "encourage the provision of information to investors that is more balanced and informative, particularly in the area of investment performance."[14]

In sum, SEC and FINRA rules, accompanied by comprehensive, multifaceted staff review, serve to ensure that fund communications are clear and not misleading, making many of the proposed amendments to the Names Rule unnecessary.

II. The Proposal Exceeds the Commission's Rulemaking Authority Under Section 35(d) of the 1940 Act.

The Supreme Court has recently reiterated that agencies must stay within the bounds of their statutory authority,[15] and other cases provide guidance regarding an agency's authority to engage in rulemaking.[16] As we explained in our 2022 Letter,[17] ICI believes that the Proposal, if adopted, would exceed the Commission's authority under Section 35(d) of the 1940 Act[18] "to define such names or titles as are materially deceptive or misleading." We believe the Commission lacks authority to adopt the Proposal under that authority for two distinct reasons.

The Commission has authority under Section 35(d) to "*define*" misleading names. Defining means, in essence, setting forth boundaries with some precision and specificity. Our 2022 Letter

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[12] 2023 Report on FINRA's Examination and Risk Monitoring Program, FINRA at 41 (Jan. 2023), available at https://www.finra.org/sites/default/files/2023-01/2023-report-finras-examination-risk-monitoring-program.pdf.

[13] *See, e.g.*, Rules 482 and 156 under the Securities Act of 1933.

[14] Amendments to Investment Company Advertising Rules, SEC Release No. 33-8294, 68 FR 57760, 57760 (Oct. 6, 2003), available at https://www.govinfo.gov/content/pkg/FR-2003-10-06/pdf/03-25114.pdf

[15] *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Alabama Ass'n of Realtors v. HHS*, 141 S.Ct. 2485 (2021) (per curiam).

[16] The legality of every rule promulgated by an agency depends on "whether the agency has stayed within the bounds of its statutory authority." See, e.g., *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015). "An agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." *New York Stock Exch. LLC v. SEC*, 962 F.3d 541, 546 (D.C. Cir. 2020).

[17] 2022 Letter at 5.

[18] 15 U.S.C. § 80a-34(d).

highlighted our concerns related to the interpretive issues that the Proposal creates,[19] and we are concerned that the Proposal is too vague and ambiguous to be an exercise of the Commission's "defining" authority. The Proposal's central concept, "particular characteristics" of an "investment focus," is ambiguous and subjective. Even if funds could ascertain the boundaries of "particular characteristics," the "particular characteristics" within each category may lack objective, ascertainable meanings. And the Proposal fails to explain how fund managers and investors should determine whether a given investment is consistent with a fund's 80% investment policy. We therefore question the Commission's authority under Section 35(d).

Additionally, Congress, via Section 35(d), authorized the Commission to define fund names or titles that are "*materially* deceptive or misleading." Materiality has a well-developed meaning within securities law.[20] Congress could have vested the Commission with authority to regulate all fund names in any manner the Commission saw fit, but it did not. We are concerned that the Proposal does not satisfy (and essentially ignores) the materiality requirement and would not be an appropriate exercise of the Commission's authority under Section 35(d). Nothing in the record shows that there are materially deceptive or misleading names currently in use by funds that need to be regulated, or that the Proposal's approach would restrict only materially deceptive or misleading names.

III. Aspects of the Proposal Raise Constitutional Concerns under the First Amendment.

Our 2022 Letter identified numerous problems with the Commission's Proposal to expand the scope of the Names Rule, adopt ESG-related restrictions for fund names, and enhance Form N-PORT disclosure requirements. We are concerned that each of these aspects of the Proposal raises significant constitutional concerns by proposing to restrict speech protected by the First Amendment.

As an initial matter, we note that the Supreme Court has made clear, as recently as June 2023, that the First Amendment protects commercial as well as noncommercial speech. It is therefore appropriate to evaluate the Proposal against that legal backdrop.[21] Other Supreme Court and lower court decisions provide guidance on how the government may regulate protected commercial speech[22] and on the government's ability to compel speech.[23]

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[19] 2022 Letter at 8-13.

[20] *See, e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011).

[21] *See 303 Creative, LLC v. Elenis*, 143 S. Ct. 2298, 2316 (2023); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Com'n of N.Y.*, 447 U.S. 557, 566 (1980).

[22] "[B]road prophylactic rules in the area of free expression are suspect." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 683 (1994) (internal quotation marks omitted). And "a regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564. If the SEC "could achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002). Content-based rules are subject to particularly searching review. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

[23] *See, e.g., Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).

First, the Proposal is a content-based restriction of speech because it singles out certain categories of speech for disfavored treatment. For example, under proposed Rule 35d-1(d), fund names using ESG terms would be subject to heightened restrictions while names using non-ESG terms would not be similarly restricted. This content-based restriction of protected speech is presumptively unconstitutional and must satisfy the most rigorous form of strict scrutiny under the First Amendment. For the reasons we and other commenters have already explained, the Proposal is not narrowly tailored to further a compelling governmental interest.

Second, the Proposal would expand the scope of the Names Rule to include terms suggesting investments with "particular characteristics."[24] This element of the rule operates as a restriction on funds' ability to speak through their names and must satisfy heightened scrutiny under the First Amendment. We are concerned that the Proposal fails to identify sufficient evidence to justify expanding the scope of the Names Rule in the proposed manner and also fails to sufficiently tailor the rule's expanded scope to address any identified problems. Moreover, as discussed above, the proposed requirements are ambiguous on multiple levels. That failure to specify the contours of the rule's scope raises vagueness concerns that are particularly serious in the First Amendment context.

Third, ICI is concerned that the proposed requirement that funds publicly disclose various aspects of Names Rule compliance or noncompliance on Form N-PORT compels speech without sufficient justification. In particular, the Proposal would require funds to disclose on Form N-PORT: (1) the value of a fund's 80% basket as a percentage of the value of the fund's assets; (2) the number of days of noncompliance with a fund's 80% investment policy during the reporting period; and (3) which investments fall within the fund's 80% basket. For the reasons we and other commenters have already explained, these disclosure requirements would be unduly burdensome, and they would require funds to disclose subjective information on which investment managers may appropriately disagree, such as identifying whether a particular investment accords with a fund's investment focus.

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We appreciate the opportunity to provide supplemental comments on the proposed amendments to the Names Rule. If you have any questions, please contact either one of us.

Sincerely,

/s/ Eric J. Pan

Eric J. Pan
President & CEO

[24] *See* proposed Rule 35d-1(a)(2).

/s/ Dorothy M. Donohue

Dorothy M. Donohue
Deputy General Counsel, Securities Regulation

cc: Chair Gary Gensler
Commissioner Hester Peirce
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