August 16, 2022

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

Re: Investment Company Names [File Number S7–16–22]

Via: https://www.sec.gov/cgi-bin/ruling-comments

Dear Ms. Countryman:

I am pleased to submit these comments regarding the proposed rule entitled "Investment Company Names"[1]

Introduction

Section 3(d) of the Investment Company Act [15 U.S. Code § 80a–34(d) reads as follows:

> Deceptive or misleading names
>
> 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 Commission finds are materially deceptive or misleading. The Commission is authorized, by rule, regulation, or order, to define such names or titles as are materially deceptive or misleading.

17 CFR § 270.35d-1 fleshes this out to a modest degree.

Thus, a fund that calls itself the Canada Fund may not invest primarily in Chinese securities. A fund that calls itself the Electric Utilities Fund may not invest primarily in pharmaceutical companies. And so on. This provision is simply a species of anti-fraud law and is non-controversial for good reason.

The reason this is good policy and non-controversial is that investors, fund managers and the Commission know where Canada or China is and, with limited ambiguity, know what a Canadian or Chinese company is. Similarly, most investors, fund managers and Commission lawyers know the difference between an electric utility and other kinds of companies. In the extremely rare cases where serious issues are posed, we are content to let a judge or a jury make the determination as to whether the fund's behavior was materially deceptive or misleading.

[1] "Investment Company Names," Securities and Exchange Commission, Proposed Rule, *Federal Register*, Vol. 87, No. 117, June 17, 2022, pp. 36594-36651 [Release No. 33–11067; 34–94981; IC–34593; File No. S7–16–22; RIN 3235–AM72] https://www.govinfo.gov/content/pkg/FR-2022-06-17/pdf/2022-11742.pdf. See also SEC Release 33-11067 https://www.sec.gov/rules/proposed/2022/33-11067.pdf (209 pages).

ESG fund names pose a much more difficult problem for the Commission because ESG is built on sand and there is nothing close to a consensus about what the term means.

Let me start by quoting the most relevant provisions from the proposed rule:

§270.35d–1 Investment company names.

(a) Materially deceptive and misleading fund names. For purposes of section 35(d) of the Act (15 U.S.C. 80a–34(d)), a materially deceptive and misleading name of a fund includes:

...

> (2) Names suggesting an investment focus. A name that includes terms suggesting that the fund focuses its investments in: a particular type of investment or investments; a particular industry or group of industries; particular countries or geographic regions; or investments that have, or whose issuers have, particular characteristics (e.g., a name with terms such as ‘‘growth’’ or ‘‘value,’’ or **terms indicating that the fund's investment decisions incorporate one or more ESG factors**), unless:
>
> > (i) The fund has adopted a policy to invest, except under the circumstances provided in paragraph (b)(1) of this section, at least 80% of the value of its assets in investments in accordance with the investment focus that the fund's name suggests. For a name suggesting that the fund focuses its investments in a particular country or geographic region, investments that are in accordance with the investment focus that the fund's name suggests are investments that are tied economically to the particular country or geographic region suggested by its name;
> > (ii) The policy described in paragraph (a)(2)(i) of this section is a fundamental policy, or the fund has adopted a policy to provide the fund's shareholders with at least 60 days prior notice of any change in the policy described in paragraph (a)(2)(i) of this section, and any change in the fund's name that accompanies the change, that meets the provisions of paragraph (e) of this section. If the fund is a closed–end company or business development company, and the fund does not have shares that are listed on a national securities exchange, the fund's policy is a fundamental policy; and
> > (iii) Any terms used in the fund's name that suggest that the fund focuses its investments as described in paragraph (a)(2)(i) of this section are consistent with those terms' plain English meaning or established industry use.
>
> ...
>
> **d) Use of ESG terms in fund names.**
>
> **If a fund considers one or more ESG factors alongside other, non-ESG factors in its investment decisions, but those ESG factors 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, the use of terms in the fund's name indicating that the fund's investment decisions incorporate one or more ESG factors is materially deceptive and misleading.**

(emphasis added)

The bolded language represents the most relevant language added relating to ESG names.

Neither ESG nor "ESG factors" is defined in the rulemaking. The companion rulemaking, entitled "Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices"[2] does not define these terms either.

While the failure to define the central terms ESG and ESG factors is problematic in the companion rulemaking, that rulemaking can be made to work if the funds are permitted to define what ESG means to them and then are simply required to comply with their own definition. In other words, they can say what they are going to do and the Commission can make sure that that is what they actually do.

In this rulemaking, the failure to define the central terms renders the rulemaking intellectually, analytically and legally incoherent. How is it possible to determine, as the proposed rule requires, that "the use of terms in the fund's name indicating that the fund's investment decisions incorporate one or more ESG factors is materially deceptive and misleading" if we have no idea what an ESG factor is? I submit that cannot be done. Or can only be done clandestinely via regulation by enforcement where the enforcement is conducted based on an explicit or implicit definition that is known only to the Commission but must be divined by regulated entities based on the pattern of enforcement activity.

The same problem arises in determining whether the 80 percent threshold is met.

For this rulemaking to work, the Commission is going to have to define the term "ESG factor" and that is a serious problem for the Commission because ESG is built on sand and has no generally accepted meaning. The alternative is for ESG factor to mean whatever the fund manager says it means.

If someone sells a fund called the Wargle Fund, the Commission is going to have a hard time arguing that the name is inherently and materially deceptive and misleading because no one knows what a Wargle is. Similarly, no one knows what ESG means, at least until the Commission says what it means.

---

[2] "Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices," Securities and Exchange Commission, Proposed Rule, *Federal Register*, Vol. 87, No. 117, June 17, 2022, pp. 36654-36761 [Release No. 33–11068; 34–94985; IA–6034; IC–34594; File No. S7–17–22; RIN 3235–AM96] https://www.govinfo.gov/content/pkg/FR-2022-06-17/pdf/2022-11718.pdf. See also SEC Release 33-11068 https://www.sec.gov/rules/proposed/2022/33-11068.pdf (362 pages).

Although I am sympathetic to the problem the Commission faces in defining ESG, my sympathy is tempered by the evident interest of the Commission to proceed far down the ESG path without thinking very seriously about what that really means or the adverse impact that it will have on millions of Americans.[3]

The approach adopted by the Commission in the proposed rule will inevitably result in many years of "regulation by enforcement" since the Commission has chosen to not regulate by regulation. Market actors will only determine what the Commission actually means by ESG or "ESG factors" by watching what enforcement actions it launches over a period of years and adjusting their naming accordingly. Uncertainty will be much higher. Clarity regarding what is expected of regulated parties will be markedly reduced. This is not how a responsible agency regulates.

So given the failure of the proposed rule to define ESG or "ESG factors" or "ESG terms," here are my central questions for the Commission: If a fund defines ESG, for example, by saying that "to us social (S) means achieving the highest return for our investors because we believe that is best means of achieving a higher standard of living for the American people and to enhance social welfare," is the SEC going to let them name the fund "The Social Welfare Fund"?[4] If a fund defines ESG to mean "to us environmental (E) means complying with all applicable environmental laws, period" is the SEC going to let them name the fund "The Environmental Compliance Fund"? If a fund defines G as meaning governance by our Board of Directors in manner that it deems to be in the best interest of the corporation (or its shareholders), is the SEC going to let them name the fund "The Good Corporate Governance Fund"? If a fund defines S as investing to cure dread diseases or to enhance food production, can the fund be named the "Social Compassion Fund" or the "Social Justice Fund"? If conservative or libertarian funds define S in distinctly non-progressive ways and names a fund to reflect that fact, is that going to pass SEC muster? If a fund decides that natural gas-derived fertilizer and fossil fuels are key to a decent living standard and defeating abject poverty in the developing world (which they are) and that their S concerns require that they oppose forcing famine upon many millions of people in pursuit of progressive environmental (E) objectives, is the SEC going to let them name their fund "The Poverty and Famine Reduction Fund"? If a fund defines S as requiring the rejection of racist DEI policies and affirms freedom of speech, freedom of religion and due process in the face of progressive assaults on the Bill of Rights, is the SEC going to let the fund be named the "American Civil Liberties Fund"? If the answer to any of these question is no, then I would like for the Commission to explain why given that it has not defined ESG, ESG factor or ESG term.

---

[3] See, for example, Comment Letter of David R. Burton regarding "The Enhancement and Standardization of Climate-Related Disclosures for Investors," June 17, 2022 https://www.sec.gov/comments/s7-10-22/s71022-20131980-302443.pdf; Comment Letter of David R. Burton regarding "Proposed Nasdaq Rule Change to Adopt Listing Rules Related to Board Diversity," January 4, 2021 https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8204282-227462.pdf; David R. Burton, "Nasdaq's Proposed Board Diversity Rule Is Immoral and Has No Basis in Economics," Heritage Foundation Backgrounder No. 3591, March 9, 2021 https://www.heritage.org/sites/default/files/2021-03/BG3591_0.pdf; Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions, Office of Management and Budget, Office of Information and Regulatory Affairs, Securities and Exchange Commission submission, "Corporate Board Diversity" [3235-AL91] and "Human Capital Management Disclosure" [3235-AM88] https://www.reginfo.gov/public/do/eAgendaMain.

[4] This name is wholly consonant with a field of economics called Social Welfare Economics.

If the Commission would let these ESG names be adopted, then so be it. That means that the term ESG can reflect the true diversity of perspectives in America rather than be a stalking horse for progressive politics. But if that is the case then the SEC needs to make it *clear in the proposing release and the rule* that non-progressive understandings of the term ESG and its component parts are permitted. If it is not so, then the SEC should not pretend that it is being neutral in its posture towards ESG or in its ESG fund naming requirements. It is really adopting a rule that will be enforced as if it contains a substantive progressive understanding or definition of the term "ESG." This, of course, makes a certain degree of sense since the term "ESG," as most commonly used, is a smokescreen for the progressive political agenda. A majority of people, whether sympathetic to or opposed to ESG, understand the three letters in that way. But if that is what the SEC is really doing here, then *the Commission should be honest, not deceptive, with the public and those it seeks to regulate*. The SEC should be forthright and say that it will be enforcing ESG as understood by progressives. And it should define the term accordingly – in the rule. We should not have to wait until a large number of enforcement actions are launched to know what the SEC is really doing with this rulemaking.

It is emphatically not the case, by the way, that there is any universal progressive understanding of what environmental, conservation, social or governance mean as standalone terms. It is only when these ideas are transmogrified into an acronym – ESG -- that they are widely understood as indicative of the current progressive political agenda.

All of that said, I am seriously sympathetic to problem that the Commission faces in trying to define ESG. ESG as a concept is built on sand. I have read countless journal articles, reports and articles on ESG. It is almost never defined and when it is, the definition is vacuous. In practice, ESG investing simply means investing in accordance with the latest progressive *cause du jour*. Its meaning morphs along with progressive political priorities.

The first step in defining ESG is to understand that ESG is not a new concept. It is an old concept with a new name. What is new about ESG is the ubiquitousness and stridency of ESG proponents both within and without government.

ESG is part of a major effort under way to redefine the purpose of businesses to achieve various social or political objectives unrelated to earning a return, satisfying customers or treating workers or suppliers fairly. This effort seeks to politicize virtually every aspect of daily life. It seeks to redefine the purpose of business as the pursuit of progressive social and political objectives that have little to do with people who have any real connection to the business and only a tertiary concern for shareholder returns. ESG is also being done under the banner of social justice,[5] corporate social responsibility (CSR), stakeholder theory, wokeness, critical race theory (CRT), socially responsible investing (SRI), sustainability, diversity, business ethics, common good capitalism or corporate actual responsibility.[6]

[5] This was Nasdaq's favorite term in its overtly racist board diversity rule ratified by the SEC.
[6] The last two are 'conservative' versions of ESG.

Specific Requests for Comment

Question 1. Should we expand the requirement for certain funds to adopt an 80% investment policy, as proposed, to cover names that include terms suggesting an investment focus in investments or issuers that have particular characteristics? Is it clear what types of names would subject a fund to the expanded scope of this requirement under the proposed rule? Should we only require certain fund names that suggest an investment focus, such as those that ''reasonably suggest'' an investment focus, to adopt an 80% investment policy? Would the proposed amendments address all types of names that connote an investment focus to investors, or otherwise create investor expectations regarding the composition of the fund's portfolio? Conversely, are there certain names that would be included under the expanded scope for which investors would not have these types of expectations?

Response 1. See discussion above. The Commission either needs to define ESG or state in the rule that ESG means whatever the fund manager says that it means. Given that ESG has no generally agreed meaning, any enforcement of an implicit objective standard that will arise through regulation by enforcement (presumably built on an amorphous progressive understanding of the term) will be arbitrary and capricious.

Question 2. Is it appropriate to retain, as proposed, the requirement for fund names that suggest a focus in a particular type of investment or investments, investments in a particular industry or group of industries, or particular countries or geographic regions to adopt an 80% investment policy? Should we eliminate or add to these types of names in the rule text, given the proposed expanded scope of the requirement (i.e., including within the scope names that include terms suggesting a focus in investments or issuers that have particular characteristics)?

Response 2. The 80 percent rule appears to have worked fine with respect to country funds or industry funds. Until we know what ESG *means*, it is hard to say anything with respect to the application of the 80 percent rule to ESG other than I have no idea how the Commission would enforce such a rule if it doesn't say what ESG means and I have no idea how funds would comply with the rule unless the Commission defines the rule or the funds are permitted to define what ESG means for their funds.

Question 4. Should the names rule's 80% investment policy requirement apply, as proposed, to fund names with terms such as ''ESG'' and ''sustainable'' that reflect certain qualitative characteristics of an investment? Why or why not? Are investors relying on these terms as indications of the kinds of companies in which the fund invests or does not invest? Would this be the case even to the extent that funds with ESG and similar terminology in their names may use disparate means to select their portfolio investments? Should there be any additional requirements for funds that use ESG or similar terminology in their names?

Response 4. The Commission needs to make it clear in the rule that a fund may define "ESG factors" in non-progressive ways and name the fund accordingly or affirmatively define ESG factors. In addition, as also discussed above, ESG is new terminology for an entire family of progressive ideas that have been around for a long time. Permitting alternative terms seems

appropriate but the Commission should at the very least provide a non-exclusive list of permitted terms. Examples might include social justice, corporate social responsibility (CSR), stakeholder theory, wokeness, critical race theory (CRT), socially responsible investing (SRI), sustainability, diversity, ethical investing, or common good investing.

Question 6a. Will funds be able to reasonably determine what investments qualify for their 80% baskets under the proposed rule?

Response 6a. Not unless the Commission defines ESG or ESG factors or allows the fund to define those factors themselves with respect to their fund.

Question 6b. What steps and tools will funds use to make these determinations? If not, what steps should we take to clarify this, particularly given the proposed expanded scope of the 80% investment policy requirement?

Response 6b. If the term ESG or ESG factors remains undefined and the funds are unable to define the terms themselves, then I have no idea what steps and tools they will use to make the determination. Most likely, they will end up farming these determinations out to consultants in the climate-industrial complex to protect themselves enriching the lawyers, accountants, consultants and NGOs that live off of ESG.

Question 6c. Is it likely that funds with similar names will come to different reasonable determinations as to what investments qualify for inclusion in their 80% baskets? If so, will investors be confused by these names?

Response 6c. Yes, it is virtually certain that funds with similar names will come to different reasonable determinations as to what investments qualify for inclusion in their 80% baskets. The Commission has given them nothing to go on.

Question 63. Should we, as proposed, define a fund name as materially deceptive and misleading when the fund is an integration fund that uses ESG terms in its name? Are there circumstances in which an integration fund's use of an ESG term in its name would not be materially deceptive and misleading?

Response 63. This is subsection (d) of the proposed rule. Provided the term used in the name is not literally "ESG," and given that neither ESG, nor "ESG factor" nor "ESG term" is defined by the Commission nor has a commonly understood meaning,[7] it is beyond me how you can even determine whether an ESG term is used in the name let alone whether it is materially deceptive and misleading.

[7] Unlike, for example, China, Canada, electric utility, pharmaceutical company, etc.

Sincerely,

David R. Burton
Senior Fellow in Economic Policy
The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
202-608-6229 (direct dial)
David.Burton@heritage.org