ONPOINT / A legal update from Dechert's Financial Services Group

SEC Expands Scope of Fund "Names Rule"

Authored by Matthew E. Barsamian, Brenden P. Carroll, Philip T. Hinkle, Corey F. Rose, Aaron D. Withrow, Nadeea R. Zakaria, Austin G. McComb and Robert Spiro

December 2023

Dechert LLP

SEC Expands Scope of Fund "Names Rule"

December 2023 / Authored by Matthew E. Barsamian, Brenden P. Carroll, Philip T. Hinkle, Corey F. Rose, Aaron D. Withrow, Nadeea R. Zakaria, Austin G. McComb and Robert Spiro

The Securities and Exchange Commission recently adopted significant changes to Rule 35d-1 under the Investment Company Act of 1940 (Names Rule), as well as certain forms and disclosure requirements on September 20, 2023 (Amendments).[1] Among other changes, the Amendments:

- Significantly expand the 80% investment policy requirement[2] to include fund names with terms suggesting an investment focus in investments that have, or whose issuers have, "particular characteristics," including "growth," "value" and terms indicating that the fund's "investment decisions incorporate one or more [ESG] factors."
- Require, for funds that adopt an 80% Investment Policy, that any terms used in the fund's name that suggest either an investment focus or that the fund is a tax-exempt fund be consistent with the plain English meaning or established industry use of those terms.[3]
- Define a time period for funds that deviate from their 80% Investment Policy to come back into compliance, generally 90 days or as soon as practicable for passive breaches or within 90 days for breaches due to abnormal circumstances.
- Require funds to review the classifications of their portfolio assets under their 80% Investment Policies at least on a quarterly basis.
- Require funds to calculate assets for Names Rule purposes, including compliance with the 80% Investment Policy, by valuing derivatives using their notional amount and short sales using the value of the asset sold short (with certain required and permitted adjustments).
- Amend the notice requirement associated with changes to a fund's name or 80% Investment Policy.
- Require additional disclosure within a fund's prospectus to define terms used in the fund's name, including related investment criteria for selecting investments described by the name.

---

1 Investment Company Names, Release No. IC-3500 (September 20, 2023) (Adopting Release). At times, this *Dechert OnPoint* tracks the Adopting Release without the use of quotation marks. Terms not defined in this *Dechert OnPoint* have the meaning assigned to them in the Adopting Release. SEC Chair Gensler and Commissioners Peirce, Crenshaw and Lizárraga voted in favor of the Amendments; Commissioner Uyeda voted against the Amendments.

2 The Names Rule currently requires that funds with names suggesting investment in a particular type of investment, industry, country or geographic region adopt a policy to invest, under normal circumstances, at least 80% of their respective assets (net assets plus the amount of any borrowings for investment purposes) in such type, industry, country or geographic region (80% Investment Policy). The Names Rule also contains a similar requirement for funds with names suggesting that the funds' distributions are exempt from federal income tax or from both federal and state income tax. Unless otherwise specified, the term "fund" as used in this *Dechert OnPoint* refers to a registered investment company and business development company (BDC).

3 The SEC did not change the requirement in current Rule 35d-1 that funds with names suggesting that their distributions are exempt from federal income tax or from both federal and state income tax must adopt a fundamental 80% Investment Policy. The Amendments continue to allow "tax-exempt" funds to adopt either an asset test or an income test to comply with its 80% Investment Policy. *See* Adopting Release at n. 184.

The Amendments are intended to modernize and enhance the investor protections provided by the Names Rule given the important information that fund names can convey to investors and industry developments over the last two decades, including the growth of funds that incorporate ESG criteria into their investment processes.[4] Nevertheless, a number of interpretive questions remain concerning the scope of the Amendments and the guidance in the Adopting Release. Additional guidance in the form of an FAQ or otherwise could help to resolve certain such questions.[5]

Background

Section 35(d) of the 1940 Act prohibits a registered investment company (as does Section 59 of the 1940 Act for BDCs) from adopting as part of its name or title any word or words that the SEC finds are materially deceptive or misleading. However, given the statute's cumbersome procedural hurdles, it was rarely used or invoked. To address this, as part of the National Securities Markets Improvement Act of 1996, Congress amended Section 35(d) to authorize the SEC "by rule, regulation, or order, to define such names or titles as are materially deceptive or misleading."[6] The SEC adopted the Names Rule under this rulemaking authority in Section 35(d) of the 1940 Act in 2001. The Names Rule deems certain types of fund names to be materially deceptive or misleading for purposes of Section 35(d) unless certain conditions are satisfied, such as adoption of an 80% Investment Policy.[7] Depending on the circumstances and the type of fund name, an 80% Investment Policy may be fundamental or non-fundamental. Changes in a fundamental 80% Investment Policy require shareholder approval whereas changes in a non-fundamental 80% Investment Policy require 60-days' prior notice to shareholders (Notice).

Proposal and Notable Departures in the Amendments

The SEC originally proposed amendments to the Names Rule on May 25, 2022 (Proposal) that, among other things, would have significantly expanded the scope of the Names Rule, imposed a new ongoing compliance framework and established new recordkeeping and disclosure requirements.[8] The Proposal followed a 2020 SEC request for public comment on the effectiveness of and potential alternatives to the existing framework for addressing fund names.[9] The SEC released the Proposal on the same day a companion rulemaking on ESG matters was issued.[10] Under the ESG Proposal, a fund that has a name that includes terms indicating that its investment decisions incorporate one or more ESG factors would meet the definition of an "ESG-focused fund."

---

4 The SEC noted in the Adopting Release that the "breadth of ESG-related terms, as well as evolving investor expectations" fuel the "possibility of investor confusion and potential 'greenwashing' in fund names." *Id.* at section I.B.

5 Shortly after previous amendments to the Names Rule were adopted in 2001, the SEC released Frequently Asked Questions about Rule 35d-1 (Investment Company Names) (2001 FAQ).

6 The full text of Section 35(d) now reads: "It shall be 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 [SEC] finds are materially deceptive or misleading. The [SEC] is authorized, by rule, regulation, or order, to define such names or titles as are materially deceptive or misleading."

7 The Names Rule, before these Amendments were adopted, reached fund names that suggest: (1) government approval or guarantee; (2) investment in certain investments or industries; (3) investment in certain countries or geographic regions; or (4) that a fund's distributions are exempt from federal income tax or from both federal and state income tax. The 2001 FAQ provided guidance on which names were excluded from the rule. *See* 2001 FAQ, Questions 6-13.

8 Investment Company Names, Release No. IC-34593 (May 25, 2022) (Proposing Release).

9 Request for Comments on Fund Names, Release No. IC-33809 (Mar. 2, 2020).

10 Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, Release No. IC-34594 (May 25, 2022) (ESG Proposal).

As compared to "integration funds," which the Proposal defined as funds that consider one or more ESG factors alongside other, non-ESG factors in its investment decisions,[11] ESG-focused funds would be subject to different disclosure requirements under the ESG Proposal.

The Amendments depart from the Proposal in certain key respects. Notably, the SEC did not adopt aspects of the Proposal that would have designated as materially deceptive and misleading the use of ESG terms[12] in the names of integration funds, although funds with names suggesting ESG investments will be required to adopt an 80% Investment Policy nonetheless.[13] Further, among other significant departures from the Proposal, the SEC stated that the Amendments generally do not apply to terms such as global, international or, when describing a bond, intermediate term (or similar). The Amendments also require funds to review the classifications of investments for their applicability to the 80% Investment Policy at least quarterly instead of requiring monitoring on an effectively continuous basis, as in the Proposal. Moreover, the Amendments preserve the current requirements that a fund's 80% Investment Policy apply "under normal circumstances" and that compliance generally is measured at the time of investment, rather than creating a framework which delineated specified reasons that a fund may depart from its 80% Investment Policy.[14]

Overview of Amendments

Expanded Scope of the Names Rule

The SEC has expanded the Names Rule to require a fund to adopt an 80% Investment Policy if its name suggests a focus[15] "in investments that have, or whose issuers have, particular characteristics."[16] The SEC explained in the Adopting Release that the term "particular characteristics" is left undefined in the Amendments because it can be "adequately understood to mean any feature, quality, or attribute," and this broad construction

---

[11] *See* Proposing Release at section II.D. The ESG factors incorporated by integration funds into their investment decisions are generally no more significant than other factors in the investment selection process, such that ESG factors may not be determinative in deciding to include or exclude any particular investment in the portfolio. *Id*.

[12] For purposes of the Amendments, "ESG" terms include "socially responsible investing," "sustainable," "green," "ethical," "impact," or "good governance" to the extent they describe environmental, social, and/or governance factors that may be considered when making an investment decision. In response to comments, the SEC recognized that terms such as "sustainable" could refer to the overall result the fund seeks to achieve, rather than an ESG connotation, and a name including "sustainable growth," for example, could be a suitable name for a non-ESG fund, in a departure from the Proposing Release, although the Adopting Release notes that such a fund would be required to adopt an 80% investment policy in either event. *See* Adopting Release at section II.A.1.d

[13] Integration funds are defined in the Proposing Release as funds that incorporate one or more ESG factors alongside other, non-ESG factors, but the ESG factors are no more significant than the other factors in the investment selection process. *See* Proposing Release at section II.D.

[14] If a fund name includes global or international plus a term suggesting an investment focus, such as fixed income or growth, then it would require an 80% Investment Policy associated with fixed income or growth, as applicable. An 80% Investment Policy would continue to be required with respect to the use of the word "bond." *See* Adopting Release at section II.A.1.b. A fund would be required to reassess its compliance with its 80% Investment Policy no less frequently than quarterly. Amended Rule 35d-1(g).

[15] Where a fund's name suggests an investment focus that has multiple elements, the 80% Investment Policy is required to address each element, although there is no minimum or maximum amount of assets that must be dedicated to each element unless the fund's disclosure indicates otherwise. *See* Adopting Release at section II.A.1.c.

[16] The SEC clarified that the Amendments only expand the Names Rule in this area and funds that are currently required to adopt an 80% Investment Policy (i.e., funds whose names suggest a focus in a particular type of investments or industry, or in particular countries or geographic regions, or suggest certain tax treatment) under the Names Rule will still be required to do so. *See id.* at section II.A.1.

will "ensure that the rule remains evergreen."[17] For instance, to the extent that a fund uses a term in its name that suggests a thematic investment focus, the fund will be required to adopt an 80% Investment Policy.[18] The Adopting Release provided two different categories of examples of thematic terms that are within the scope of the Amendments, even though there may be reasonable questions about whether they suggest a focus in a particular type of investment or in investment in a particular industry or group of industries. These include: (1) terms that may be narrower or more expansive than an industry, such as "drones," "smart cities," "metaverse," and "big data" and (2) terms that are thematic but may not be considered by many to suggest a focus in a type of investment or a focus in a particular industry or group of industries, such as "millennial," "Gen Z," "biothreat," "gig economy," "meme stocks," and "post-Corona." The Amendments further identify "growth," "value" and terms indicating that a fund's investment decisions incorporate one or more ESG factor(s) as examples of names indicating a focus on investments or issuers having particular characteristics.[19] With regard to potential ambiguity of whether a term suggests an individual investment or portfolio results the SEC indicated such a fund's name would implicate the Names Rule: "If terms in a fund's name can reasonably be understood to reference either the characteristics of a fund's individual investments or the intended result of a fund's portfolio investments in the aggregate, the fund will be required to adopt an 80% investment policy, consistent with the proposal."[20]

However, as noted above, the Amendments generally will not apply to certain other names that have historically been interpreted as being outside the scope of the Names Rule, including global, international or intermediate term (or similar) bond. Similarly, terms that suggest a portfolio-wide result to be achieved (e.g., "real return," "balanced," "managed risk" and ESG uplift strategies), a particular investment technique (e.g., "long/short" and "hedged") or asset allocation determinations that evolve over time (e.g., "sector rotation" and "target date") remain outside of the scope of the Names Rule, with the caveat that these funds may be required to adopt an 80% Investment Policy to the extent that the words in their names could "reasonably be understood to reference" individual investments in addition to the overall intended result of the investments.[21] While the SEC noted in the Adopting Release that terms connoting a negative or exclusionary screening process (e.g., "fossil fuel-free") or referencing well-known organizations, affinity groups or a specific population of investors are not subject to the 80% Investment Policy requirement, they may still be found to be materially deceptive or misleading.[22]

Funds retain flexibility in defining the contours of their required 80% Investment Policies, ascribing definitions to the terms used in those policies, and determining (in many instances) what investments are appropriate to include in their 80% Investment Policy basket (80% basket).[23] The SEC indicated that a fund may find "a sufficient nexus exists between certain securities and a given industry if the securities are issued by companies that derive more than 50% of their revenue or income from, or own significant assets in, the industry," but that use of text analytics to measure the frequency of particular terms in an issuer's disclosures is insufficient to

---

17 *See id.*

18 The SEC in the Adopting Release noted that some of these thematic terms may already be considered within the current scope of the Names Rule, such as terms clearly suggesting a focus in a type of industry or groups of industries (e.g., terms suggesting a focus in cybersecurity, health and wellness, or travel and tourism).

19 Under the current rule, such names are generally considered by many fund sponsors to be investment strategies not subject to the 80% Investment Policy requirement.

20 *See id.* at section II.A.1.b.

21 *See id.*

22 *See id.* at nn. 128-29.

23 For funds of funds or other "acquiring" funds, the SEC indicated that it would be reasonable, under the Amendments, for a top-tier fund to count its entire position in an underlying fund towards the 80% Investment Policy in certain circumstances, such as where the underlying fund itself has an 80% Investment Policy. *See id.* at section II.A.1.c.

create a reasonable nexus on its own.[24] However, as noted above, any investment focus-related terms used in a fund's name will be required to be defined "consistent with those terms' plain English meaning or established industry use."[25]

Clarifications of "Materially Deceptive or Misleading"

The SEC also codified that compliance with a fund's 80% Investment Policy is not a safe harbor from the prohibitions on adopting a fund name that is materially deceptive or misleading under Section 35(d).[26] The following may be deemed to be materially deceptive or misleading practices: "substantial"[27] investments made outside the 80% basket that are "materially inconsistent"[28] to the fund's investment focus[29] or an index fund's 80% Investment Policy to invest in assets connoted by a specific index in circumstances where the reference index's composition is contradictory to the index's name.[30] The SEC stated that, as a result, index funds generally should adopt and implement written policies and procedures reasonably designed to ensure that an index selected by a fund does not have a materially misleading or deceptive name itself.[31] As noted above, the SEC declined to adopt a provision in the Proposal that would have designated any "integration fund" with ESG-related terms in its name as per se materially deceptive and misleading.[32]

Temporary Departures from an 80% Investment Policy

The Amendments retain two key aspects of the current Names Rule's principles-based approach by allowing funds to depart from their 80% Investment Policy "under normal circumstances"[33] and to determine whether an

---

24 *See id*.

25 Amended Rule 35d-1(a)(2)(iii).

26 That is, a fund's name may still be materially deceptive or misleading for purposes of Section 35(d) in certain circumstances even if it technically complies with the Names Rule. Amended Rule 35d-1(c); *see* Adopting Release at section II.A.5.

27 "Substantial" investments could include, for example, investing in a way "such that the source of a substantial portion of the fund's risk or returns is materially different from that which an investor reasonably would expect based on the fund's name." *See* Adopting Release at section II.A.5.

28 *See id*. The SEC in the Proposing Release instead used the term "antithetical," but the SEC declined to incorporate this language in the Amendments or the Adopting Release to not "create new requirements or standards with respect to the selection of investments in a fund's 20% basket that are not now present." *See id*. at n. 537; Proposing Release at section II.A.5.

29 The SEC provided the following examples of fund investments that could be materially deceptive or misleading for purposes of Section 35(d): a "green energy and fossil fuel-free" fund making a substantial investment in an issuer with fossil fuel reserves and 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 lower-yielding bonds. *See* Adopting Release at section II.A.5.

30 In addition, the SEC reiterated its view that an index fund generally would be expected to invest more than 80% of its assets in investments connoted by the applicable index. *See id*.

31 In response to commenters, the SEC confirmed that, while index funds should generally implement written policies and procedures ensuring that they comply with the requirements of section 35(d), the terms in a market index referenced in an index fund's name would not be subject to an 80% Investment Policy test that would be in addition to the fund's policy to invest at least 80% of its assets in the index's components required under the rule. *See id.*

32 The SEC is "continuing to consider comments" because this proposed provision implicates the companion rulemaking on ESG matters issued the same day as the Proposing Release. *See id.* at section I.C.2; *see also* ESG Proposal.

33 As noted above, the Proposal would have allowed departures from a fund's 80% Investment Policy only in discrete circumstances.

investment qualifies for the 80% basket at the time of acquisition.[34] However, the Amendments require a fund subject to the Names Rule to review the classifications of its portfolio investments under its 80% Investment Policy at least quarterly.[35] The SEC noted that, at a certain point, a departure from a fund's 80% Investment Policy may occur under normal circumstances when an investment's characteristics change, resulting in a different determination for 80% basket purposes (a phenomenon the SEC refers to as "drift").[36] The SEC recognized that although drift is a natural fluctuation in a portfolio, it could begin to change the nature of the fund fundamentally, undermining investor expectations created by the fund's name. Therefore, the SEC believes that a quarterly review requirement will ensure that drift of portfolio investments does not go unchecked but be less burdensome than an ongoing compliance requirement, which could require frequent portfolio rebalancing.

A fund may also, in other-than-normal circumstances, make investments that are not consistent with the fund's 80% Investment Policy for a limited period of time.[37] The Amendments allow funds to determine what constitutes other-than-normal circumstances.[38] The SEC clarified, however, that if a fund serially departs from its 80% Investment Policy under purported other-than-normal circumstances, this may suggest that such circumstances are in fact normal and flag questions about the appropriateness of the fund's name.

Regardless of whether the departure from the 80% Investment Policy was during normal circumstances or other-than-normal circumstances, a fund will be required to reattain compliance with its 80% Investment Policy within 90 consecutive days.[39] In the case of departures during normal circumstances, such as due to portfolio drift, a fund will be required to reattain compliance with its 80% Investment Policy "as soon as reasonably practicable" but, in any event within 90 consecutive days.[40] While a fund is out of compliance, all future investments must be made in a manner that will bring the fund back into compliance. The SEC clarified in the Adopting Release that a fund may change its name or seek exemptive relief from the SEC if it believes it would be appropriate to depart for a limited additional period beyond 90 days.[41]

---

[34] For example, the SEC explained in the Adopting Release that when making a new investment, a fund needs to consider the characteristics and value of the new investment and the value, but not the characteristics, of its existing investments to determine compliance with its 80% Investment Policy.

[35] Amended Rule 35d-1(b)(1)(i). The Proposal would have required continual or daily compliance monitoring. *See* Adopting Release at section II.A.2.

[36] *See* Adopting Release at section II.A2.b.

[37] Amended Rule 35d-1(b)(1)(ii).

[38] *See* Adopting Release at section II.B. As discussed above, this is in contrast to the Proposal which would have allowed departures from a fund's 80% Investment Policy only in discrete circumstances.

[39] Amended Rule 35d-1(b)(1)(i)-(ii); *see* Adopting Release at section II.A.2. The 90-day window in which a fund is required to reattain compliance begins when it identifies the departure in the instance of normal circumstances, or when the departure occurred in other-than-normal circumstances. *Id*. This does not apply to fund launches (which are permitted up to 180 consecutive days from the "date the fund commences operations" to come into compliance), reorganizations (no specified time period for reattaining compliance), and situations where 60-days' notice of a change in a non-fundamental 80% Investment Policy was provided to shareholders. The Proposing Release clarified that "as soon as reasonably practicable" does not require reattaining compliance "as soon as possible" in all instances. Instead, this phrase would allow "for consideration by the adviser of how to return to compliance in a manner that best serves the interest of the fund and its shareholders." *See* Proposing Release at n. 57.

[40] *See* Adopting Release at section IV.D.1.

[41] The SEC provided an example of a fund that anticipates resolving the departure but cannot do so within 90 days and seeks to avoid changing its name only to change it again in a short period of time.

Derivatives-Related Aspects of the Names Rule

As with the Proposal, the Amendments address (1) the derivatives instruments that a fund may include in its 80% basket and (2) the valuation of derivatives instruments for purposes of determining compliance with a fund's 80% Investment Policy. The Amendments also address short positions and physical short sales.

As under the Proposal, the Amendments define the term "derivatives instrument" to mean any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, or any similar instrument.[42]

Scope of Derivatives Instruments Included in 80% Basket

The Amendments provide that, in addition to any derivatives instrument that the fund includes in its 80% basket because the derivatives instrument provides investment exposure suggested by the fund's name, a fund may include in its 80% basket a derivatives instrument that provides investment exposure to one or more of the market risk factors associated with the investment focus that the fund's name suggests.

The SEC restated guidance that this approach recognizes that funds may use derivatives instruments to hedge exposures or to obtain exposure to market risk factors associated with a fund's investments (e.g., interest rate risk and credit spread risk). The SEC also explained that, to help determine whether a derivatives instrument provides this type of investment exposure, a fund "generally should consider whether the derivative provides investment exposure to any explicit input that the fund uses to value its name assets, where a change in that input would change the value of the security."

Valuation of Derivatives Instruments and Short Sales and Adjustments

The Amendments require that a fund must, in determining the value of a fund's assets for purposes of complying with the fund's 80% Investment Policy:

- Value each derivatives instrument, for both the numerator and the denominator in the 80% Investment Policy calculation, using the notional amount of the derivatives instrument.
- Adjust the notional value by converting interest rate derivatives instruments to their 10-year bond equivalents and delta adjusting options contracts.[43]
- Exclude from the 80% Investment Policy calculation derivatives instruments used to hedge currency risks associated with one or more specific foreign currency-denominated equity or fixed-income investments held by the fund, provided that such currency derivatives are entered into and maintained by the fund for hedging purposes and that the notional amounts of such derivatives do not exceed the

[42] The definition of derivatives instrument does not include physical short sales (which were not addressed in the Proposal). However, the Amendments address short sales within the valuation of derivatives instruments and short sales.

[43] The use of notional value and the adjustments mirror the Proposal.

value of the hedged investments (or the par value thereof, in the case of fixed- income investments) by more than 10 percent.[44]

The Amendments also require a fund to value each physical short position using the value of the asset sold short.

The Amendments also permit but do not require a fund to reduce the value of its assets (i.e., the denominator in the 80% Investment Policy calculation) by excluding:

- Cash and cash equivalents and U.S. Treasury securities with remaining maturities of one year or less, up to the notional amounts of the derivatives instruments and the value of assets sold short.[45]
- Any closed-out derivatives positions if those positions result in no credit or market exposure to the fund.[46]

Additional Considerations

Disclosures

The SEC added disclosure requirements to a fund's prospectus.[47] The Amendments will require a fund with an 80% Investment Policy to define in the fund's prospectus the terms[48] used in the fund's name related to its investment focus and the fund's investment criteria for selecting the investments described by that term. Specifically, the definitions of terms must be summarized in the summary prospectus and disclosed in the statutory prospectus. Funds will have flexibility to use "reasonable definitions" of the terms that their name uses, provided that the definitions of such terms have a meaningful nexus between the terms and the fund's investment focus and are consistent with their plain English meaning or established industry use.[49] The SEC in the Adopting Release explained a variety of sources may be used to derive plain English meaning or established industry use[50] and that this requirement should not prevent a fund from utilizing a term subject to industry debate. The

---

44 The SEC explains that exclusion of specified currency hedging derivatives instruments, which was not included in the Proposal, addresses commenters' concerns that the Proposal's approach to derivatives could limit the use of derivatives for hedging purposes (providing as an example a U.S. equity fund that invests up to 20% of its assets in stocks of non-U.S. companies and hedges the associated currency exposure). The SEC also noted that, in contrast with currency hedging derivatives instruments, other types of hedging transactions executed through derivatives are difficult to distinguish from transactions that create exposures that contribute to (or detract from) the investment focus that a fund's name suggests.

45 The Proposal would have required, not permitted, this deduction, and did not include U.S. Treasury securities.

46 The Proposal did not address closed-out derivatives instruments directly, but a request for comment suggested that derivatives that were closed out with the same counterparty and result in no credit or market exposure to the fund could be eliminated from the Names Rule calculation. The Adopting Release clarifies that the Final Rule does not require "closed-out positions to be closed out with the same counterparty in order for a fund to exclude them from the calculation of its assets."

47 Prospectus requirements apply to Form N-1A, Form N-2, Form N-8B-2, and Form S6. *See* Adopting Release at section II.B.

48 The phrase "terms" means "any word or phrase used in a fund's name, other than any trade name of the fund or its adviser, related to the fund's investment focus or strategies." *See id.* at n. 323.

49 The failure to do so could result in such terms being deemed to be materially deceptive or misleading for purposes of Section 35(d). *See id.* at section II.B; Amended Rule 35d-1(a)(2)(iii) and (3)(ii).

50 Sources listed in the Adopting Release include the dictionary, prior public disclosures, industry codes or classifications and a colloquial understanding of the term.

Amendments also require applicable funds to tag most of the new required information using the Inline XBRL structured data language.

Form N-PORT

Amendments to Form N-PORT will require registered investment companies that are required to adopt an 80% Investment Policy to report: whether a portfolio investment is included in the 80% basket; the definitions of the terms used in the fund's name, including the specific criteria the fund uses to select the investments the term describes, if any; and the value of its 80% Investment Policy basket as a percentage of fund assets.[51] In line with quarterly monitoring for compliance with an 80% Investment Policy, this data must be reported on Form N-PORT for the third month of each quarter. The Proposal would have required such reporting on Form N-PORT every month and also would have required a fund to indicate the number of days, if any, that it was not in compliance with its 80% Investment Policy during the reporting period.[52]

Notice Requirement

The content and delivery of Notices have been affected by the Amendments as well. As mentioned above, the Names Rule currently requires 60-days' notice to shareholders of changes in a fund's non-fundamental 80% Investment Policy. The Amendments retain the requirement that Notice must be provided (except for fundamental 80% Investment Policy changes) but also require a fund to describe any related changes to the fund's name in the Notice. The Amendments also provide greater clarity around the content of a Notice, electronic delivery and what it means for the Notice to be provided "separately from any other document."[53]

Recordkeeping Requirements

The Amendments also include certain recordkeeping requirements, which (in relevant part) will require funds with an 80% Investment Policy to document compliance with the amended rule. Applicable funds will be required to maintain:

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

---

51 *See* Adopting Release at section II.E. Such requirements do not apply to money market funds or BDCs.

52 The SEC explained in the Adopting Release that requiring funds to report the number of days that they were out of compliance would have effectively required daily compliance monitoring.

53 Although "separately from any other document" is phrased differently than the current requirement, the requirement is intended to be "functionally the same as the current rule's requirement." *See id.* at section II.D.

- Any notice sent to the fund's shareholders pursuant to the rule.

These records must be maintained for six years following the creation of such record, the first two in an easily accessible place. The SEC recognized that the recordkeeping requirements could be costly, particularly for funds that make investments on a daily basis and that some recordkeeping may not easily lend itself to automation due to the nature of certain investments, or otherwise. The SEC stated, however, that it believes there could be multiple reasonable approaches to documenting the basis for an investments' inclusion in a fund's 80% basket in compliance with the final amendments and did not prescribe a single approach.

In a change from the Proposal, the Amendments do not require a fund without an 80% Investment Policy to document why the fund determined an 80% Investment Policy is not required.[54]

Unlisted Closed-End Funds, BDCs and UITs

For registered closed-end investment companies or BDCs that do not have shares listed on a national securities exchange (collectively, Unlisted Funds), the Amendments will generally require shareholder approval to change an 80% Investment Policy. Such funds will, however, be permitted to make changes to their 80% Investment Policy without a shareholder vote if the fund conducts a tender or repurchase offer in advance of the change, subject to certain conditions, including that the tender or repurchase offer is not oversubscribed. The SEC explains that this exception provides investors an opportunity to exit the Unlisted Fund within the 60-day notice period permitted under the current Names Rule and that if a tender or repurchase offer is oversubscribed, it indicates that investors do not support the change.[55]

Additionally, the Amendments provide that the 80% Investment Policy and recordkeeping requirements apply to unit investment trusts (UITs) only at the time of initial deposit of securities.

Key Dates and Timing

The Amendments will become effective December 11, 2023. Fund groups with net assets of $1 billion or more will have until December 11, 2025, to comply with the Amendments, and fund groups with net assets of less than $1 billion will have until June 11, 2026, to comply with the Amendments.

---

[54] The current Names Rule and other recordkeeping requirements under the 1940 Act do not require recordkeeping with respect to the Names Rule. *See id*. at section II.F.

[55] *See id*. at section II.A.4.

This update was authored by:

Matthew E. Barsamian
Partner
Washington, D.C.
+1 202 261 3392
matthew.barsamian@dechert.com

Brenden P. Carroll
Partner
Washington, D.C.
+1 202 261 3458
brenden.carroll@dechert.com

Philip T. Hinkle
Partner
Washington, D.C.
+1 202 261 3460
philip.hinkle@dechert.com

Corey F. Rose
Partner
Washington, D.C.
+1 202 261 3314
corey.rose@dechert.com

Aaron D. Withrow
Partner
Washington, D.C.
+1 202 261 3333
aaron.withrow@dechert.com

Nadeea R. Zakaria
Partner
New York
+1 212 641 5671
nadeea.zakaria@dechert.com

Austin G. McComb
Associate
Washington, D.C.
+1 202 261 3430
austin.mccomb@dechert.com

Robert Spiro
Associate
New York
+1 212 649 8707
robert.spiro@dechert.com