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ADDRESSING QUESTIONS UNDER THE AMENDED REGISTERED FUND NAMES RULE

Recent amendments to Rule 35d-1 under the Investment Company Act of 1940 — commonly known as the "Names Rule" — broaden the scope of terms in fund names subject to the rule, impose enhanced disclosure and compliance requirements on funds related to their names, and describe how to treat derivatives instruments and short positions under the rule. This article discusses certain interpretive questions fund managers face in implementing these amendments ahead of the December 2025 compliance date.

By Philip T. Hinkle, Corey F. Rose, Dale C. Beggs, and Austin G. McComb *

On September 20, 2023, the U.S. Securities and Exchange Commission adopted significant changes to Rule 35d-1 under the Investment Company Act of 1940, as amended ("Names Rule"), as well as certain forms and disclosure requirements ("Amendments"), with a compliance date of December 11, 2025, for large fund complexes and June 11, 2026, for small fund complexes.[1] The Commission has asserted that the Amendments will help modernize and enhance the investor protections provided by the Names Rule. In the Adopting Release, the Commission juxtaposed how fund names can convey important information to investors with industry developments over the last two decades, including the growth of funds that incorporate environmental, social, or governance ("ESG") criteria into their investment processes. Nevertheless, a number of interpretive questions remain concerning the scope of the Amendments and the guidance, or lack thereof, in the Adopting Release. The Staff of the Commission's Division of Investment Management ("Staff") recently issued updated frequently asked questions ("2025 FAQs") which will help to resolve some questions left from the Adopting Release.[2] But without further guidance, fund managers are left parsing some of the

[1] *Investment Company Names*, Inv. Co. Act Rel. No. 35000, 88 Fed. Reg. 70436 (Oct. 11, 2023) ("Adopting Release"). With regard to the compliance date, large fund complexes have assets of $1 billion or more and small fund complexes have assets of less than $1 billion. *Id.* at 70476. For ease of reading purposes, this Article assumes that the compliance date has passed, referring to the requirements under the amended Names Rule in the present tense.

[2] Shortly after the Names Rule was adopted in 2001, the Staff released Frequently Asked Questions about Rule 35d-1 (Investment Company Names) ("2001 FAQ").

* *PHILIP T. HINKLE and COREY F. ROSE are partners and DALE C. BEGGS and AUSTIN G. MCCOMB are associates in the Washington, DC office of Dechert LLP. Their e-mail addresses are philip.hinkle@dechert.com, corey.rose@dechert.com, dale.beggs@dechert.com, and austin.mccomb@dechert.com. Messrs. Rose and McComb co-authored an article in Volume 55, Number 22 of The Review of Securities & Commodities Regulation titled The SEC's Proposed Changes to the Names Rule on December 28, 2022.*

FORTHCOMING

● ***TRACKING THE PERFORMANCE OF THE ADVISERS ACT MARKETING RULE SINCE ITS INCEPTION***

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remaining open issues discussed below with the compliance date rapidly approaching.

BACKGROUND

Section 35(d) of the 1940 Act prohibits a registered investment company (as does Section 59 of the 1940 Act for a business development company ("BDC")) from adopting as part of its name or title any word or words that the Commission finds to be materially deceptive or misleading.[3] 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 Commission "by rule, regulation, or order, to define such names or titles as are materially deceptive or misleading."[4] The Commission adopted the Names Rule under this rulemaking authority in 2001.[5] 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 the fund adopting a policy to invest, under normal circumstances, at least 80% of its assets (net assets plus the amount of any borrowings for investment purposes) in investments in accordance with the investment focus that the fund's name suggests ("80% Investment Policy").[6] Depending on the circumstances and the type of fund name, an 80% Investment Policy may be fundamental or non-fundamental. Changes to a fundamental 80% Investment Policy require shareholder approval whereas changes to a non-fundamental 80% Investment Policy require 60-days' prior notice to shareholders ("Notice").

OVERVIEW OF AMENDMENTS

The Amendments significantly expand the scope of the 80% Investment Policy requirement, as compared to the prior Names Rule, to include fund names with terms suggesting an investment focus in investments that have, or whose issuers have, "particular characteristics."[7] Terms within the scope of the amended Names Rule include "growth," "value," and terms indicating that the fund's "investment decisions incorporate one or more [ESG] factors." For a fund required to adopt an 80% Investment Policy, any terms used in the fund's name that suggest either an investment focus or that the fund is a tax-exempt fund must be consistent with the plain English meaning or established industry use of those terms, as must be defined in the fund's prospectus, including related investment criteria for selecting investments described by the term. If a fund deviates from its 80% Investment Policy, it must come back into compliance as soon as practicable for passive breaches, but no later than 90 days for passive breaches, or within 90 days for deviations due to abnormal circumstances. Although the amended Names Rule retains the general "time of investment" test for new investments, funds now must also review the classifications of their portfolio assets under their 80% Investment Policies at least on a quarterly basis. Under the amended Names Rule, derivatives must be valued using their notional

[3] Section 35(d) of the 1940 Act is incorporated by reference into Section 59 of the 1940 Act, thus subjecting BDCs to the Names Rule. For that reason, unless otherwise specified, the term "fund" as used in this article refers to a registered investment company and BDC.

[4] H.R.3005 - 104th Congress (1995-1996): National Securities Markets Improvement Act of 1996, H.R.3005, 104th Cong. (1996).

[5] *Investment Company Names*, Inv. Co. Act Rel. No. 24828, 66 Fed. Reg. 8509 (Feb. 1, 2001).

[6] 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 both federal and state income tax. The 2001 FAQ provided guidance on certain names that were excluded from the

footnote continued from previous column…

Names Rule. 2001 FAQ, Questions 6-13. Of these, the 2025 FAQ withdrew Questions 6, 10, 11, and 12.

[7] The phrase "term" 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." Adopting Release, 88 Fed, Reg. at 70466, n. 323.

amount and short sales must be valued using the value of the asset sold short (with certain required and permitted adjustments) for asset calculations. Finally, the Notice requirement associated with changes to a fund's name or 80% Investment Policy was changed by the Amendments.

EXPANDED SCOPE OF THE NAMES RULE

The amended Names Rule requires a fund to adopt an 80% Investment Policy if its name suggests a focus[8] "in investments that have, or whose issuers have, particular characteristics."[9] The Commission 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 will "ensure that the rule remains evergreen."[10] 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.[11] The amended Names Rule further identifies "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 in investments or issuers having particular characteristics.[12] However, the Names Rule generally still does not apply to certain other names that have historically been interpreted as being outside its scope, 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 terms in their names could "reasonably be understood to reference" individual investments in addition to the overall intended result of the investments.[13] While the Commission 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.[14]

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% basket.[15] The Commission 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

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[8] 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, 88 Fed. Reg. at 70449.

[9] The Commission 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. *Id.* at 70442.

[10] *Id.*

[11] The Commission 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). 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."

[12] Under the prior Names Rule, such names were generally considered to be investment strategies not subject to the 80% Investment Policy requirement.

[13] Adopting Release, 88 Fed. Reg. at 70447.

[14] *Id.* at nn. 128-29.

[15] The Names Rule defines the 80% basket as "investments that are invested in accordance with the investment focus that the fund's name suggests" or in accordance with the fund's 80% Investment Policy. Rule 35d-1(g). For funds of funds or other "acquiring" funds, the Commission 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. Adopting Release, 88 Fed. Reg. at 70449.

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 create a reasonable nexus on its own.[16] However, as noted above, a fund must define any term in its name subject to the Names Rule "consistent with those terms' plain English meaning or established industry use."[17]

Interpretive Questions

Uncertainty persists on whether particular terms will be deemed to be within the scope of the Names Rule. Although the term "income" was discussed in the Proposing Release at some length,[18] it was conspicuously absent in the Adopting Release, other than a scant reference to the number of funds with "income" in their names in the economic analysis section.[19] This left the industry with a lack of clarity on whether the term is within the scope of the Names Rule until the release of the 2025 FAQ. On the one hand, a fund with the term "income" in its name could intend for that term to refer to the characteristics of the fund's investments — namely that they provide income to the fund as a shareholder. On the other hand, an "income" fund instead could use the term as a reference to its objective to provide income to fund shareholders. Such a fund need not invest 80% or more of its assets in income-producing securities to produce income for distribution to its shareholders, and terms like this that reference such a portfolio-wide result to be achieved generally are outside of the scope of the amended Names Rule. Thus, a reasonable interpretation of the amended Names Rule would be that funds using "income" in the former sense should have an 80% Investment Policy, whereas funds using the term in the latter sense need not.

Many in the industry struggled with how to reconcile the dual uses of the term "income" with the following passage in the Adopting Release:

> 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. We disagree with the commenter who asserted that such terms are *per se* not misleading. It would be confusing to investors if the same term in a fund's name required an 80% investment policy in some cases and not in others.[20]

No text in the Adopting Release has spurred more interpretive questions than this passage. The 2025 FAQ regarding "income" sought to provide clarity in this respect.[21] Under the 2025 FAQ, when the term "income" in a fund's name "does not refer to 'fixed income' securities," it "generally suggests that the fund emphasizes the achievement of current income as a portfolio-wide result." In these circumstances, the term "income" in a fund's name "would not, alone, require the fund to adopt" an 80% Investment Policy. This clarification is particularly useful for funds with "income" in their names that intend to provide income to shareholders but do not wish to be required to adopt an associated 80% Investment Policy. However, the 2025 FAQ does not provide any guidance or examples regarding where the term "income" *would* "refer" to fixed income securities or under what circumstances a fund would be using the term in this sense.[22] Thus, a degree of uncertainty remains regarding the Staff's specification "when the term 'income' does not refer to 'fixed income' securities."

In providing this guidance, the 2025 FAQ seemingly touches on the controversial passage from the Adopting Release above. The Staff's specification — "when the term 'income' does not refer to 'fixed income' securities" — seems to indicate a Staff view that the word "income" could indeed "reasonably be understood" to reference either a desired outcome or the characteristics of a fund's individual investments, and that the conclusion will depend on usage and context. Further, by clarifying certain circumstances under which the term "income" in a fund's name "would not, alone, require the fund to adopt" an 80% Investment Policy, the 2025 FAQ indicates that the Staff is of the view that, notwithstanding the above language from the Adopting Release, the same term — "income" — could "requir[e] an 80% investment policy in some cases and not in others" without "be[ing] confusing to investors."

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[16] *Id.*

[17] Rule 35d-1(a)(2)(iii).

[18] *Investment Company Names*, Inv. Co. Act. Rel. No. 11067, 87 Fed. Reg. 36594, 36599 (June 17, 2022) ("Proposing Release").

[19] Adopting Release, 88 Fed. Reg. at 70479.

[20] *Id.* at 70448 (internal footnote references removed).

[21] 2025 FAQ, Question 6.

[22] The corresponding 2001 FAQ provided examples of types of funds where "income" refers to a portfolio-wide result to be achieved but did not give guidance on where "income" would refer to investments in fixed income securities. 2001 FAQ, Question 9.

It is unclear whether or, if so, how, the Staff would view other words with similar multiple uses in light of this 2025 FAQ. Similar interpretive questions arise for other terms, such as "growth," but relevant guidance has yet to be issued. Although many funds with "growth" in their names use the term to refer to investments in "growth" stocks, which clearly would be within the scope of the Amendments, many other funds use the term to refer to the objective or posture of the fund, such as "growth allocation" funds. Many growth allocation funds are funds of funds that do not primarily invest in underlying funds with 80% Investment Policies to invest in growth stocks. The term "growth" in such a fund's name is intended to connote an objective of capital appreciation for the fund and, in most instances, to differentiate it from more or less aggressive allocation funds. Because the language in the Adopting Release quoted above specifically refers to a public comment highlighting the issue of terms with multiple meanings, including "growth," this seems to indicate that any fund with "growth" in its name must adopt an 80% Investment Policy, even if it is using the term to refer to a portfolio-wide result to be achieved.[23] If that is the case, the 80% Investment Policy may have challenges similar to the policy described above related to "income" at the aggregated portfolio level.

A similar question arises with respect to the term "core." For instance, "core" within the context of a bond fund typically connotes that the fund invests primarily in investment-grade fixed-income securities or is meant to be part of the "core" of an investor's overall allocations, typically because it focuses on investment-grade securities. However, the term "core" within the context of an equity fund generally either connotes an investment strategy to invest in a blend of growth and value stocks or to invest in a way that is agnostic as to whether a stock would be a growth or a value stock. We believe it would be reasonable to take the view that a bond fund using "core" in one of the ways above would be required to adopt an 80% Investment Policy tied to investment-grade, fixed-income securities. However, we also believe it would be reasonable for a core equity fund using the term as described above to conclude that it need not adopt an 80% Investment Policy because the term relates to the overall portfolio and not to the "core" characteristics of any individual investments. It is unclear how or whether the Staff will interpret the language quoted above in this context, although we believe it would be reasonable to distinguish between the terms "core bond" and "core equity" for these purposes.

Finally, the term "high yield" when used by itself will require an 80% Investment Policy, but there was some question after adoption of the Amendments whether "high yield municipal" funds would be within the scope of the amended Names Rule. In the 2001 FAQ, the Staff provided that a "high yield municipal" fund is not required to adopt an 80% Investment Policy related to the term "high yield."[24] That guidance in the 2001 FAQ cited historical market practice by tax-free high-yield bond funds due to the market for below-investment-grade municipal bonds being smaller and relatively less liquid than below-investment-grade corporate bonds. The Staff retained this guidance in the 2025 FAQ, again making reference to the historical investment practices of high-yield municipal bond funds.[25] The Staff reiterated that a "high yield municipal" or "high yield tax-exempt" fund must adopt fundamental investment policy consistent with Names Rule requirements with respect to the term "municipal" or "tax-exempt." This response confirmed that the Staff will not take issue if such a fund invests less than 80% of the value of its assets in bonds that meet the fund's high-yield rating criteria. The Staff cautioned, however, that such funds are still subject to the general Section 35(d) prohibition on materially deceptive or misleading names. This guidance is a welcome development for managers of high yield municipal funds, given the uncertainty as to whether the position articulated in the 2001 FAQ would remain in place under the amended Names Rule and the challenges many such funds would face if required to invest at least 80% of their assets in below investment-grade securities.

CLARIFICATIONS OF "MATERIALLY DECEPTIVE OR MISLEADING"

The Commission also codified in Rule 35d-1(c) 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

[23] On the other hand, this argument may be weaker as compared to the example below relating to a fund with "growth" in its name that refers to the objective or designed outcome of the fund (such as to achieve capital appreciation), where every investment could be made with the intention that it will appreciate and therefore contribute to the overall objective of the fund. In the case of a fund that uses "income" in an analogous way, one could reasonably argue that investments that do not produce income should not be included in the 80% basket because they do not contribute to the overall objective of the fund to provide income to shareholders.

[24] 2001 FAQ, Question 7.

[25] 2025 FAQ, Question 4.

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] with 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 Commission 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 Commission declined to adopt a provision in the proposed amendments that would have designated any "integration fund" with ESG-related terms in its name as *per se* materially deceptive and misleading.[32]

Interpretive Questions

Questions remain as to how fund managers should address the 20% basket to not make investments that would render a fund's name materially deceptive or misleading. Specifically, it is unclear whether funds should utilize some benchmark threshold for determining when an investment is materially inconsistent with the fund's investment focus or how much of such an investment would be permissible in any given context. The 20% basket exists to allow for investments that do not align with a fund's investment focus and would not qualify for the 80% basket. Nonetheless, the Adopting Release indicates that some investments or some amount of such investments simply may not be made by certain funds, even within the 20% basket, but there is no clear threshold. Although the Adopting Release provides examples where technical compliance with the Names Rule would not prevent a fund's name from being materially misleading, beyond those examples, what is left is an inherently facts-and-circumstances test that may leave fund companies open to questions from the Commission or the Staff.[33]

TEMPORARY DEPARTURES FROM AN 80% INVESTMENT POLICY

The amended Names Rule continues to require funds to determine whether an investment qualifies for the 80% basket at the time of acquisition.[34] However, the amended Names Rule requires 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 Commission noted that, at a certain point, a departure from a fund's 80% Investment Policy

[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.

[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." Adopting Release, 88 Fed. Reg. at 70465.

[28] The Commission in the Proposing Release instead used the term "antithetical," but the Commission declined to incorporate this language in the Amendments or the Adopting Release to not "create new requirements or standards with respect to selection of investments in a fund's 20% basket that are not now present." *Id*.

[29] The Commission 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. *Id*.

[30] In addition, the Commission 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. *Id.*

[31] In response to commenters, the Commission 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. *Id*.

[32] The Commission is "continuing to consider comments" because this proposed provision implicates the companion rulemaking on ESG matters issued the same day as the Proposing Release. *Id.* at 70441.

[33] Adopting Release, 88 Fed. Reg. at 70465.

[34] For example, the Commission 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] Rule 35d-1(b)(1)(i). The proposed amendments would have required continual or daily compliance monitoring. Adopting Release, 88 Fed. Reg. at 70473.

may occur under normal circumstances when an investment's characteristics change, resulting in a different determination for 80% basket purposes (a phenomenon the Commission refers to as "drift").[36] The Commission 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.

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 amended Names Rule allows funds to determine what constitutes other-than-normal circumstances.[38] The Commission 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 a departure from a fund's 80% Investment Policy was during normal circumstances or other-than-normal circumstances, the 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 within no more than 90 consecutive days.[40] The Adopting Release clarifies that although a fund is only required to review its holdings "at least quarterly" to determine whether the fund remains in compliance, the requirement to seek to cure such a passive breach begins when it is identified, "as part of its quarterly review *or otherwise*."[41] 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 Commission clarified in the Adopting Release that a fund may change its name or seek exemptive relief from the Commission if it believes it would be appropriate to depart for a limited additional period beyond 90 days.[42]

FUNDAMENTAL INVESTMENT POLICIES FOR TAX-EXEMPT FUNDS

The Commission did not change the requirement in the Names Rule 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.[43] The amended Names Rule continues to allow "tax-exempt" funds to adopt either an asset test or an income test to comply with its 80% Investment Policy.[44] The 2025 FAQ confirms this and adds, consistent with the 2001 FAQ, that single state tax-exempt funds may only include in its 80% basket a security of an issuer located outside of the named state if: (1) the security pays interest that is exempt from both federal income tax and the tax of the named state and (2) the fund discloses in its prospectus that it may invest in tax-exempt securities of issuers located outside of the named state.[45]

Since the Amendments were adopted, it has been unclear whether shareholder approval would be required for changes to a fund's fundamental 80% Investment Policy needed to comply with the amended Names Rule. For funds with an existing fundamental 80% Investment Policy, the Staff clarified in the 2025 FAQ that as long

[36] Adopting Release, 88 Fed. Reg. at 70440.

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

[38] Rule 35d-1(b)(3).

[39] Rule 35d-1(b)(1)(i)-(ii). 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 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 allows "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." Proposing Release, 87 Fed. Reg. at 36602, n. 57.

[40] Rule 35d-1(b)(1)(i).

[41] Adopting Release, 88 Fed. Reg. at 70440.

[42] The Commission 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.

[43] Rule 35d-1(a)(3).

[44] Adopting Release, 88 Fed. Reg. at 70453, n. 184.

[45] 2025 FAQ, Question 2. Under the Amendments, a single-state tax-exempt fund (*e.g.*, the "Maryland Tax-Exempt Fund") must have a fundamental policy to invest, under normal circumstances, either: (i) at least 80% of the fund's assets in investments the income from which is exempt from both federal and the named state's income tax, or (ii) its assets so that 80% of the income that it distributes will be exempt from both federal and the named state's income tax.

as the new policy does not deviate from the current policy, shareholder approval is not required.[46] The example Staff provided in the 2025 FAQ is if an equity fund with "growth" in its name and an existing fundamental 80% Investment Policy broadly referencing equity investments revised this policy to reference equity investments with growth characteristics, it generally would not be deviating from its current policy and, thus, the change would not require shareholder approval.

DERIVATIVES-RELATED ASPECTS OF THE NAMES RULE

Introduction and Background

With respect to a fund's transactions and holdings in derivatives instruments, the amended Names Rule sets out: (1) a new definition of the term "derivatives instrument" for purposes of the Names Rule; (2) a new definition of the term "assets" that provides a new measure for the valuation of derivatives and physical short sales for purposes of the Names Rule based on the "notional" amount of the derivative and the value of the asset sold short, respectively, with certain required and permitted adjustments to the value of the fund's assets relating to the fund's holdings in derivatives instruments; and (3) a new two-part methodology for determining whether a fund may include derivatives instruments in its 80% basket.

Definition of "Derivatives Instrument"

The amended Names Rule defines 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."[47] This definition will appear familiar to funds and their advisers, as it is one of the building blocks of the "derivatives transaction" definition found in Rule 18f-4 under the 1940 Act.[48] However, the definition of "derivatives instrument" under the Names Rule differs from the definition of the term "derivatives transaction" under Rule 18f-4 in the following ways:

- The term "derivatives instrument" under the amended Names Rule does not include reverse repurchase agreements or similar financing transactions.

- There is no requirement that a fund be obligated "to make any payment or delivery of cash or other assets during the life of the instrument or at maturity or early termination, whether as margin or settlement payment or otherwise." Accordingly, purchased options are derivatives instruments under the Names Rule.

- Short sale borrowings are not addressed in the Names Rule's definition of derivatives instrument.[49] Instead, "physical short positions" are addressed in the definition of "assets" — *i.e.*, the fund "must value each physical position using the value of the asset sold short."

The amended Names Rule does not provide a framework to distinguish forward contracts from when-issued or forward-settling securities transactions that are not forward contracts. In contrast, Rule 18f-4(f) permits a fund to treat when-issued, forward-settling, and non-standard settlement cycle securities as not involving a "senior security," provided that the fund intends to physically settle the transaction and the transaction will settle within 35 days of its trade date. The lack of guidance in the Names Rule regarding forward-settling securities may raise the question of how funds should determine whether securities with longer settlement periods (such as to-be-announced investments and

[46] 2025 FAQ, Question 1.

[47] Rule 35d-1(g) (definition of "assets").

[48] Rule 18f-4(a) defines "derivatives transaction" as:

"(1) Any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, or any similar instrument ('derivatives instrument'), under which a fund is or may be required to make any payment or delivery of cash or other assets during the life of the instrument or at maturity or early termination, whether as margin or settlement payment or otherwise;

(2) Any short sale borrowing; and

footnote continued from previous column…

(3) If a fund relies on paragraph (d)(1)(ii) of this section, any reverse repurchase agreement or similar financing transaction."

Rule 18f-4 provides a standardized regulatory framework governing funds' use of "derivatives transactions" (including short sales) for purposes of Sections 18 and 61 of the 1940 Act, which limit a fund's ability to obtain leverage or incur obligations through the issuance of "senior securities."

[49] Although the definition of "derivatives instrument" under the Names Rule is identical to the definition of "derivatives instrument" embedded in the definition of "derivatives transaction" under Rule 18f-4, the term "derivatives transaction" expressly includes a short sale borrowing.

longer-settling investments) are "forward contracts" and therefore derivatives instruments for purposes of the Names Rule. Given the lack of specific guidance from the Commission or the Staff, it appears that it may be appropriate and reasonable for a fund to apply the Rule 18f-4(f) framework in the context of the Names Rule.[50] For an instrument that is not a forward contract (and that is not otherwise a derivatives instrument), a fund would account solely for the mark-to-market gain or loss on the position (*i.e.*, the valuation of the investment). When the trades settle, a fund would value the position using normal valuation procedures.

The classification of an instrument as a derivatives instrument will impact both the numerator and the denominator of a fund's 80% Investment Policy calculation. As explained later in this article, derivatives instruments are eligible for the 80% basket (*i.e.*, the numerator) under an entirely different framework than applies to non-derivatives instruments. Further, as discussed below, the amended Names Rule provides a permissive exclusion from a fund's assets for "cash, 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."[51] This exclusion recognizes that a fund that uses derivatives instruments may maintain much of its assets in cash and cash equivalents, which may not themselves provide market exposure, but rather function as low-risk collateral for the fund's derivatives instruments. These aspects of the rule could potentially make the classification of a particular instrument as a derivatives instrument or not the determining factor in whether a fund is able to comply with its 80% Investment Policy.

Valuation of Derivatives Instruments and Short Sales

The definition of the term "assets" under the amended Names Rule provides that, for purposes of determining the value of a fund's assets under the Names Rule, a fund must value each derivatives instrument using its notional amount.[52] Additionally, the definition requires that a fund must value each physical short sale using the value of the asset sold short.

The definition of the term "assets" also provides certain required and permitted adjustments to the value of a fund's assets relating to the fund's holdings in derivatives instruments. For interest rate derivatives, a fund must convert the notional amount to a 10-year bond equivalent measure. For options contracts, a fund must apply a delta-adjustment to the notional amount. A fund must 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 value of the hedged investments (or the par value thereof, in the case of fixed-income investments) by more than 10 percent." A fund may reduce the value of its assets 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 fund's derivatives instruments and the value of assets sold short. A fund may exclude from its assets "any closed-out derivatives positions that result in no credit or market exposure to the fund." There is no other permitted "netting" of offsetting derivatives instruments permitted for purposes of the Names Rule. While the amended Names Rule and the Adopting Release do not specifically state this, it appears that these principles should be applied consistently (as applicable) for purposes of valuing both the numerator and the denominator in the 80% Investment Policy calculation.

Funds have historically valued derivatives instruments for purposes of the Names Rule at market value, fair value, or cost, depending on the instrument, with only a limited number of funds disclosing the use of the notional amount for certain derivatives instruments.[53] The market value of a derivatives instrument will almost never exceed its notional amount and will frequently be

[50] Under that framework, a fund would treat a when-issued, forward-settling, or non-standard settlement cycle securities transaction as not constituting a forward contract if the transaction (1) is intended to be physically settled, and (2) will settle in 35 days or less.

[51] Rule 35d-1(g) (definition of "assets").

[52] *Id.*

[53] The Adopting Release explains that, without a prescribed valuation method under the Names Rule, the 1940 Act would generally require the use of "market values" "by operation of its definition of the term 'value'." Adopting Release, 88 Fed. Reg. at 70457. Section 2(a)(41) of the 1940 Act, in relevant part, defines "value" to mean: "(i) with respect to securities for which market quotations are readily available, the market value of such securities; and (ii) with respect to other securities and assets, fair value as determined in good faith by the board of directors."

smaller. As acknowledged by the Commission in the Adopting Release, the market value of most derivatives instruments will be "quite low," understating true economic exposure, and "may bear no relation to the investment exposure that the derivatives instrument creates."[54] For funds that use relatively higher levels of derivatives instruments in their portfolios, the derivatives portfolio will likely comprise a larger percentage of a fund's assets under the new required valuation methodology compared to the prior framework. The Amendments were designed to, among other things, address the possibility that a fund could gain significant exposure through a derivatives instrument to a particular asset class but use a name that reflects exposure to a different asset class.[55] Thus, the valuation framework under the amended Names Rule dramatically increases the importance of derivatives instruments with respect to a fund's compliance with its 80% Investment Policy.

Scope of Derivatives Instruments Included in 80% Basket

The amended Names Rule provides that a derivatives instrument is eligible to be included in a fund's 80% basket if the derivatives instrument (1) "provides investment exposure to investments suggested by the fund's name" (the "Investment Exposure Test") or (2) provides "investment exposure to one or more of the market risk factors associated with the investment focus that the fund's name suggests" (the "Market Risk Factor Test").[56]

The Investment Exposure Test recognizes that derivatives instruments may be used as substitutes for cash investments in the investments suggested by the fund's name. Under the Investment Exposure Test, a derivatives instrument may be included in the 80% basket when it functions as a substitute for direct investments in the securities or assets suggested by the fund's name. Alternatively, if a fund's name suggests an investment focus in certain derivatives instruments, it appears that such a derivatives instrument would also be eligible to be included in the 80% basket under the Investment Exposure Test.

The Market Risk Factor Test recognizes that funds may use derivatives instruments to hedge exposures or to obtain exposure to market risk factors associated with a fund's investments. The Adopting Release indicates that the use of the term "investment exposure" in the Market Risk Factor Test means a derivatives instrument may be included in the 80% basket if it is "used to facilitate investments" in investments suggested by the fund's name by increasing or decreasing exposure to a risk factor associated with those investments.[57]

The term "market risk factors" is not defined in the Names Rule. To include derivatives instruments in a fund's 80% basket under the Market Risk Factor Test, the fund must determine which market risk factors are associated with the fund's investments and which derivatives instruments are used for relevant purposes. In this regard, the Adopting Release states that, to help determine whether a derivatives instrument provides this type of investment exposure, a fund "generally should consider whether the derivatives instrument 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."[58] In addition, the Proposing Release listed three nonexclusive examples of market risk factors: interest rate risk, credit spread risk, and foreign currency risk.[59] The Adopting Release also indicates as examples that credit risk is a risk associated with bonds and that "prepayment is an explicit risk factor in the price of a mortgage security."[60] These examples suggest that a relatively expansive approach to interpreting whether a risk factor may constitute a "market" risk may be appropriate.

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[54] Adopting Release, 88 Fed. Reg. at 70457. In justifying the mandatory valuation adjustments applicable to options contracts, the Commission acknowledged that deep out-of-the-money options can have large unadjusted notional amounts but will provide limited investment exposure to the underlying reference asset. *Id.* at 70460.

[55] Proposing Release, 87 Fed. Reg. at 36608.

[56] Rule 35d-1(b)(2).

[57] Adopting Release, 88 Fed. Reg. at 70462.

[58] *Id.* ("For example, a foreign equity or bond fund may hold substantial currency forwards or swaps to hedge foreign currency risk. If the rule did not allow funds to treat the notional amounts of those derivatives instruments as investments that reflect the fund's investment focus, the notional amounts of those derivatives instruments could cause a fund to fall out of compliance with its 80% investment policy.").

[59] Proposing Release, 87 Fed. Reg. at 36607 ("We recognize that, in addition to using derivatives as direct substitutes for cash market investments, some funds use derivatives instruments to hedge exposures or to obtain exposure to market risk factors associated with the fund's investments (for example, interest rate risk, credit spread risk, and foreign currency risk). Those instruments may have very high notional amounts.").

[60] Adopting Release, 88 Fed. Reg. at 70462.

Notably, the term "market risk factors" is also used in Rule 18f-4 in the context of value-at-risk testing for funds that have adopted a derivatives risk management program. Such funds must calculate a measure of potential losses considering, as applicable: equity price risk, interest rate risk, credit spread risk, foreign currency risk, commodity price risk, material risks arising from nonlinear price characteristics of a fund's investments, and the sensitivity of the market value of the fund's investments to changes in volatility.[61] These market risk factors may serve as additional guides to what risk factors may be treated as market risk factors.

In addition, the Adopting Release discouraged the inclusion of derivatives instruments in the 80% basket if those instruments completely negate the primary market risk factor suggested by the Fund's name:

> For example, investors may reasonably expect the investments in which the 'XYZ Corporate Bond Fund' focuses to reflect exposure to certain risks, such as credit risk. If this fund were to purchase credit default swaps or any other derivatives instruments that resulted in the elimination of all credit risk in its portfolio for an extended period of time, and were to include these derivatives in the fund's 80% basket, the fund's name could be materially deceptive and misleading because the fund would have eliminated the primary market risk factor associated with the assets in which the fund's name suggests a focus.[62]

In the absence of further guidance, there may be some leeway in identifying the "primary" market risk factor associated with a fund's 80% Investment Policy assets. Logically, the primary market risk factor likely would be listed among the principal risks in a fund's prospectus. Whether a derivatives instrument "completely" negates such a market risk factor would be a facts-and-circumstances analysis.

Treatment of Currency Derivatives

Lack of specificity in the text of the Names Rule, changes from the 2022 proposed rulemaking, and sparse guidance have created a challenging interpretive puzzle on whether or how the Market Risk Factor Test applies to currency derivatives. In the Proposing Release, the Commission used currency risk as the primary example motivating the Market Risk Factor Test.[63] However, in a change from the 2022 proposed rulemaking, as noted above, the amended Names Rule subjects certain derivatives instruments used to manage currency risk to a mandatory exclusion from a fund's assets.[64]

This mandatory exclusion addresses only derivatives used to hedge currency risks associated with "one or more specific foreign-currency-denominated equity or fixed-income investments" rather than derivatives used to provide positive investment exposure to currency risk as a market risk factor associated the investment focus that the fund's name suggests. Additionally, the mandatory exclusion does not address how a fund may treat currency hedging derivatives where the notional amounts of such instruments exceed the value of the hedged investments by more than 10%. This raises the question of whether a fund may rely on currency risk (or "foreign currency risk") under the Market Risk Factor Test to include the notional exposure of a derivatives instrument in the 80% basket with regard to (1) positive investment exposure to currency risk and (2) negative investment exposure to foreign currency risk when some portion of the exposure from the fund's total position in that derivatives instrument has been excluded under the currency-hedging exclusion. This also raises the question of whether the fund may or must exclude the notional exposure of such a currency derivatives instrument up to the value of the hedged investments or up to the 10% buffer amount.

The answer to the first question — whether a fund would be able to include positive investment exposure to currency risk in its 80% basket when currency risk is associated with the investment focus that the fund's name suggests — appears to be yes. Simply put, positive investment exposure to foreign currency risk would obviously not be a hedging exposure. The currency-hedging exclusion operates before consideration of the Market Risk Factor Test, by removing the currency-hedging derivatives instrument exposure from the calculation of the fund's assets or the fund's 80%

[61] Rule 18f-4(a) (definition of "Value-at-risk or VaR").

[62] Adopting Release, 88 Fed. Reg. at 70462, n. 283.

[63] Proposing Release, 87 Fed. Reg. at 36607.

[64] Rule 18f-4(g) (definition of "assets"). Under this requirement:

> ... a fund must exclude from [the calculation of assets] 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 value of the hedged investments (or the par value thereof, in the case of fixed-income investments) by more than 10 percent.

basket.[65] It does not, however, operate as an exclusion to the Market Risk Factor Test.

The answer to the second question — whether a fund would be able to include negative investment exposure to foreign currency risk when some portion of the exposure from the fund's total position in that derivatives instrument has been excluded under the currency-hedging exclusion in its 80% basket — is less certain and appears to be open to reasonable interpretation. When the investments suggested by a fund's name are associated with a foreign currency risk, derivatives instruments providing negative investment exposure to that foreign currency risk would fall squarely within the Market Risk Factor Test. As explained in the Adopting Release, the currency-hedging exclusion was designed to expand the ability of funds to hedge currency risks from investments outside of their 80% basket.[66] The purpose was not to limit the use of the Market Risk Factor Test. Hedging exposure is a subset of negative investment exposure, and negative investment exposure in excess of the buffered value of a "hedged investment" would seem to fall outside the Commission's conception of a hedge — suggesting an answer of yes.

With respect to the third question — whether the fund may or must exclude the notional exposure of a currency derivatives instrument with a notional amount that exceeds the value of the hedged investments by more than 10% up to the value of the hedged investments or up to the "10% buffer amount" — there is no guidance in the Adopting Release on this point. Absent further guidance, based on the same logic articulated above in connection with the second question, it would appear reasonable for a fund to determine that it must exclude the notional amount up to the 10% buffer amount from its assets for purposes of the Names Rule and include in assets only the portion of the notional amount that exceeds the hedged assets by more than 10%.

A comparison of the motivating hypotheticals for the currency-hedging exclusion and the Market Risk Factor Test is illuminating. The Adopting Release clarifies that while the currency-hedging exclusion applies with respect to hedged investments, those investments are not necessarily investment-focus assets: a fund with "U.S. equities" in its name would not be able to include foreign stocks in its 80% basket.[67] This fund *would not* be able to include derivatives providing investment exposure to foreign currency risk because foreign currency risk would not be associated with the investments suggested by its name — U.S. equities. In contrast, the motivating hypothetical in the Proposing Release for the Market Risk Factor test was a foreign equity or bond fund that used currency forwards or swaps to hedge foreign currency risk. This fund *would* be able to include the derivatives instruments providing investment exposure to foreign currency risk because foreign currency risk would be associated with the investments suggested by its name.

While hedging exposure and non-hedging negative investment exposure may sometimes be difficult to distinguish, the Commission seems to have acknowledged that there is still a distinction, stating that 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."[68] In fact, the Commission explained that it believed the "hedging purpose" of a currency derivative "is more straightforward to determine."[69] It follows that a portion

[65] Adopting Release, 88 Fed. Reg. at 70457 ("In a change from the proposal, however, the final amendments also require a fund to exclude from the calculation certain derivatives that hedge the currency risk associated with a fund's foreign-currency denominated investments. These derivatives therefore will not be included in the calculation of the fund's assets or the fund's 80% basket when determining if the fund is complying with its 80% investment policy.").

[66] Adopting Release, 88 Fed. Reg. at 70458 ("The fund in this example would not include the foreign stocks in its 80% basket, and therefore these foreign stocks would be in the denominator in the calculation that the fund would use to determine compliance with its 80% investment policy. Any related currency derivative that the fund holds for hedging purposes, therefore, also would be in the denominator. This currency derivative could have a high notional amount, even though it would be reducing, not increasing, the fund's exposure to risks associated with the fund's foreign securities. Holding the currency derivative therefore could significantly limit the extent to which the fund could invest outside of its 80% basket.").

[67] *Id.*

[68] *Id.*

[69] Guidance in the adopting release for Rule 18f-4 likewise expresses the Commission's view that hedging exposure is different than other negative investment exposure: "If the notional amount of a derivatives transaction exceeds the value of the hedged investments by more than 10%, however, it will no longer qualify as a hedge under the limited derivatives user exception." *Use of Derivatives by Registered Investment Companies and Business Development Companies*, Inv. Co. Act. Rel. No. 34084, 85 Fed. Reg. 83162, 83209 (2020)

of a fund's currency derivative notional amount exceeding the value of the assets being hedged — and, thus, having a non-hedging impact on the fund's portfolio — would not change the hedging purpose of the portion that corresponds to the value of the assets being hedged.

ADDITIONAL CONSIDERATIONS

Disclosures

The Commission added corresponding disclosure requirements to a fund's prospectus.[70] The Amendments require a fund with an 80% Investment Policy to define in the fund's prospectus the terms 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. A fund will have flexibility to use "reasonable definitions" of the terms that its 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.[71] The Commission in the Adopting Release explained a variety of sources may be used to derive plain English meaning or established industry use[72] and that this requirement should not prevent a fund from utilizing a term subject to industry debate. The 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 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.[73] 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 proposed amendments 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.[74]

Notice Requirement

The content and delivery of Notices have been affected by the Amendments as well. Before adoption of the Amendments, the Names Rules required 60-days' prior notice to shareholders of changes in a fund's non-fundamental 80% Investment Policy. The Amendments retain this Notice requirement and now additionally 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."[75]

Recordkeeping Requirements

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

- Written records, at the time the fund invests its assets, documenting (1) whether the investment is included in the fund's 80% basket and, if so, the basis for including that investment in the 80%

footnote continued from previous page…

(discussing the currency-hedging exclusion for the limited derivatives user exception).

[70] Prospectus requirements apply to Form N-1A, Form N-2, Form N-8B-2, and Form S6. Adopting Release, 88 Fed. Reg. at 70466.

[71] The failure to do so could result in such terms being deemed to be materially deceptive or misleading for purposes of Section 35(d). Adopting Release, 88 Fed. Reg. at 70440; Rule 35d-1(a)(2)(iii) and (3)(ii).

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

[73] Adopting Release, 88 Fed. Reg. at 70470. Such requirements do not apply to money market funds or BDCs.

[74] The Commission 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.

[75] 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." Adopting Release, 88 Fed. Reg. at 70470, n. 363.

basket and (2) 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 the reason why the fund departed (including why the fund determined that circumstances are other-than-normal).

- 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 Commission 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 Commission 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 Amendments and did not prescribe a single approach.

In a change from the proposed amendments, 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.[76]

Interpretive Questions

Managers are still considering the practical aspects of implementing the Amendments with respect to investments that are bought or sold, particularly for funds that engage in daily trading. For example, managers are exploring whether it would be appropriate to set guidelines in its policies and procedures in anticipation of future trading activity with parameters for which investments would qualify for the fund's 80% Investment Policy.

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 generally require shareholder approval to change an 80% Investment Policy. An Unlisted Fund will, however, be permitted to make changes to its 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 Commission explains that this exception provides investors an opportunity to exit the Unlisted Fund within the 60-day notice period as permitted under the Names Rule before the adoption of the Amendments, and that if a tender or repurchase offer is oversubscribed, it indicates that investors do not support the change.[77]

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

CONCLUSION

Although the Amendments and the 2025 FAQ provide some clarity in broadening the scope of the Names Rule and imposing new requirements on applicable funds, considerable interpretive questions remain. With the compliance date for large fund complexes now less than a year away, managers of such funds are searching for predictability on some of the issues discussed above. They eagerly await additional guidance as implementation of the Amendments progresses. ■

[76] The prior Names Rule and other recordkeeping requirements under the 1940 Act did not require recordkeeping with respect to the Names Rule. *Id*. at 70473.

[77] *Id*. at 70464.

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