The 2023 Names Rule Amendment: An Unnecessary, Unjustifiable, and Consequential Expansion

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INTRODUCTION

Consider the difference between a well-defined food item, such as a banana, versus something more abstract, like a "healthy food."[1] If an individual orders a banana from a delivery service, they are selecting a specific item with a clear, widely recognized identity. So, if they receive, for example, an apple, it is reasonable to say the delivery service failed to meet the individual's expectations. A banana is an unambiguous food type and not open to a subjective interpretation.[2] Now imagine a scenario where an individual desires a banana, but instead of ordering it directly, they place an order for "healthy food" through a delivery service that categorizes various foods under the broad label "healthy food." In this case, the individual might assume a banana fits within "healthy food,"[3] yet the delivery service could interpret it differently, perhaps including a steak based on a different nutritional perspective.[4] Here, it is less clear whether the individual was

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1. *Compare Banana*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/banana [https://perma.cc/ZB2Y-E9Y8] (defining a "banana" as "an elongated usually tapering tropical fruit with soft pulpy flesh enclosed in a soft usually yellow rind"), *with What Does Healthy Food Mean?*, SAFEFOOD, https://www.safefood.net/heathy-food/what-it-means [https://perma.cc/8MDR-9JAH] (defining "healthy food" as "food that gives your body what it needs to stay well and full of energy").

2. *See Subjective Interpretation*, COLLINS, https://www.collinsdictionary.com/us/dictionary/english/subjective-interpretation [https://perma.cc/6G3X-5QBR] (defining "subjective" as "based on personal opinions and feelings rather than on facts" and defining "interpretation" as "an opinion about what [something] means").

3. The consumer might believe that a banana has the nutritional requirements to qualify as healthy. *See, e.g.*, SAFEFOOD, *supra* note 1, at 1.

4. It could be argued, given a steak's nutritional profile, it could fit into the category of providing adequate nutrients to stay healthy. *See id.*

misled, as "healthy food" is open to subjective interpretations.[5] What one individual views as healthy can vary widely from another's view, making it harder to pinpoint whether an individual's reasonable expectations were met.

A similar scenario can take place in the financial world. Like the expectation an individual might have when ordering a banana, investors who purchase shares of a mutual fund (i.e., a type of registered investment company)[6] choose a fund expecting the fund to invest in certain investments.[7] For example, an investor investing in a fund named the "Stock Fund" would reasonably expect the fund to invest in stocks.[8] Stocks are an "investment type" and convey an objective definition for both investors and fund managers[9] similar to the connotation conveyed to consumers and sellers of bananas. Thus, if the "Stock Fund" primarily invested in bonds, for example, it would be difficult to argue that the investors were not misled.[10] However, such an investment strategy would be prohibited in this case.

Section 35(d) of the Investment Company Act of 1940, as amended (the "1940 Act") broadly prohibits a fund from using as part of its name any word or words that the United States Securities and Exchange Commission (the "SEC") finds to be materially deceptive or misleading.[11] Section 35(d) also authorizes the SEC to define—by rule, regulation, or order—what constitutes a materially deceptive or misleading name.[12] In 2001, the SEC adopted Rule 35d-1 under the 1940 Act (the "2001 Names Rule"), which, in part, defines what the SEC considered to be a materially deceptive or misleading fund name.[13] The 2001 Names Rule required a fund with terms in its name that suggest the fund focuses in particular types of investments (e.g., stocks) to

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5. *See generally* COLLINS, *supra* note 2.

6. The author uses the terms "fund" or "mutual funds" to broadly denote a registered investment company, which is discussed in more detail in Section I.A.

7. *See generally* Investment Company Names, Investment Company Act Release No. 24828, 66 Fed. Reg. 8509, 8510 (Feb. 1, 2001) [hereinafter 2001 Adopting Release] ("The need for investment companies to invest in a manner consistent with their names is particularly important to . . . investors who place great emphasis on allocating their investment company holdings in well-defined types of investments, such as stocks, bonds, and money market instruments.").

8. *See* U.S. SEC. & EXCH. COMM'N, MUTUAL FUNDS AND ETFS 15 ("Stock funds invest primarily in stocks . . . .").

9. *See* 2001 Adopting Release, *supra* note 7, at 8510 (denoting that "stocks" are a "well-defined type[] of investment[]").

10. *See, e.g.*, *supra* note 7.

11. 15 U.S.C. § 80a–34(d).

12. *Id.*

13. 2001 Adopting Release, *supra* note 7, at 8509.

invest 80% of the value of the fund's assets in the type of investment suggested by the name (the "80% Policy").[14]

For twenty years, fund managers[15] relied on the SEC's interpretation that certain terms were explicitly excluded from the scope of the 2001 Names Rule—funds with terms that referenced an investment strategy, for example, rather than a type of investment, were not required to invest using an 80% Policy.[16] Consider a fund whose name is the "Growth Fund." Under the 2001 Names Rule, the "Growth Fund" was not required to have a policy to invest 80% of its assets in "growth" investments because "growth" connotes a type of investment strategy.[17] This fund could allocate its investments across various investment types (e.g., 50% in stocks and 50% in bonds), provided that its investment strategy remained aligned with the fund's intended investments.[18] Put differently, just as "healthy food" could include both bananas and steaks,[19] "growth" could encompass both stocks and bonds. However, just as bananas are fundamentally different from steaks, stocks are distinct from bonds.

In 2023, the SEC amended the 2001 Names Rule to significantly broaden the 2001 Names Rule's scope to include funds that use terms suggesting a focus in investments with "particular characteristics," such as "growth" or "value" (the "2023 Amendment" or the "Amendment").[20] Rather than limiting the 80% Policy requirement to terms that relate to investments that are easily quantifiable (e.g., investment types), the SEC is now extending this requirement to terms that involve subjective judgment.[21] For example, if you asked two fund managers to define what qualifies as a "growth" or "value" investment, their definitions could vary widely.[22] Thus, the 2023 Amendment

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14. *Id.* at 8510. ("The rule, for example, would require an investment company with a name that suggests that the company focuses on a particular type of security (e.g., an investment company that calls itself the ABC Stock Fund, the XYZ Bond Fund, or the QRS U.S. Government Fund) to invest at least 80% of its assets in the type of security indicated by its name.").

15. The author refers to "fund managers" as the collective group (e.g., portfolio managers, investment advisers, etc.) responsible for making decisions on behalf of the fund.

16. 2001 Adopting Release, *supra* note 7, at 8514.

17. *See id.*

18. *Id.*

19. *See, e.g.*, *supra* notes 3–4 and accompanying text.

20. Investment Company Names, Securities Act Release No. 11238, Exchange Act Release No. 98438, Investment Company Act Release No. 35000, 88 Fed. Reg. 70436, 70440 (Oct. 11, 2023) [hereinafter Adopting Release].

21. *See* discussion *infra* Section II.C.2.

22. *Compare* FIDELITY, FIDELITY VALUE FUND PROSPECTUS (Form N-1A) (2024) (defining "value" as investments that "[t]he Adviser . . . believes are undervalued in the marketplace in relation to factors such as the issuing company's assets, earnings, or growth potential"), *with* T. ROWE PRICE, VALUE FUND PROSPECTUS (Form N-1A) (2025) (defining "value" as "undervalued

brings into scope inherently subjective terms that cannot be reduced to quantifiable and objective criteria and lack universal definitions.[23]

This Comment argues that the 2023 Amendment is unnecessary because existing regulations sufficiently prevent deceptive or misleading fund names, the 2001 Names Rule remains effective, and the 2023 Amendment overemphasizes the significance of a fund's name. Additionally, if the 2023 Amendment is proven to be necessary, the SEC's reliance on a "reasonable investor expectations" standard is problematic under § 35(d). This Comment argues that the 2023 Amendment should be repealed because it will stifle innovation in the fund industry, create substantial interpretive issues for both investors and fund managers, and place heavy labor and cost burdens on the fund industry, all of which, ultimately, harms investors. Instead of the 2023 Amendment, this Comment suggests that funds now covered by the 2023 Amendment define the terms in their names and specify investment criteria without requiring an 80% Policy.

Part I contextualizes the 2001 Names Rule and the development of the 2023 Amendment within the broader regulation of registered investment companies. Part I then outlines the new provisions of the 2023 Amendment and further considers the existing prohibitions within the fund industry and underscores the ongoing emphasis the SEC places on disclosure documents across the industry. Part II argues that the 2023 Amendment is unnecessary, critiques the SEC's "reasonable investor expectations" standard, and examines the potential consequences of the 2023 Amendment. Part III proposes a revised approach for funds newly subject to the 2023 Amendment, highlighting the proposal's benefits while addressing potential counterarguments. Lastly, Part IV briefly concludes.

I. BACKGROUND: UNDERSTANDING THE 2001 NAMES RULE AND THE 2023 AMENDMENT

This Part provides the regulatory framework that the SEC and Congress apply to funds. This Part then explores the 2001 Names Rule and reviews the 2023 Amendment, addressing the SEC's justification for the Amendment and detailing the Amendment's expanded scope, requirements, and compliance

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by various measures, and may be temporarily out of favor, but have good prospects for capital appreciation"). Both of these definitions were taken prior to these funds updating their disclosures to include "value" in an 80% Policy.

23. Inv. Co. Inst., Comment Letter on Proposed Rule to Investment Company Names 55 (Aug. 16, 2022), https://www.sec.gov/comments/s7-16-22/s71622-20136238-307259.pdf [https://perma.cc/7S5M-A2PC].

timeline. Lastly, this Part assesses how the 2023 Amendment fits into the current regulatory landscape related to fund names.

A. Regulating Funds Under the 1940 Act

An investment company is a company that issues securities, in the form of fund shares, and is primarily engaged in the business of investing in securities.[24] Securities include a wide range of financial assets, such as stocks and bonds.[25] Registered investment companies, as the name suggests, are investment companies that are registered with, and regulated by, the SEC pursuant to the 1940 Act and its associated rules, regulations, and forms.[26] The 1940 Act categorizes registered investment companies into three main types: (1) open-end funds (which includes mutual funds); (2) closed-end funds; and (3) unit investment trusts.[27] Most registered investment companies are mutual funds, which pool money from investors and diversify the money by investing across various securities.[28] Mutual fund investors purchase shares directly from the fund and can sell their shares back to the fund at any time.[29]

The 1940 Act regulates the structure and operations of funds through registration and disclosure requirements.[30] The Securities Act of 1933, as amended (the "1933 Act") requires funds to regularly disclose information about the fund to investors.[31] The cornerstone of the disclosure regime for funds is the prospectus.[32] Mutual funds are required to maintain a current prospectus that provides investors with key details about the fund, such as its investment strategy.[33] A fund must provide a prospectus to shareholders in connection with a purchase of shares, and a fund's prospectus is included in

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24. 15 U.S.C § 80a–3(a)(1).

25. *Id.* § 80a–2(a)(36).

26. *See Investment Companies*, U.S. SEC. & EXCH. COMM'N (July 9, 2013), https://www.sec.gov/answers/mfinvco.htm [https://perma.cc/4USC-9298]. Registered investment companies are different from other investment companies that are not registered (e.g., hedge funds and private equity firms).

27. *Id.*

28. INV. CO. INST., HOW US-REGISTERED INVESTMENT COMPANIES OPERATE AND THE CORE PRINCIPLES UNDERLYING THEIR REGULATION 3 (2022). For purposes of this Comment, the 2001 Names Rule/2023 Amendment applies the same to all three types of registered investment companies (i.e., the specific distinctions between the three types of registered investment companies are not relevant).

29. U.S. SEC. & EXCH. COMM'N, *supra* note 8, at 4.

30. INV. CO. INST., *supra* note 28, at 2.

31. *Id.* at 2, 15.

32. *Id.* at 15.

33. *Id.*

the fund's registration statement, which is filed with the SEC annually and made publicly available on the SEC's Electronic Data Gathering, Analysis, and Retrieval system.[34]

Rule 8b-16 under the 1940 Act requires that registration statements are amended at least once a year to ensure that financial statements and other information do not become stale.[35] This is often referred to as the "annual update" and must occur within 120 days after the date of the close of a fund's fiscal year end.[36] A fund can supplement or amend its registration statement throughout the year as necessary to reflect material changes to its disclosure.[37]

B. The 2001 Names Rule

Section 35(d) of the 1940 Act, as amended by the National Securities Markets Improvement Act ("NSMIA"), has a general prohibition on funds using names that the SEC finds to be materially deceptive or misleading.[38] Section 35(d) grants the SEC congressional authority to define "by rule, regulation, or order" names that are "materially deceptive or misleading."[39] In addition to the specific requirements of § 35(d), the name of a fund also may be deceptive or misleading for purposes of the disclosure requirements of the 1933 Act.[40] Before NSMIA amended § 35(d), the SEC needed to declare by order that a particular fund name was misleading, if it so found.[41]

Under the authority Congress granted to the SEC, on March 31, 2001, the SEC adopted the 2001 Names Rule to define fund names that could mislead investors regarding a fund's investment emphasis.[42] According to the SEC, in amending § 35(d) under NSMIA, Congress reaffirmed its concern that investors might rely on a fund's name to determine the fund's investments,

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34. *Id.*

35. *See* 17 C.F.R. § 270.8b–16(a) (2025).

36. *Id.* The term "fiscal year" means the annual accounting period for the fund. *Id.* § 270.8b–2(e).

37. *See* INV. CO. INST., *supra* note 28, at 15.

38. 15 U.S.C § 80a–34(d); Pub. L. No. 104–290, § 208, 110 Stat. 3416, 3432 (1996).

39. 15 U.S.C § 80a–34(d).

40. THOMAS P. LEMKE ET AL., 1 REGULATION OF INVESTMENT COMPANIES § 9.08 (Matthew Bender, rev. ed.). For example, if the name of the investment company implies certain attributes (such as a focus on certain types of investments) that aren't actually reflected in the company's offerings, it could be considered misleading under the 1933 Act.

41. 2001 Adopting Release, *supra* note 7, at 8509. In other words, the SEC needed to make a formal, authoritative decision declaring a specific fund name as deceptive or misleading.

42. *Id.* Essentially, § 35(d) prohibits a fund from using names that the SEC considers materially misleading or deceptive. Under the 2001 Names Rule, certain fund names—like "Stock Fund"—are automatically deemed misleading if the fund doesn't invest at least 80% of its assets in the type of investments implied by its name. *See, e.g.*, *infra* text accompanying notes 46, 49.

and thus gave the SEC rulemaking authority to protect investors.[43] In the adopting release for the 2001 Names Rule (the "2001 Adopting Release"), the SEC stated there are "certain investment company names that are likely to mislead an investor about a company's investment emphasis," and "Congress has recognized . . . the name of an investment company may communicate a great deal to an investor."[44]

The 2001 Names Rule framework required a fund with terms in its name suggesting a particular investment emphasis in certain investments, industries, or geography to invest in a manner consistent with its name.[45] The 2001 Names Rule applied to all funds with terms in their names suggesting a focus in: (1) a particular type of investment (e.g., the ABC *Stock* Fund or XYZ *Bond* Fund); (2) a particular industry (e.g., the ABC *Utilities* Fund); or (3) a particular geographic focus (e.g., the ABC *Japan* Fund).[46] Notably, fund names solely suggesting a focus in an investment strategy (e.g., funds with the terms "growth" or "value" in their names) were explicitly excluded from the 2001 Names Rule's scope.[47] Furthermore, for names outside the 2001 Names Rule's scope, in determining whether a particular name was deceptive or misleading, the SEC would "*continue* to scrutinize investment company names *not covered by the proposed rule* . . . [by] consider[ing] whether the name would lead a reasonable investor to conclude that the company invests in a manner that is inconsistent with the company's intended investments."[48]

Under the 2001 Names Rule, a fund whose name fell within the scope of the 2001 Names Rule had to adopt an 80% Policy, which requires investing at least 80% of the fund's assets in the investment type that the fund's name suggests.[49] A fund's 80% Policy was disclosed as one of its principal

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43. *Id.*
44. *Id.* at 8509–10.
45. *Id.* at 8510, 8512.
46. *Id.* (emphasis added).
47. *Id.* at 8514 ("[T]he rule does not apply to fund names that incorporate terms such as 'growth' and 'value' that connote types of investment strategies as opposed to types of investments."); *see also* Investment Company Names, Securities Act Release No. 11067, Exchange Act Release No. 94981, Investment Company Act Release No. 34593, 87 Fed. Reg. 36594, 36597 (proposed June 17, 2022) [hereinafter Proposing Release] ("The [SEC] has previously taken the position that fund names that incorporate terms such as 'growth' and 'value' connote an investment objective, strategy, or policy (i.e., 'investment strategies').").
48. 2001 Adopting Release, *supra* note 7, at 8514 (emphasis added). The SEC further explained that, as it pertains to this determination, it would focus on the fund's disclosure and a fund may use "any reasonable definition of the terms used in its name and should define the terms used in its name in discussing its investment objectives and strategies in the prospectus." *See id.* at 8514 n.43.
49. *Id.* at 8510.

investment strategies on the prospectus.[50] Although funds were allowed to make changes to their 80% Policy, they were required to provide notice to shareholders at least sixty days in advance of any changes (the "Sixty-Day Notice Requirement").[51] However, any fund that did make changes to its 80% Policy may also be required to change its name if the change in investments subsequently results in the fund now using a term in its name in a potentially deceptive or misleading way.[52]

C. The 2023 Amendment

For over two decades, the 2001 Names Rule remained unchanged as the primary regulation governing fund names. However, in 2023, the SEC adopted changes aimed at specific broad categories of fund names (i.e., the 2023 Amendment).[53] The 2023 Amendment significantly broadened the SEC's historical interpretation of the 2001 Names Rule's scope and added certain compliance, reporting, and recordkeeping requirements, among other changes.[54] The following Sections examine the SEC's rationale for adopting the 2023 Amendment and outline the Amendment's expanded scope, additional requirements, and compliance timeline.

1. The SEC's Justification

On May 25, 2022, after requesting public comments on the effectiveness of the 2001 Names Rule,[55] the SEC proposed the 2023 Amendment which would expand the 2001 Name Rule's scope and impose additional regulatory requirements related to fund names.[56] The SEC contended that omitting names which suggest a fund is focused on a particular investment strategy—which the 2001 Names Rule explicitly omitted—led to interpretative challenges for the fund industry, including uncertainty about which names fall within the 2001 Names Rule's scope.[57] The SEC argued that this

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50. *Id.* at 8511 n.15.
51. *Id.* at 8511.
52. *Id.*
53. Adopting Release, *supra* note 20, at 70436.
54. LEMKE ET AL., *supra* note 40, at § 9.08; *see* discussion *infra* Section I.C.3.
55. Request for Comments on Fund Names, Investment Company Act Release No. 33808, 85 Fed. Reg. 13221 (Mar. 6, 2020). In publishing the request for comment, the SEC was soliciting information to determine whether the existing rule (i.e., the 2001 Names Rule) was effective and whether there are alternatives that the SEC should consider. *Id* at 13221.
56. *See* Proposing Release, *supra* note 47, at 36595.
57. *Id.* at 36597.

exclusion "resulted in some fund names being excluded from this requirement because the name contains a term suggesting an investment strategy, even if the name also suggests an investment focus to investors."[58] The proposal for the 2023 Amendment recognized that "a fund name might connote a particular investment focus and result in *reasonable investor expectations*" and—thus is likely to be materially deceptive or misleading if not supported by an 80% Policy—"regardless of whether the fund's name describes a strategy as opposed to a type of investment."[59]

The SEC received over one hundred comment letters on the proposal, reflecting a wide range of opinions on the proposed changes.[60] On December 11, 2023, the 2023 Amendment became effective with the goal of modernizing and enhancing investor protections.[61]

2. Expanding the Scope

The 2023 Amendment applies to any fund name using terms that suggest the fund focuses in investments that have, or investments whose issuers have, "particular characteristics."[62] Now, in addition to the category of terms that were included within the scope of the 2001 Names Rule—that is, terms that suggest a focus in an investment type, particular industry, or geographic focus—funds with terms in their names that are suggestive of "particular characteristics" are also required to adopt an 80% Policy.[63] Collectively, these are fund names that suggest an investment focus.[64]

The adopting release for the 2023 Amendment (the "2023 Adopting Release") explicitly states that a fund with a term in its name that references "characteristics of the fund's portfolio as whole" or a "portfolio-wide result to be achieved" does not suggest a focus in investments that have "particular characteristics" and are thus not required to adopt an 80% Policy tied to that

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58. *Id.*

59. *See id.* at 36598 (emphasis added).

60. *See Comments on Investment Company Names*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/comments/s7-16-22/s71622.htm [https://perma.cc/R24U-LZ32].

61. Adopting Release, *supra* note 20, at 70436; 17 C.F.R. § 270.35d–1 (2025). It's important to distinguish between a rule's "effective date" and its "compliance date." As it relates to the 2023 Amendment, the compliance date is when a fund must begin adhering to the Amendment—which, for most funds, is June 11, 2026. *See* discussion *infra* Section I.C.4.

62. 17 C.F.R. § 270.35d–1(a)(2). When discussing the "particular characteristics" qualification, the author uses "investments that have" to implicitly encompass the "whose issuers have" language of the 2023 Amendment.

63. *Id.*

64. *Id.*

term.[65] However, this "portfolio-wide result to be achieved" exclusion depends largely on the context in which a term is used, as certain terms could refer either to "particular characteristics" of investments in a portfolio or a "portfolio-wide result to be achieved."[66] Notably, the SEC stated that for fund names that could reasonably be understood to reference either a fund's emphasis in investments with "particular characteristics" or a "portfolio-wide result to be achieved" the fund will be required to adopt an 80% Policy.[67]

The SEC estimated that as of October 11, 2023, the 2023 Amendment covers approximately 76% of all mutual funds (i.e., 10,291 out of 13,541), whereas the 2001 Names Rule covered approximately 60% of all funds.[68] Of note, the SEC did not change the Sixty-Day Notice Requirement initially adopted under the 2001 Names Rule.[69] If a fund that was not previously in scope under the 2001 Names Rule now needs to adopt or modify an 80% Policy, this would require approval from the fund's board of directors.[70]

The 2023 Amendment does not explicitly define "particular characteristics" and instead provides an "illustrative parenthetical that is

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65. Adopting Release, *supra* note 20, at 70446–47 ("[W]e continue to recognize that there are certain terms that do not communicate to investors the particular characteristics of investments that will make up the fund's portfolio and for which an 80% investment policy will not be required. Such names include, for instance, terms that suggest a *portfolio-wide result to be achieved* . . . ." (emphasis added)).

66. *Id.* at 70447 ("Many commenters, however, sought additional clarity on terms—such as 'growth' and 'value'—that commenters stated can reference either the characteristics of a fund's investments or the intended result of a fund's portfolio investments in the aggregate."); *see also 2025 Names Rule FAQs*, U.S. SEC. & EXCH. COMM'N (Jan 8, 2025) [hereinafter *2025 FAQ*], https://www.sec.gov/rules-regulations/staff-guidance/division-investment-management-frequently-asked-questions/2025-names-rule-faqs [https://perma.cc/TU5J-6T3W] (stating clearly the circumstances where "income" refers to a "portfolio-wide result to be achieved"); Inv. Co. Inst., *supra* note 23, at 9 ("[D]epending on the context in which they are used, certain terms—such as 'growth,' 'income,' 'global' or 'sustainable'—could refer either to a particular portfolio investment or to the overall outcome that the fund seeks to achieve."). For instance, the "Diversified Growth Fund" might use the term "growth" to indicate its goal of achieving capital appreciation or long-term growth (implying a "portfolio-wide result to be achieved"). *Id.* Alternatively, it could use "growth" to signify that the fund primarily invests in a diverse range of growth-oriented companies (indicating a focus in investments with "particular characteristics"). *Id.*

67. Adopting Release, *supra* note 20 at 70448. However, the SEC stated that "it is not typical in current practice for growth and value funds to implement their strategies on a portfolio-wide basis, as opposed to a selection process based on the growth or value characteristics of the fund's component portfolio investments." *Id.*

68. *Id.* at 70481 & n.495, 70496 tbl.1.

69. 17 C.F.R. § 270.35d–1(a)(2)(ii) (2025).

70. *See id.* § 270.38a–1(a)(2) Any change to an investment policy—which includes adopting or modifying an 80% Policy—requires approval from the fund's board of directors. *See id.*

designed to give non-exclusive examples of terms" that are subject to this expanded scope.[71] The parenthetical list includes "growth," "value," and "terms indicating that fund's investment decisions incorporate one or more environmental, social, or governance factors."[72] The SEC chose not to provide a list of enumerated terms that are included in the expanded scope because it "believe[d] that this term will be adequately understood to mean any feature, quality, or attribute."[73] Additionally, the SEC highlighted that the effect of the scope of 2023 Amendment is that funds that use terms that reference a thematic investment focus (which have surged over recent years)[74] are required to adopt an 80% Policy associated with that term.[75] Thematic investment terms include terms—in addition to those related to environmental, social, and governance factors[76]—that suggest a focus in investments that target ideas, personal values, or trends that do not fit squarely into existing industry classifications.[77]

The 2023 Amendment does not distinguish between a type of investment (i.e., the scope covered by the 2001 Names Rule) and an investment strategy (i.e., what the 2001 Names Rule explicitly excluded), because, as the SEC stated, "a fund name might connote a particular investment focus and result in *reasonable investor expectations* regardless of whether the fund's name describes a strategy as opposed to a type of investment."[78] For example, terms like "growth" and "value"—which were explicitly excluded from the scope of the 2001 Names Rule—create, in the SEC's view, reasonable expectations that funds with those terms will "invest predominantly in companies that exhibit "˜growth' or "˜value' characteristics."[79]

In justifying its authority to expand the 2001 Names Rule scope, the SEC relied on Congress' amendments to § 35(d) under NSMIA—which gave the SEC explicit rulemaking authority—and, among other things, its experience

71. Adopting Release, *supra* note 20, at 70443.

72. 17 C.F.R. § 270.35d–1(a)(2).

73. Adopting Release, *supra* note 20, at 70443–44.

74. *Id.* at 70444.

75. *Id.*

76. *Id.* at 70439.

77. *What Is Thematic Investing*, CHARLES SCHWAB (July 14, 2022), https://www.schwab.com/learn/story/what-is-thematic-investing [https://perma.cc/7MCH-G95D]; Dechert LLP, Comment Letter on Proposed Rule to Investment Company Names (Aug. 16, 2022) at 4, https://www.sec.gov/comments/s7-16-22/s71622-20137478-307961.pdf [https://perma.cc/EBN6-3R5F] (explaining that these investment strategies capture value associated with a particular theme, which could span a variety of industries and geographies).

78. Adopting Release, *supra* note 20, at 70444 (emphasis added).

79. *Id.*

with the 2001 Names Rule.[80] However, it is important to note that Congress specifically stated that the SEC's rulemaking authority related to materially deceptive or misleading fund names "should not impose any routine or general paperwork burdens [on funds] and should not impose any economic impact."[81] The SEC estimated that the total costs for a fund to establish and implement practices designed to meet the requirements of the 2023 Amendment will range from $50,000 to $500,000.[82]

Since the 2023 Adopting Release was published, the staff of the SEC has provided minimal guidance on the 2023 Amendment. However, on January 8, 2025, the staff of the SEC released an "FAQ" addressing significant questions related to the 2023 Amendment.[83] In this "FAQ," the staff of the SEC explained, among other things, that funds that have the term "income" in their names would not be required to adopt an 80% Policy associated with the term "income" if "income" does not refer to "fixed income securities" (i.e., when "income" is used to suggest a "portfolio-wide result to be achieved").[84]

3. Additional Requirements

In addition to expanding the 2001 Names Rule's scope, the 2023 Amendment has certain additional requirements. The following Sections highlight the specific requirements.

a. Enhanced Disclosure

The 2023 Amendment mandates that any fund required to adopt an 80% Policy must include in its prospectus disclosure the definitions of the terms used in its name and the specific criteria the fund employs to select the

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80. *Id.* at 70446 ("[The [SEC] in adopting rule amendments is exercising its authority under section 35(d) to 'define,' 'by rule,' 'such names or titles as are materially deceptive or misleading' and is doing so based on consideration of the broad public input the Commission has received on fund names, our analysis of this input, the Commission and staff's experience with the names rule over the past two decades, and developments in the fund industry during this time period.").

81. S. REP. NO. 104-293, at 33 (1996).

82. Adopting Release, *supra* note 20, at 70491.

83. *2025 FAQ*, *supra* note 66. The staff of the SEC regularly releases responses to "FAQs" concerning the SEC's laws and regulations—these responses are interpretations and guidance from the staff. *See generally Division of Investment Management: Frequently Asked Questions*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/rules-regulations/staff-guidance/division-investment-management-frequently-asked-questions [https://perma.cc/2T8J-XSVF] (Apr. 21, 2025).

84. *2025 FAQ*, *supra* note 66.

investments those terms describe.[85] This enhanced disclosure requirement is intended to "help investors better understand how the fund's investment strategies correspond with the investment focus that the fund's name suggests, as well as to provide additional information about how the fund's management seeks to achieve the fund's objective."[86]

b. Plain English/Industry Use Requirement

Furthermore, the 2023 Amendment requires that any terms used in a fund's name must be "consistent with those terms' plain English meaning or established industry use" (the "Plain English/Industry Use Requirement").[87] The SEC stated that the Plain English/Industry Use Requirement "is designed to provide investors with a better understanding of the fund and its investment objectives by effectively requiring a fund's name to be consistent with a reasonable investor's likely understanding of the investment focus."[88] Whether a fund is using a term consistent with the Plain English/Industry Use Requirement could be derived from a variety of sources.[89] Before the adoption of the 2023 Amendment, it was common practice for a fund to include prospectus disclosure that describes the fund's 80% Policy and that defines the terms in the fund's name, with some funds implicitly adhering to the Plain English/Industry Use Requirement.[90] The SEC adopted the "established industry use" component because some terms that are now in scope of the 2023 Amendment (e.g., "value") do not have a plain English definition, but still convey a particular focus to investors.[91]

The SEC stated that "using a term that has a plain English meaning or established industry use but then defining that term in disclosure in a materially different way, would generally violate § 35(d)."[92] However, as the SEC has recognized, certain terms may be defined in multiple reasonable ways, and a definition is sufficient as long as it complies with the Plain

85. Adopting Release, *supra* note 20, at 70466.

86. *Id.*

87. 17 C.F.R. § 270.35d–1(a)(2)(iii) (2025).

88. Adopting Release, *supra* note 20, at 70467–68.

89. *Id.* at 70468.

90. *See, e.g.*, *id.* at 70466 & n.330; Letter from Cynthia Lo Bessette, Chief Legal Officer, Fidelity Mgmt. & Rsch. Co. LLC, to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, at 15–16, 16 n.33 (Aug. 16, 2022), https://www.sec.gov/comments/s7-17-22/s71722-20137660-308068.pdf [https://perma.cc/9HW2-4NCY] (highlighting that two Fidelity funds used plain English definitions in the language of their prospectuses prior to the adoption of the 2023 Amendment).

91. Adopting Release, *supra* note 20, at 70469.

92. *Id.* at 70468.

English/Industry Use Requirement.[93] The SEC explained that "[a] fund's use of reasonable definitions of the terms used in the fund's name . . . may not be inconsistent with their plain English meaning or established industry use" as long as the definition has a meaningful nexus between the term used in the fund's name and the fund's investment focus.[94]

c. Meaningful Nexus Between Investments and Investment Focus

When determining whether a particular investment qualifies as being invested in accordance with the investment focus that the fund's name suggests—that is, whether an investment qualifies for inclusion in a fund's 80% basket (the "80% Basket")[95]—the 2023 Amendment requires a "meaningful nexus between the given investment and the investment focus suggested by the name."[96] The SEC has offered guidance on this matter, suggesting that it would typically be reasonable for a fund to conclude that a meaningful nexus exists between certain securities and a particular industry if the companies issuing these securities generate 50% or more of their revenue or income from, or hold substantial assets in, that industry.[97] The SEC also provided flexibility for funds to determine what qualifies as a reasonable nexus between a security and a given investment focus.[98]

d. Compliance Monitoring

The 2023 Amendment requires funds to review the inclusion of their portfolio investments in the 80% Basket "at least quarterly."[99] Each quarter,

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93. *Id.* at 70445 ("[F]or many terms, there will be various reasonable means of implementing an 80% investment policy that incorporates a definition . . . that differs from another fund whose name incorporates the same terminology. For example, different funds may have 'growth' in their name, and each of these funds may have portfolio managers who have different approaches to selecting investments that have growth characteristics. In such circumstances, two funds would naturally have different policies that reflect their portfolio managers' distinct approaches to growth investing. In this example, each of these funds would describe to investors how it defines 'growth,' provided the definitions are consistent with the term's plain English meaning or established industry use . . . .").

94. *Id.* at 70467.

95. The 80% Basket is defined as "investments that are invested in accordance with the investment focus that the fund's name suggests." 17 C.F.R. § 270.35d–1(g) (2025).

96. Adopting Release, *supra* note 20, at 70448.

97. *Id.*

98. *Id.*

99. *Id.* at 70441. It is worth noting that, in the proposal for the 2023 Amendment, the SEC required that a fund assess compliance with its 80% Policy on a continual basis. *See id.* at 70451. In response to feedback about the significant burden a continuous or daily reassessment program would impose on funds, the SEC opted to adopt a quarterly review requirement instead. *See id.* at 70451–52.

a fund is required to publicly file on Form N-Port[100]: (1) whether each investment in the fund's portfolio is in the fund's 80% Basket; (2) the value of the fund's 80% Basket, as a percentage of the value of the fund's assets; and (3) any definition(s) of terms used in the fund's name.[101] Funds must keep written records of the first two filing requirements.[102] The initial determination of whether an investment is in the 80% Basket is "at the time that [the fund] invests."[103] However, each quarter a fund must re-assess the characteristics of its investments for consistency with the fund's 80% Policy.[104] The 2023 Amendment permits temporary departures from the 80% Policy investment requirement, but a fund must return to compliance within ninety days.[105] The quarterly review and ninety-day return to compliance period represents a significant change from the 2001 Names Rule—the 2001 Names Rule only measured compliance at the time of investment.[106]

4. Compliance Date and Timeline

The 2023 Amendment became effective on December 11, 2023,[107] and the compliance date, for most funds, is June 11, 2026 (the "Compliance Date").[108] Originally, the compliance date for most funds was December 11, 2025 (the "Original Compliance Date").[109] However, on March 14, 2025, after two industry leaders—including the Investment Company Institute (the "ICI")—wrote letters identifying the challenges and complex steps to implement the

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100. Form N-Port is the reporting form that funds use to file monthly reports to the SEC. U.S. SEC. & EXCH. COMM'N, FORM N-PORT (2023).

101. Adopting Release, *supra* note 20, at 70441, 70473.

102. *Id.* at 70473–74.

103. *Id.* at 70450.

104. *Id.* at 70451.

105. *See* 17 C.F.R. § 270.35d–1(b)(1)(i)–(ii) (2025). Notably, the originally proposed return-to-compliance period was thirty days, not ninety. Proposing Release, *supra* note 47, at 36602. As a result, some comment letters—such as that from the Investment Company Institute—refer to a thirty-day period. *See, e.g.*, Inv. Co. Inst., *supra* note 23, at 17.

106. *See* 2001 Adopting Release, *supra* note 7, at 8513 & n.32 ("The rule would require an investment company that no longer meets the 80% investment requirement . . . to make future investments in a manner that would bring the company into compliance with the 80% requirement. However, an investment company subject to the requirement would not have to sell portfolio holdings that have increased in value.").

107. Adopting Release, *supra* note 20, at 70436.

108. Investment Company Names; Extension of Compliance Date, Exchange Act Release No. 102680, 90 Fed. Reg. 13076 (Mar. 20, 2025) [hereinafter Compliance Extension]. The compliance date for funds with less than $1 billion in net assets is December 11, 2026. *Id.* at 13076. The SEC estimated that, as of December 2022, 77% of funds had more than $1 billion in net assets (i.e., 77% of funds had to comply by June 11, 2026). *Id.* at 13077 n.13.

109. *See* Adopting Release, *supra* note 20, at 70476.

2023 Amendment in an orderly manner by the Original Compliance Date,[110] the SEC granted a six-month extension.[111]

To comply with the 2023 Amendment, funds must modify their prospectus disclosure and may have to change their names and/or investment policies and disclosure.[112] A new fund required to make changes to comply with the 2023 Amendment will be required to be in compliance at the time of the effective date of its registration statement that the fund files (i.e., its "annual update") on or following June 11, 2026.[113]

D. Current Regulatory Landscape

As outlined in Section I.B., § 35(d) prohibits funds from using names that the SEC deems materially deceptive or misleading, or that are classified as such by a rule (e.g., the 2001 Names Rule).[114] However, even if a fund was not required to adopt an 80% Policy, it still could not invest in a manner that was inconsistent with the fund's intended investments as suggested by its name.[115] The SEC explained that the 2001 Names Rule had never been a "safe harbor" for materially deceptive or misleading names, and the 2023 Amendment codifies this view.[116] Similarly, like § 35(d)'s general prohibition applicable to all funds, Rule 421(d) of the 1933 Act, passed on October 1, 1988, has consistently mandated the use of plain English in prospectus disclosures.[117] Additionally, Form N-1A, which, in part, sets forth disclosure

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110. *See, e.g.*, Letter from Eric J. Pan, President & CEO, Inv. Co. Inst., & Paul Cellupica, Gen. Couns., Inv. Co. Inst., to Hon. Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n, at 1, 3 (Dec. 23, 2024), https://www.ici.org/system/files/2025-01/24-cl-extension-compliance-dates.pdf [https://perma.cc/5D46-LLN3]. On December 23, 2024, the ICI requested an eighteen-month extension to the initial compliance date, highlighting the extensive collaborative efforts, along with the numerous steps and complexities involved in the implementation process. *See id.* at 3; Compliance Extension, *supra* note 108, at 13077.

111. Compliance Extension, *supra* note 108, at 13077.

112. *Id.* at 13078.

113. *Id.*

114. *See* discussion *supra* Section I.B; 15 U.S.C. § 80a–34(d).

115. *See, e.g.*, *supra* text accompanying note 48.

116. *See* 2001 Adopting Release, *supra* note 7, at 8511 ("A name may be materially deceptive and misleading even if the investment company meets the 80% requirement."); 17 C.F.R. § 270.35d–1(c) (2025).

117. 17 C.F.R. § 230.421(d)(1) (2025); *see also* Adopting Release, *supra* note 20, at 70468–69 (stating that the Plain English/Industry Use Requirement in the 2023 Amendment is different than Rule 421(d)'s requirement, as the former is focused on meaning, while the latter is "focused on making prospectuses simpler, clearer, and more useful to investors").

requirements applicable to registered open-end investment companies under the 1940 Act, further requires the use of plain English disclosures.[118]

In the twenty-four years since the adoption of the 2001 Names Rule, the SEC has rarely determined that a fund name was materially deceptive or misleading.[119] Only one enforcement action has been cited by the SEC alleging harm to shareholders due to a misleading fund name.[120] The SEC noted that a lack of enforcement actions does not necessarily imply that new rulemaking is unwarranted.[121] Instead, in adopting the 2023 Amendment, the SEC relied in part on its two decades of experience with the 2001 Names Rule and considered changes within the fund industry since 2001.[122] Notably, while the SEC's Division of Examinations issues annual priorities,[123] fund names have not been listed as a priority since 2018.[124]

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118. U.S. SEC. & EXCH. COMM'N, FORM N-1A (2023), at § B.4(c) ("The plain English requirements of rule 421 under the Securities Act . . . apply to prospectus disclosure in Part A of Form N-1A.").

119. Letter from Lindsey Weber Keljo, Head – Asset Mgmt. Grp., Sec. Ind. & Fin. Mkts. Ass'n, to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, at 3 (Aug. 16, 2022), https://www.sec.gov/comments/s7-16-22/s71622-20137421-307918.pdf [https://perma.cc/MPN9-79BH].

120. *Id.* at 3 n.3 (arguing that this singular action—*In re Ambassador Capital Management, LLC*—dealt with a fund that was not complying with a specific provision of the 1940 Act (Rule 2a-7) relating to the term "money market," and thus was not brought directly under § 35(d)'s prohibition on materially deceptive or misleading names).

121. Adopting Release, *supra* note 20, at 70481 ("There are a number of factors that determine whether and when the [SEC] brings enforcement actions, meaning the presence or absence of such actions does not necessarily indicate whether rulemaking is or is not justified.").

122. *Id.* at 70444 ("Although there have been limited [SEC] enforcement cases citing section 35(d) of the Act, [the] [SEC's] experience with the names rule over the past two decades and developments in the fund industry during this time period, including the increase in fund assets under management and the proliferation of diverse fund strategies, lead us to modernize and enhance the names rule to further the investor protection goals of section 35(d).").

123. *Examination Priorities*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/compliance/examination-priorities [https://perma.cc/A7UG-5P4K] (Oct. 21, 2024) ("The Division of Examinations annually publishes its examination priorities for the upcoming year to inform investors and registrants of the key risks, trends, and topics that will be the focus of examiners as they conduct their examinations of firms.").

124. *See, e.g.*, U.S. SEC. & EXCH. COMM'N, FISCAL YEAR 2025 EXAMINATION PRIORITIES (2025); *see also* Inv. Co. Inst., *supra* note 23, at 6 & n.19 (finding that from 2018 to 2022, there was only one reference to compliance with the 2001 Names Rule in the Division of Examinations' priorities, and here, the SEC merely stated that it had observed some funds that had "inadequate policies and procedures" for "monitoring portfolios for compliance with the 80% rule"). Additionally, on November 4, 2024, the Division of Examinations published a Risk Alert providing insight into examination observations, and the 2001 Names Rule was not mentioned. *See* U.S. SEC. & EXCH. COMM'N, REGISTERED INVESTMENT COMPANIES: REVIEW OF CERTAIN CORE FOCUS AREAS AND ASSOCIATED DOCUMENTS REQUESTED (2024).

Federal securities law, and specifically the 1940 Act, makes it clear that funds have the flexibility to invest in the way they want to, as long as they properly disclose it.[125] The SEC has continuously encouraged investors to look beyond a fund's name to obtain a complete understanding of a fund's investment objective, policies, strategies, and risks,[126] which is practice.[127] Additionally, the importance of disclosure is evidenced in a recent rule proposal by the SEC focused on fund disclosure requirements.[128]

While the 2023 Amendment reflects the SEC's evolving approach to fund names and is intended to protect investors, a closer examination reveals that the 2023 Amendment is ultimately unnecessary. This Comment argues that in adopting the 2023 Amendment, the SEC is attempting to address a problem that does not exist. Despite the SEC's justifications—which are themselves flawed—the 2023 Amendment raises significant concerns, casting doubt on whether such changes to the 2001 Names Rule were necessary at all.

II. ANALYSIS: A CRITIQUE OF THE 2023 AMENDMENT

The 2023 Amendment seeks to address a non-existent problem, making it unnecessary. This is evident from the existing prohibitions on materially deceptive and misleading fund names, the lack of prior SEC enforcement actions related to fund names, and the SEC's ongoing focus on improving disclosure documents. Furthermore, the SEC's use of the "reasonable investor expectations" standard to justify expanding the scope of the 2001 Names Rule exceeds its congressional authority and relies on flawed

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125. *See generally* EVA SU, CONG. RSCH. SERV., IF11256, SEC SECURITIES DISCLOSURE: BACKGROUND AND POLICY ISSUES 3 (2024) ("Disclosure Requirements are the cornerstone of federal securities regulation.").

126. Adopting Release, *supra* note 20, at 70437.

127. *See* INV. CO. INST., 2025 INVESTMENT COMPANY FACT BOOK 99 (2025) (showing that 93% of mutual fund–owning households that were surveyed considered a fund's investment objective when making their purchase decision).

128. *See, e.g.*, Tailored Shareholder Reports for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements, Securities Act Release No. 11125, Exchange Act Release No. 96158, Investment Company Act Release No. 34731, 87 Fed. Reg. 72758 (2022) (where the SEC adopted a rule that revamps shareholder and prospectus reports to include "concise and visually engaging" information).

assumptions. By adopting the 2023 Amendment, the SEC is causing negative consequences for the fund industry, and for investors.

A. An Unnecessary Expansion

Section 35(d) of the 1940 Act broadly prohibits funds from using names that the SEC finds to be materially deceptive or misleading.[129] Rule 421(d) of the 1933 Act requires funds to use plain English principles in their disclosures.[130] These provisions, along with the framework established by the 2001 Names Rule, have successfully safeguarded investors from materially deceptive or misleading fund names, making the 2023 Amendment redundant. Furthermore, the SEC's ongoing emphasis on fund disclosure further underscores the lack of necessity for the 2023 Amendment.

1. General Prohibition on Deceptive or Misleading Names

The following Sections examine § 35(d) and Rule 421(d) to highlight how the 2023 Amendment unnecessarily layers onto an already effective legal framework.

a. Section 35(d)

Section 35(d) of the 1940 Act preceded the adoption of the 2001 Names Rule and subjects all funds to the same general prohibition that is, funds may not use names that the SEC finds to be materially deceptive or misleading.[131] However, even before the SEC established the 2001 Names Rule to define what constitutes materially deceptive or misleading names, funds were already prohibited from investing in ways that were materially deceptive or misleading.[132] Notably, the SEC acknowledged this general prohibition in the 2001 Adopting Release, noting that even for names with terms that were not explicitly covered by the 2001 Names Rule (e.g., "growth" or "value"), it was "scrutiniz[ing] . . . whether [a] name would lead a reasonable investor to conclude that the company invests in a manner inconsistent with the company's intended investments."[133] As it pertains to this determination, the

129. 15 U.S.C. § 80a–34(d).
130. 17 C.F.R. § 230.421(d)(1) (2025).
131. *See* 15 U.S.C. § 80a–34(d).
132. *See, e.g.*, *supra* text accompanying notes 114–16.
133. 2001 Adopting Release, *supra* note 7, at 8514.

SEC focused on a fund's reasonable definition of the terms used in its name, as defined in the prospectus.[134]

This suggests that all funds, prior to the 2001 Names Rule, were always prohibited from using names in a way that misrepresented their intended or actual investments. In essence, while the 2001 Names Rule clarified which fund names the SEC deemed likely to deceive or mislead investors, it did not disregard fund names that fell outside its scope.[135] Consequently, the SEC has consistently evaluated funds with names that have terms that are newly in scope of the 2023 Amendment (i.e., funds with names implying a focus in investments with "particular characteristics") to determine if the names are materially deceptive or misleading.

The 2023 Amendment codifies the view that the 80% Policy requirement has never created a "safe harbor" from liability under § 35(d).[136] In other words, even if a fund invests 80% of its assets in a manner that is consistent with the terms in the fund's name, the other 20% is still subject to § 35(d)'s general prohibition.[137] For example, it would be materially deceptive or misleading for the "Fossil Fuel Free Fund," whose name implies that the fund does not invest in fossil fuel investments, to make an investment in a company with fossil fuel reserves.[138] This is further evidence that even funds previously outside the scope of the 2001 Names Rule were still subject to potential liability under § 35(d). Thus, the 2023 Amendment is unnecessarily redundant and imposes unnecessary requirements for the newly in-scope funds.

b. Rule 421(d)

An additional example of the SEC layering onto an already sufficient legal framework is the Plain English/Industry Use Requirement. This requirement mandates that for funds that are required to adopt an 80% Policy, the terms in the funds' names must be "consistent with those terms' plain English meaning or established industry use."[139] However, Rule 421(d) under the 1933 Act (which applies to funds registered under the 1940 Act)[140] and Form N-1A require funds to use "plain English principles" in the language of their

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134. *Id.* at 8514 n.43.
135. *See, e.g.*, *supra* note 48 and accompanying text.
136. *See* 17 C.F.R. § 270.35d–1(c) (2025).
137. Adopting Release, *supra* note 20, at 70465.
138. *Id.*
139. 17 C.F.R. § 270.35d–1(a)(2)(iii).
140. *See* LEMKE ET AL., *supra* note 40, § 9.08.

prospectus disclosures—both of these provisions were in place prior to the 2001 Names Rule.[141]

The SEC contends that Rule 421(d) differs from the Plain English/Industry Use Requirement, as the latter focuses on the "meaning" of terms, whereas Rule 421(d) emphasizes making prospectuses—not names—"simpler, clearer, and more useful" to investors.[142] Although the SEC's primary focus may differ, funds are still required to follow plain English principles in their prospectus disclosures under Rule 421(d). Thus, any definitions of terms within the investment strategies would need to be defined in a manner that is consistent with plain English principles. This is demonstrated by the fact that under the 2001 Names Rule framework, before the Plain English/Industry Use Requirement was formally codified, funds commonly defined any terms in their names that triggered an 80% Policy using plain English.[143] Accordingly, similar to the application of § 35(d)'s general prohibition on misleading or deceptive fund names, all funds have effectively been subject to the plain English provision of the 2023 Amendment even before its adoption.

c. The Interaction Between § 35(d) and Rule 421(d)

Examining the interaction between § 35(d) and Rule 421(d) raises further doubts about the necessity of the 2023 Amendment. All funds—including those newly in scope under the 2023 Amendment—are already subject to § 35(d)'s prohibition on using materially deceptive or misleading names.[144] The SEC acknowledged that "using a term that has a plain English meaning or established industry use but then defining that term in disclosure in a materially different way, would generally violate § 35(d)."[145] For funds not subject to the 2001 Names Rule, the SEC considered the fund's definition of the terms in its name when assessing whether the name was materially deceptive or misleading.[146] Since Rule 421(d) required plain English in

141. *See* 17 C.F.R. § 230.421(d)(1) (2025); U.S. SEC. & EXCH. COMM'N, *supra* note 118, § B.4(c). The author cites Form N-1A not as a primary focus, but to illustrate another provision—alongside Rule 421(d)—that includes plain English requirements.

142. Adopting Release, *supra* note 20, at 70468–69. The author acknowledges that the "established industry use" component of the Plain English/Industry Use Requirement may distinguish it from Rule 421(d)'s plain English principle requirement. However, in making this distinction, the SEC does not argue that the "established industry use" component is a reason for the difference between Rule 421(d) and the Plain English/Industry Use Requirement. *See id.* As a result, the author does not address the counterargument to this distinction.

143. *See, e.g.*, sources cited *supra* note 90.

144. *See* discussion *supra* Section II.A.1.a.

145. Adopting Release, *supra* note 20, at 70468.

146. 2001 Adopting Release, *supra* note 7, at 8514 & n.43.

strategy disclosures before the Plain English/Industry Use Requirement[147]—and given that the SEC referenced a fund's definition in its disclosures regardless of whether the fund fell within the 2001 Names Rule Scope—a violation of Rule 421(d) concerning these definitions would inherently constitute a violation of § 35(d). This raises questions about the necessity of expanding the 2001 Names Rule's scope, particularly for funds not required to adopt an 80% Policy.

2. The Lack of Enforcement Proceedings

The effectiveness of the 2001 Names Rule and the current safeguards on materially deceptive or misleading names is demonstrated by the notable absence of enforcement actions against funds allegedly using materially deceptive or misleading names. In the twenty-four years since the adoption of the 2001 Names Rule, the SEC pursued only a single enforcement action alleging shareholder harm due to a misleading name, and this case did not specifically involve a violation of § 35(d).[148]

The SEC argued that previous enforcement actions are not necessary to justify amending the 2001 Names Rule, stating that various factors influence the decision to pursue enforcement, and that the lack of enforcement actions demonstrates the effectiveness of the 2001 Names Rule, rather than indicates that additional enhancements are unwarranted.[149] However, in the last seven years, the SEC has never recognized overreliance on fund names as a priority area.[150] This highlights a potential inconsistency in the SEC's position: while the SEC argued that the lack of enforcement actions demonstrates the effectiveness of the 2001 Names Rule and that materially deceptive or misleading names are a low-priority issue, it is simultaneously expanding the 2001 Names Rule.

In response to criticisms of the 2023 Amendment regarding the lack of enforcement actions for fund names, the SEC pointed to its experience with the 2001 Names Rule and shifts in the fund industry over time.[151] Specifically, it cited the growth in the number of funds, the increase in assets under management, and the diversification of investment strategies as justifications.[152] However, given the effectiveness of the current framework

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147. *See* discussion *supra* Section II.A.1.b.
148. *See, e.g.*, *supra* note 120 and accompanying text.
149. Adopting Release, *supra* note 20, at 70481.
150. *See, e.g.*, sources cited *supra* note 124.
151. *See, e.g.*, *supra* note 122 and accompanying text.
152. Adopting Release, *supra* note 20, at 70444.

and the low priority of fund names as an issue, this Comment argues that these reasons are insufficient to warrant the negative consequences that could result from expanding the 2001 Names Rule.

3. The SEC's Inconsistent Emphasis

The 2023 Amendment expands the scope of the 2001 Names Rule to cover an estimated 76% of all mutual funds.[153] As a result, the SEC appears to overemphasize the importance of fund names. Because most funds are now covered by the 2023 Amendment, this shift may encourage investors to assume—without reviewing disclosure documents—that a fund's investments align precisely with its name. As a result, the 2023 Amendment may divert attention from critical fund disclosures, weakening the disclosure-based regulatory framework that the fund industry is built on[154] and contradicting the SEC's stance that investment decisions should be driven by disclosures rather than fund names.[155]

The SEC justified the 2023 Amendment's expansion of the 2001 Names Rule scope by claiming that fund names impact investment decisions, including names with terms not covered by the 2001 Names Rule.[156] However, in 2023, the same year the 2023 Amendment was passed, 93% of mutual fund-owning households surveyed by the ICI "considered a fund's investment objective when making their purchase decision."[157] In other words, although a fund's name could theoretically influence investment decisions, investors tend to look at the fund's disclosure before deciding to invest in the fund. Thus, in expanding the scope of the 2001 Names Rule, the SEC is addressing an influence on investors that is not the primary factor in the way investors choose funds. Furthermore, by overemphasizing the importance of a fund's name, the 2023 Amendment is seemingly at odds with the SEC's recent stance on enhancing disclosure documents for investors.[158] If a fund's name is so important, in theory, a fund's disclosure documents need not be so comprehensive.

The SEC should avoid rulemaking that might encourage investors to expect a name to tell them all they need to know about a fund before making

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153. *Id.* at 70481.

154. *See, e.g.*, *supra* note 125 and accompanying text.

155. *See* Adopting Release, *supra* note 20, at 70437.

156. *See id.* at 70437, 70439–40.

157. INV. CO. INST., *supra* note 127, at 99.

158. *See, e.g.*, Tailored Shareholder Reports for Mutual Funds and Exchange-Traded Funds, *supra* note 128.

an investment decision. However, the SEC appears to be adopting this approach, which contradicts the policy foundations of § 35(d), the original intent behind the 2001 Names Rule, and the SEC's recent efforts to enhance disclosure documents for investors.

B. An Unjustifiable Expansion

Since there is a strong argument that the 2023 Amendment is unnecessary, directly rebutting the SEC's justification may not even be necessary. However, even if the argument about necessity is set aside, the SEC's own justification for the 2023 Amendment reveals additional problems. In justifying the 2023 Amendment, the SEC stated that "a fund name might connote a particular investment focus and result in *reasonable investor expectations* regardless of whether the fund's name describes a strategy as opposed to a type of investment."[159] Even if this is true, the "reasonable investor expectations" standard is problematic because: (1) it is inconsistent with the authority granted to the SEC by Congress; and (2) it implies unrealistic emphasis on a fund's name.

1. The SEC Is Acting Beyond Its Authority

Congress, through its amendments to § 35(d) under NSMIA, explicitly authorized the SEC to define materially deceptive or misleading fund names through rule, regulation, or order.[160] First and foremost, there is a significant difference between "materially deceptive or misleading" names and names based on investors' "reasonable expectations."[161] A term is inherently misleading if it creates an affirmative impression in one way or another and if the impression created differs in a material way from what actually exists.[162] For instance, the term "stock" in a fund's name implies that the fund invests primarily in stocks.[163] If the fund does not actually invest in stocks, the term becomes inherently misleading as it creates a false impression. Therefore, requiring an 80% Policy for the term "stock" is within the SEC's granted

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159. Adopting Release, *supra* note 20, at 70444 (emphasis added); *see also* Proposing Release, *supra* note 47, at 36595.

160. 15 U.S.C. § 80a–34(d).

161. Inv. Co. Inst., *supra* note 23, at 5.

162. *See id.* at 10; *see also* Brody v. Transitional Hosps. Corp., 280 F.3d 997, 1006 (9th Cir. 2002) ("To be actionable under the securities laws, an omission must be misleading; in other words, it must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists.").

163. *See, e.g.*, U.S. SEC. & EXCH. COMM'N, *supra* note 8, at 15.

authority under § 35(d). However, terms like "growth" or "value," which the SEC has deemed misleading if a fund does not invest 80% of its assets in quantifiable investments tied to them,[164] can have multiple interpretations depending on context.[165] Unlike terms that convey a clear, measurable investment type, these broader descriptors can mean a number of things and can be implemented in a fund's investment strategy in a number of ways, making deception or misleading of investors improbable—because reasonable expectations for these terms are not singular.

For example, the 2023 Amendment explicitly excludes terms in a fund's name that suggest a "portfolio-wide result to be achieved," as these terms do not communicate to investors "particular characteristics of investments."[166] Thus, fund names with these terms are not names that the SEC believes create "reasonable investor expectations." However, there are terms like "growth," "value," or "income" where the distinction between suggesting a focus in investments with "particular characteristics" versus suggesting a "portfolio-wide result to be achieved" depends largely on the context in which the terms are used.[167] In other words, more than one meaning could be assigned to the term, and depending on that meaning, an 80% may or may not be appropriate.

The problem is that the SEC has explicitly included "growth" and "value" within the scope of the 2023 Amendment. Names containing the terms "growth" or "value" are required to adopt an 80% Policy associated with "growth" or "value" investments, regardless of whether "growth" or "value" are intended to suggest a "portfolio-wide result to be achieved."[168] The SEC contended that terms with multiple contextual meanings are inherently misleading if one interpretation necessitates an 80% Policy while another does not, as this could confuse investors.[169] While the validity of this concern is tenuous, this nevertheless raises the question of why the SEC allowed flexibility for the term "income" (requiring an 80% Policy only when it suggests a focus in "particular characteristics")[170] when "income," like

164. *See* Adopting Release, *supra* note 20, at 70448.

165. *See* Inv. Co. Inst., *supra* note 23, at 9.

166. Adopting Release, *supra* note 20, at 70447.

167. *See id.*; Inv. Co. Inst., *supra* note 23, at 8.

168. *See* 17 C.F.R. § 270.35d–1(a)(2). For example, if "growth" signals that a fund seeks *capital appreciation* or long-term growth of the net asset value of the fund and not to focus on investments in "growth" companies the fund is still required to adopt an 80% Policy, even though the name reflects a broader portfolio-wide goal rather than a focus in investments with "particular characteristics." *See, e.g.*, Adopting Release, *supra* note 20, at 70447.

169. *Id.* at 70448.

170. *2025 FAQ*, *supra* note 66.

"growth" or "value," can have multiple meanings?[171] By explicitly including "growth" and "value" in the scope of the 2023 Amendment, the SEC is mandating one meaning of a term over another, and this is inconsistent with the SEC's authority to define materially deceptive or misleading terms, as these terms, like "income," do not create an affirmative impression in one way or another.

The SEC's counter to this argument is that, in current practice, "growth" and "value" funds do not typically apply their strategies across their entire portfolio.[172] Instead, they select investments based on the growth or value characteristics of individual holdings.[173] However, similar to the term "income" in a fund's name, the terms "growth" and "value" are contextual rather than objective in defining a fund's investments.[174]

Additionally, Congress did not intend for the SEC to impose significant burdens that would have a material economic impact on funds and their investors.[175] However, implementation of the 2023 Amendment creates a substantial burden on the fund industry.[176] The SEC recognized that the 2023 Amendment may introduce greater costs and burdens compared to the 2001 Names Rule.[177] However, the SEC argued that "such costs and burdens are justified given the investor protection objectives underlying § 35(d) and that would be achieved through the amendments."[178] Regardless of the protection and benefits the SEC believes the 2023 Amendment affords, the costs associated with the 2023 Amendment still appear to conflict with Congress's original intent.

The SEC's general response to the claim that it is exceeding its congressional authority largely reiterates the authority granted under § 35(d).[179] Instead of equating investors' mistaken reasonable expectations with

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171. *See e.g.*, *id.*; Inv. Co. Inst., *supra* note 23, at 9; Adopting Release, *supra* note 20, at 70447.

172. Adopting Release, *supra* note 20, at 70448.

173. *Id.*

174. *See* Inv. Co. Inst., *supra* note 23, at 9. For an example of "growth" being used to suggest a "portfolio-wide-result to be achieved," see Vanguard, Vanguard LifeStrategy Moderate Growth Fund Summary Prospectus (Form N-1A) (Feb. 28, 2025) ("The Fund seeks to provide *capital appreciation* and a low to moderate level of current income . . . . The Fund invests in a *mix* of Vanguard mutual funds according to an asset allocation strategy that reflects an allocation of approximately 40% of the Fund's assets to fixed income securities and 60% to common stocks." (emphasis added)).

175. S. REP. NO. 293, at 33 (1996).

176. *See, e.g.*, *supra* text accompanying note 82; *supra* note 110; *see also* discussion *infra* Section II.C.3.

177. *See* Adopting Release, *supra* note 20, at 70446.

178. *Id.*

179. *See id.*

being materially misled or deceived—particularly when certain terms mandating a fund to adopt an 80% Policy do not actively create an affirmative impression—its argument hinges on a restatement of its statutory power.

2. The SEC Is Placing Unrealistic Emphasis on Fund Names

An investor must look beyond a fund's name to have reasonable expectations about how a fund invests.[180] Even a fund with "stock" in its name requires an investor to read the fund's disclosures to learn how security selection is implemented by the fund's manager. Thus, the SEC's "reasonable investor expectations" standard overlooks the reality that reasonable investors should look, and generally do look, beyond a fund's name when making a decision about whether to invest in a fund.[181] In the context of terms that may have more than one reasonable definition, the "reasonable investor expectations" justification is problematic.[182]

Consider the term "growth"—there are multiple ways "growth" can be defined and multiple investor expectations of how a growth strategy might be implemented that could be deemed "reasonable."[183] Thus, a reasonable investor must read a fund's disclosure related to the fund's investment strategy to understand how the fund's strategy is executed,[184] which, again, has been the common practice among investors.[185] By requiring an 80% Policy for funds that use the term "growth," the SEC is taking a singular "one size fits all" approach to investment strategy terms—specifically ones that are inherently more subjective—under the 2023 Amendment, and this cannot be justified by a "reasonable investor expectations" rationale.[186]

C. A Consequential Expansion

Beyond being unnecessary and unjustified, the 2023 Amendment—if left in place without repeal or modification—will inevitably have negative consequences on the fund industry. Some consequences will be felt immediately as funds begin modifying disclosure to comply with the 2023

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180. *See* Sec. Ind. & Fin. Mkts. Ass'n, *supra* note 119, at 4.
181. *See id.*; INV. CO. INST., *supra* note 127, at 99.
182. Sec. Ind. & Fin. Mkts. Ass'n, *supra* note 119, at 4.
183. *Id.*
184. *Id.*
185. *See* INV. CO. INST., *supra* note 127, at 99.
186. Sec. Ind. & Fin. Mkts. Ass'n, *supra* note 119, at 4.

Amendment's requirements, while others will persist throughout implementation and ongoing compliance.

1. Innovation in the Fund Industry Will Be Stifled

One significant consequence of the 2023 Amendment is that it will likely stifle innovation in the fund industry. This is attributable to the Plain English/Industry Use Requirement, the 2023 Amendment's effect on funds with thematic investment strategies, and the quarterly compliance review requirement.

a. Plain English/Industry Use Requirement Restricts Flexibility

The Plain English/Industry Use Requirement of the 2023 Amendment may discourage innovative strategies. In the 2023 Adopting Release, the SEC stated that whether a fund subject to an 80% Policy requirement is using a term consistent with the Plain English/Industry Use Requirement could be derived from a variety of specific sources.[187] While funds have the flexibility to reasonably define the terms used in their names—provided there is a meaningful connection between the term and the fund's investment focus[188]—the SEC's exemplary list of sources used for meeting the Plain English/Industry Use Requirement may implicitly standardize these definitions. Consequently, this could discourage funds from adopting innovative policies that fall outside the SEC's stated criteria.

Additionally, the "established industry use" option to the Plain English/Established Industry Use Requirement—intended for cases where certain terms in a fund's name lack a plain English meaning but still conveys a particular focus to investors (e.g., "value")[189]—does not offer greater flexibility and differentiation among funds. The SEC relies on fund managers to interpret and apply what constitutes "established industry use."[190] Consequently, the "established industry use" standard could restrict a fund manager's ability to differentiate their fund by pressuring them to adopt definitions that conform to industry norms—not because they accurately

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187. Adopting Release, *supra* note 20, at 70468 (stating that these sources include, but are not limited to, the dictionary, prior public disclosures, industry codes or classifications, and/or a colloquial understanding of the term).

188. *See id.* at 70467.

189. *Id.* at 70469 ("[A] fund might define the term 'value' in its 80% investment policy by referring to financial metrics that are specific to value investing, and therefore may not be viewed as reflecting the plain English meaning of the term 'value.'").

190. *See id.*

represent the fund's investment strategy, but to avoid potential SEC enforcement actions.[191] Additionally, if fund managers choose not to adopt a recognizable definition, they may instead adopt more subjective definitions, which could increase the risk of the SEC questioning the fund's definitions or classifications.

Notably, this Comment does not oppose the general requirement to use plain English principles in disclosure, as mandated by Rule 421(d) or Form N-1A.[192] However, it contends that imposing an 80% Policy on funds with inherently subjective terms in their names—thereby potentially restricting investments to a standardized criterion—is significantly more rigid and stringent than merely requiring disclosures to adhere to plain English principles.

b. Funds with Thematic Investment Strategies Are Hindered

The provisions of the 2023 Amendment disproportionately affect funds utilizing thematic investment strategies (which have seen significant growth in recent years).[193] Funds that pursue thematic investment strategies—potentially capturing value associated with a particular theme, spanning a variety of industries and geographies[194]—will be required to determine the most effective path forward to maintain compliance while preserving investment flexibility. Requiring these funds to adopt an 80% Policy[195] could force these funds to either use more generic names to avoid being in scope of the 2023 Amendment or implement manual compliance and recordkeeping processes—which are expensive and leave funds vulnerable to mistakes.[196]

Additionally, requiring funds with thematic investment strategies to adopt an 80% Policy could prevent these funds from offering investors access to an innovative strategy investments cannot be easily distilled into a quantifiable measure for compliance purposes and having to substantiate the inclusion of each investment in a fund's 80% Policy could limit fund resources and potentially cause fund managers to limit the diversity of their investments.[197] To be counted toward compliance with an 80% Policy, the 2023 Amendment stipulates that a meaningful nexus must exist between an investment and the focus implied by a fund's name.[198] While some flexibility was given in this

191. Fidelity Mgmt. & Rsch. Co. LLC, *supra* note 90, at 16.
192. 17 C.F.R. § 230.421(d)(1); U.S. SEC. & EXCH. COMM'N, *supra* note 118, at § A.4.(c).
193. Adopting Release, *supra* note 20, at 70439.
194. *See, e.g.*, *supra* note 77.
195. Adopting Release, *supra* note 20, at 70444.
196. *See supra* discussion Section II.C.3.
197. *See* Inv. Co. Inst., *supra* note 23, at 37.
198. Adopting Release, *supra* note 20, at 70448.

determination, this nexus is deemed adequate for certain investments and a given industry if the investments are issued by companies deriving over 50% of their revenue from, or holding significant assets in, the specified industry.[199] While a 50% test could be administrable in the case of names with terms that align with well-defined industries, funds whose names include terms indicating a thematic investment strategy may have difficulty satisfying a 50% test. As a result, a fund may end up excluding companies that are consistent with the fund's investment theme but provide challenge in proving a reasonable nexus due to subjective factors.

c. The Quarterly Review Consequences

The 2023 Amendment requires that every quarter, a fund must report on Form N-Port the value of its 80% Basket, whether an investment is included in the basket, and any definition(s) of terms used in the fund's name.[200] Under the 2001 Names Rule, compliance was required only at the time of investment, meaning an investment initially included in the 80% Basket would remain in the 80% Basket for as long as the fund held the investment.[201] However, under the 2023 Amendment, a fund must review each quarter whether the fund's investments continue to be consistent with the fund's 80% Policy.[202] If the 80% Policy requirement is not satisfied, the fund must return to compliance within ninety days.[203]

This stifles innovation and potentially harms investors in two ways. First, fund managers may need to devote additional time and resources to determining whether specific investments meet the criteria for their 80% Policy and maintain a written record of it,[204] which could potentially detract from their focus on selecting and analyzing high-quality investments. Second, if an investment initially qualified for the 80% Basket at the time of purchase but later no longer meets the criteria, the fund may be required to sell the investment to return to compliance within ninety days.[205] Although

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199. *Id.*

200. *Id.* at 70441.

201. *See, e.g.*, *supra* note 106 and accompanying text.

202. Adopting Release, *supra* note 20, at 70451.

203. 17 C.F.R. § 270.35d–1(b)(1)(ii).

204. Adopting Release, *supra* note 20, at 70473.

205. *See* Inv. Co. Inst., *supra* note 23, at 17–18. For example, under the 2001 Names Rule, a "Small Cap Fund" that invests in a small cap stock that subsequently performs so well that it graduates from the small cap category to the mid cap category could reap the reward of a successful investment by not being forced to sell these high-performing holdings even though its 80% Basket may not be in compliance. *See id.*; *see also, e.g.*, *supra* note 106. Now, in that same scenario under the 2023 Amendment quarterly review requirement, the fund managers will have

the intention behind the quarterly review is to enhance investor protection,[206] it will inevitably be harmful if a fund must sell holdings to meet this requirement because that sell decision may not be in the best interests of the fund or its shareholders.

2. Subjective Terms Creates Problematic Interpretative Issues

By requiring that funds with names suggesting a focus in investments with "particular characteristics" to adopt an 80% Policy, the 2023 Amendment applies an objective standard to inherently subjective terms, such as "growth" and "value."[207] The 2023 Amendment scope covers terms that are inherently subjective and not necessarily readily reducible to quantitative, asset-based tests, and this will have significant interpretative issues for both investors and fund managers.[208] These issues include: (1) whether a particular term suggests a focus in investments with "particular characteristics;" and (2) where a fund has adopted an 80% Policy tied to "particular characteristics," whether a given investment is consistent with that policy.[209]

In terms of the first issue, beyond the short list of terms identified by the SEC, there is considerable uncertainty as to precisely what terms would be deemed to suggest a focus in investments that have "particular characteristics."[210] As discussed, terms that reference characteristics of the fund's portfolio as a whole (i.e., terms that reference a "portfolio-wide result to be achieved") as opposed to investments with "particular characteristics" are not required to adopt an 80% Policy.[211] However, for some terms the "particular characteristics" determination relies largely in part on the context in which they are used[212]—and the SEC has mandated an 80% Policy for some of these terms (e.g., "growth" and "value")[213] and not others (e.g., "income").[214] Thus, this inconsistent application of the 80% Policy requirement to similar concepts highlights the significant uncertainty funds

to sell off the holdings—potentially at inopportune times—even in the case where they believe the stock is likely to continue to appreciate. *See* Inv. Co. Inst., *supra* note 23, at 17–18.

206. Adopting Release, *supra* note 20, at 70440.

207. *See* Inv. Co. Inst., *supra* note 23, at 10.

208. *See id.* at 8.

209. *Id.*

210. *Id.*

211. Adopting Release, *supra* note 20, at 70446–47.

212. *See, e.g.*, *supra* note 66.

213. Adopting Release, *supra* note 20, at 70448.

214. *2025 FAQ*, *supra* note 66.

face in determining whether a term refers to "particular characteristics" of investments or a "portfolio-wide result to be achieved."

Regarding the second issue, if a fund determines that a term in its name indicates a focus in investments with "particular characteristics" or is explicitly identified by the SEC as in scope of the 2023 Amendment the "particular characteristic" standard introduces significant subjectivity in determining whether an investment qualifies in the 80% Basket. Terms like "growth" and "value," or terms that imply a thematic investment strategy, can be flexible concepts subject to qualitative judgments based on criteria that may be subjective and change over time.[215] As a result, assessing whether a particular investment meets the criteria for inclusion in an 80% Basket tied to these terms may present challenges for fund managers.

Additionally, funds with such terms in their names may choose to rely on more objective metrics, potentially adopting an approach that either: (1) deviates from their intended purposes; or (2) reduces differentiation among funds. For example, a fund with the term "growth" in its name might decide that any stock included in a specific set of "growth" indexes meets the definition of "growth" for purposes of its 80% Policy. Consequently, as discussed in the Section II.C.1.a (in the context of the Plain English/Industry Use Requirement), this approach could lead to a lack of diversity among "growth" funds.[216] If multiple "growth" fund managers define "growth" to be those investments included in the same selection of indexes—containing a total of 100 stocks—then the only variation among these funds, at least within their 80% Baskets, will be the proportion each fund manager allocates to those 100 stocks.

The SEC counters this argument by asserting that "growth" funds have the flexibility to define "growth" as they see fit, provided their definitions align with the Plain English/Industry Use Requirement and guide their investments accordingly.[217] However, as discussed in Section II.A.1.a, prior to the 2023 Amendment, "growth" fund managers were already required to disclose the definitions of terms in their fund names while maintaining flexibility in those definitions.[218] Over the past two decades, this approach has not led to any issues[219]—so why now impose the additional burden and compliance challenges associated with an 80% Policy?

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215. *See* Inv. Co. Inst., *supra* note 23, at 10.

216. *See* discussion *supra* Section II.C.1.a.

217. *See, e.g.*, *supra* note 93 and accompanying text.

218. *See, e.g.*, *supra* text accompanying notes 133–34.

219. *See* discussion *supra* Section II.A.2.

3. The Heavy Burden Placed on the Fund Industry

The 2023 Amendment imposes a significant burden on the fund industry. This burden arises from the required mechanisms for 80% Policy testing and the extensive steps and internal collaborative efforts needed for implementation of the 2023 Amendment.

a. Compliance Testing Burden

In giving the SEC rulemaking authority to address materially deceptive or misleading names, Congress did not intend for the SEC to impose significant burdens that would have a material economic impact on funds and their investors.[220] However, unlike the framework in the 2001 Names Rule, the 2023 Amendment mandates a quarterly review of a fund's assets to ensure compliance with the 80% Policy requirement.[221] While the quarterly review was initially proposed as a continuous review, the SEC acknowledged the significant burden such a requirement would impose and adjusted it to a quarterly review.[222] The SEC argued that shifting from continuous to quarterly reviews "will address concerns . . . related to cost burdens associated with the proposed scope expansion, to the extent that those concerns largely related to the costs of continuous monitoring and assessment of a fund's 80% investment policy."[223] However, whether reviews are conducted quarterly or continuously, developing and implementing compliance tests to identify subjective characteristics (e.g., identifying a "growth" or "value" investment), especially when such characteristics vary across funds and fund managers, remains a highly complex and time-intensive task.[224]

Even if the SEC responds to this argument by pointing to its concession of shifting compliance reviews from continuous to quarterly, it ultimately makes little difference—the interpretative challenges posed by the 2023 Amendment will still create compliance issues. In a 2022 survey conducted by the ICI, 92% of the fund groups surveyed said that they would need to

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220. S. REP. NO. 104–293, at 33 (1996).

221. *See, e.g.*, *supra* text accompanying note 106.

222. *See, e.g.*, *supra* note 99.

223. Adopting Release, *supra* note 20, at 70445.

224. *See* Inv. Co. Inst., *supra* note 23, at 12 ("Development of a scalable compliance monitoring system generally requires the use of reference data supplied by third-party data providers (*i.e.*, to tag various characteristics of a fund's investments), and it is our understanding that such data providers do not currently support the expanded set of terms that would be included under the proposed amendments.").

develop processes and systems for monitoring and reporting as it relates to qualifying investments under the 2023 Amendment.[225]

In terms of the actual costs, the SEC estimated that the total costs for a fund to establish and implement practices designed to meet the requirements of the 2023 Amendment will range from $50,000 to $500,000, depending on the size of the fund.[226] There are about 10,394 funds that have names that are covered by the 2023 Amendment.[227] This represents a total estimated cost ranging from $500 million to $5 billion,[228] which is an extraordinary figure for an issue the SEC has not pursued an enforcement action against in the past two decades.[229]

b. Implementation Burden

In addition to the significant costs of compliance testing, the implementation process is highly complex, involving numerous steps and requiring extensive collaboration across multiple departments.[230] The 2023 Amendment demands coordination among legal, compliance, portfolio management, reporting, distribution, technology, and third-party vendors.[231] Key implementation steps include, but are not limited to, drafting and adopting appropriate policies, developing compliance systems for recordkeeping, updating various disclosures, and obtaining board approval.[232] Given the numerous steps and parties involved, implementing the 2023 Amendment has effectively become a project management undertaking. The SEC acknowledged this burden by extending the Original Compliance Date, stating that "we understand that funds' and service providers' actual experience in executing these [implementation] steps has reflected developments that support the need for additional time to comply."[233] However, while the extension provides more time, it does not eliminate the various efforts the fund industry must still undertake.

Given that the 2023 Amendment is unnecessary, its justification is already weak. When combined with the SEC's flawed "reasonable investor expectations" rationale and the 2023 Amendment's adverse impacts on the

225. *Id.* at 52 n.127.

226. Adopting Release, *supra* note 20, at 70491.

227. *Id.* at 70496 tbl.1.

228. Notably, the cost estimates will decrease slightly due to the extension of the Original Compliance Date. *See* Compliance Extension, *supra* note 108, at 13079.

229. *See* discussion *supra* Section II.A.2.

230. *See* Inv. Co. Inst., *supra* note 110, at 3.

231. *Id.*

232. *Id.*

233. Compliance Extension, *supra* note 108, at 13077.

fund industry, it is clear that it should be repealed or, at the very least, significantly modified.

III. PROPOSAL

Given the adequacy of the current regulatory framework protecting investors against deceptive or misleading fund names and the negative consequences of the 2023 Amendment, this Comment argues for the repeal of the Amendment. However, recognizing the challenges of the repeal process,[234] this Comment also proposes a modification to the 2023 Amendment that will mitigate some of the 2023 Amendment's consequences (the "Modification").

A. The 2023 Amendment Should Be Repealed

This Comment advocates for the repeal of the 2023 Amendment, arguing that expanding the scope of the 2001 Names Rule not only addresses a non-existent problem and relies on problematic justifications but also imposes undue burdens on the fund industry. By stifling innovation, creating interpretive challenges for fund managers, and increasing compliance costs and labor,[235] the 2023 Amendment undermines the overall effectiveness of the regulatory environment and puts investors at risk of harm.

The SEC repealing its own rules is rare; however, initiating a formal petition to the Secretary of the SEC represents a constructive first step toward reconsideration of the 2023 Amendment.[236] Recently, there have been notable instances where courts have vacated SEC regulations, indicating that while direct repeals by the SEC are rare, judicial interventions have also led to nullification of certain rules.[237]

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234. While the SEC has the authority to amend or repeal its own rules, such actions are relatively uncommon. The SEC's rulemaking process is designed to solicit significant public input and undergo rigorous analysis before any regulatory change takes effect—this process contributes to the infrequency of rule repeals. *Rules and Regulations*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/rules-regulations (Sept. 3, 2025) [https://perma.cc/6S4E-WUCZ].

235. *See* discussion *supra* Section II.C.

236. *See generally Petitions for Rulemaking Submitted to the SEC*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/rules-regulations/petitions-rulemaking-submitted-to-sec [https://perma.cc/65G7-6WPE].

237. *See, e.g.*, Nat'l Ass'n of Priv. Fund Managers v. SEC, 103 F.4th 1097, 1101 (5th Cir. 2024) (vacating the SEC's rule to enhance the regulation of private fund advisers). *See generally* Douglas Gillison, *Legal Attacks Are Slowing SEC Rulemaking in Crucial Election Year*, REUTERS (Oct. 31, 2024), https://www.reuters.com/legal/legal-attacks-are-slowing-sec-rulemaking-crucial-election-year-2024-10-31 [https://perma.cc/HWK9-K3Q5].

B. The Modification

This Section outlines the Modification and explains how the Modification avoids the negative consequences of the 2023 Amendment. This Section then addresses and responds to potential counterarguments raised by the SEC.[238]

1. The Modification: Enhance Disclosure Without the 80% Policy

The Modification is that funds newly subject to the 2023 Amendment—those using terms that suggest a focus in investments with "particular characteristics"—should not be required to adopt an 80% Policy. Instead, these funds should just be subject to the enhanced disclosure requirements, which include disclosing the explicit definition of the terms used in their names (in accordance with the Plain English/Industry Use Requirement) and clear, standardized disclosures outlining the criteria for selecting investments tied to those terms.[239] This approach does not overemphasize fund names and offers a more hybrid solution to addressing potentially deceptive and misleading fund names. It grants funds specifically those that use terms that can be subjectively interpreted (e.g., "growth" and "value")[240] greater flexibility while enabling the SEC to enforce stricter disclosure standards.

The 2023 Amendment enhances disclosure by requiring each fund that is "required to adopt and implement an 80% investment policy [to] include disclosure in its prospectus that defines the terms used in its name, including the specific criteria the fund uses to select the investments that the term describes, if any."[241] The Modification does not alter the disclosure requirements nor does it compromise the SEC's primary goal of protecting investors.[242] Instead, the Modification contends that the SEC can adequately fulfill its objective by requiring enhanced disclosure for funds with terms indicative of investments in "particular characteristics" without necessitating that these funds implement an 80% Policy. As a result, the Modification would also eliminate the 2023 Amendment's recordkeeping, reporting and onerous compliance requirements.[243]

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238. For the purposes of this Section, and the Modification as a whole, this Comment will not address whether terms in a fund's name implying a focus in investments with "particular characteristics" actually indicate an investment focus. Instead, this Section presents a separate argument for why the 80% Policy requirement should not apply to the funds that are newly in scope of the 2023 Amendment.

239. *See* discussion *supra* Section I.C.3.a–b.

240. *See* discussion *supra* Section II.C.2.

241. Adopting Release, *supra* note 20, at 70466.

242. *See id.* at 70483.

243. *See* discussion *supra* Section II.C.3.

The overarching reason the Modification is sufficient: (1) there are already adequate protections on materially deceptive and misleading names in place that apply to all funds, regardless of if they are in scope of the 2023 Amendment;[244] and (2) the 2001 Names Rule framework has proven to be effective.[245] As evidenced by the lack of enforcement proceedings in the last two decades, funds with terms in their names suggesting a focus in "particular characteristics" have not historically presented any issues.[246] Thus, as long as the funds now in scope of the 2023 Amendment do not violate the general prohibitions of § 35(d) and adhere to Rule 421(d)'s plain English principles, no additional requirements are necessary. If they do violate these prohibitions, they would already be subject to SEC enforcement.[247]

Unlike the 2023 Amendment, the Modification avoids relying on the problematic "reasonable investor expectations" standard since it retains the original requirements of the 2001 Names Rule and stays within the bounds of Congressional authority.[248] Most importantly, the Modification does not address an issue that does not exist it does not broaden the reach of the 2001 Names Rule by classifying certain fund names as materially deceptive or misleading when they do not create an affirmative impression in one way or the other[249] and have not historically posed problems for investors.[250] Instead, it enhances investor protection without imposing unnecessary or overly burdensome measures.

2. The Modification Alleviates Some of the Consequences

As outlined in Section II.C, the 2023 Amendment is associated with numerous negative consequences.[251] The following Sections address how the Modification alleviates some of these consequences.

a. The Modification Protects Innovation

The 2023 Amendment stifles innovation by restricting fund managers' investment flexibility and their ability to adopt innovative investment strategies.[252] Without the pressure of adhering to the 80% Policy and focusing

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244. *See* discussion *supra* Section II.A.1.
245. *See* discussion *supra* Section II.A.2.
246. *See* discussion *supra* Section II.A.2.
247. *See* discussion *supra* Section II.A.1.c.
248. *See* discussion *supra* Section II.B.
249. *See, e.g.*, *supra* text accompanying notes 161–65.
250. *See* discussion *supra* Section II.A.2.
251. *See* discussion *supra* Section II.C.
252. *See* discussion *supra* Section II.C.1.

instead on accurate and non-misleading disclosures, fund managers could pursue innovative and progressive strategies without fearing compliance issues tied to difficult-to-quantify investments. Additionally, eliminating the quarterly review process would save investment and compliance teams significant resources, enabling them to focus on researching investments and developing strategies that maximize shareholder returns.[253] Furthermore, by removing the quarterly review requirement, fund managers would also avoid being forced to sell or liquidate profitable investments, or make other investment decisions that are not in the best interests of the fund or shareholders.[254]

b. The Modification Reduces the Interpretative Consequences

The 2023 Amendment creates interpretative issues for the fund industry because of the ambiguity surrounding the inherently subjective terms the expanded scope captures.[255] Under the Modification, because an 80% Policy would not be required for funds with terms in their names that suggest a focus in investments with "particular characteristics," fund managers can mitigate the risk of miscategorizing a fund name and failing to adopt an 80% Policy. For example, if a fund manager is uncertain whether its "growth" fund requires an 80% Policy—since it may or may not imply a "portfolio-wide result to be achieved" and thus be exempt[256]—they can take the safer approach of just enhancing disclosure rather than struggling to classify each investment subjectively.

The Modification is a better alternative than the 2023 Amendment because it encourages fund managers whose fund is on the margin of the 80% Policy requirement to enhance disclosures rather than forgo the policy entirely and risk SEC enforcement. By reducing the consequences associated with making these subjective interpretations, this approach benefits both the fund industry and investors, as fund managers are more likely to err on the side of disclosure rather than avoid the policy due to its complexities.

c. The Modification Lessens the Burden

The 2023 Amendment severely burdens the fund industry.[257] The Modification will reduce the costs and labor associated with compliance and implementation of the 2023 Amendment. For starters, eliminating an 80%

253. *See* discussion *supra* Section II.C.1.c.
254. *See, e.g.*, *supra* note 205 and accompanying text.
255. *See* discussion *supra* Section II.C.2.
256. *See, e.g.*, *supra* notes 65–66 and accompanying text.
257. *See* discussion *supra* Section II.C.3.

Policy requirement tied to terms that suggest a focus in investments with "particular characteristics" means roughly 2,200 funds will no longer need to implement an 80% Policy.[258] That said, a large number of funds may no longer need to adopt overly strict compliance mechanisms to track whether their investments fall into a certain subjective category.[259] Instead, as long as these funds' disclosures clearly define their investment criteria and terms and invest accordingly, the existing regulatory framework used before the 2023 Amendment remains sufficient.[260]

Additionally, the Modification alleviates some of the burden associated with the quarterly review process. Although investments should still be tracked and quantified for compliance purposes, this process will be relaxed and occur once a year as part of the disclosure process with a fund's "annual update"[261] or if requested by the SEC.

Finally, while the Modification will still necessitate collaboration among multiple departments to develop adequate definitions and criteria for quantifying certain investments,[262] the implementation process will be less cumbersome. Adopting an entirely new investment policy demands extensive deliberation, coordination, and shareholder notice.[263] In contrast, agreeing on definitions and implementing investment policies that align with § 35(d) and Rule 421(d), without amending or adopting an investment policy, does not require shareholder notice separate and apart from normal shareholder communications.[264] This ultimately saves funds considerable time and resources.

258. The number of total funds (13,541 funds) required to adopt an 80% Policy after the 2023 Amendment went from about 60% to 76% (i.e., from 8,070 to 10,291). Adopting Release, *supra* note 20, at 70481 & n.495, 70496 tbl.1.

259. *See supra* text accompanying note 225.

260. *See* discussion *supra* Section II.A.1–2.

261. *See generally supra* text accompanying notes 35–36.

262. *See* Inv. Co. Inst., *supra* note 110, at 3.

263. *See id.*

264. The Sixty-Day Notice Requirement applies only to changes in a fund's policy and thus would not be required without the addition or change of a fund's 80% Policy. *See* 17 C.F.R. § 270.35d–1(a)(2)(ii).

3. Counter Arguments and Responses to the Modification

Assuming the SEC will raise counterpoints to the Modification, this Section addresses those potential arguments and provides corresponding responses and rebuttals.

The SEC may argue that while requiring specific criteria and definitions is necessary, eliminating the 80% Policy for the funds newly in scope of the 2023 Amendment could give fund managers excessive flexibility. As a result, this flexibility could enable funds to make investments that do not align with their stated criteria, undermining investor protection by allowing funds to deviate from the investment focus suggested by their names.[265] Consequently, the SEC could argue that, without an objective policy that systematically categorizes investments quarterly, there is a risk of insufficient investor protection. However, the Modification could explicitly require that the enhanced disclosure for the newly in scope funds includes examples of qualifying investments and clearly defined exclusion criteria.[266] This approach would limit the funds' ability to deviate from their disclosures by establishing exclusionary boundaries for investment criteria and using exemplary investments as benchmarks for the funds' portfolios. Additionally, these definitions could undergo a planned comment period from the SEC staff, where the staff reviews the language to ensure it aligns with industry norms and investor expectations.[267]

The SEC may acknowledge that although a fund's definitions and criteria are sufficiently clear, there still need to be mechanisms in place to ensure the fund invests accordingly. As explored throughout this Comment, general prohibitions have effectively safeguarded investors without the additional protection of an 80% Policy requirement.[268] While there may not be an ongoing mechanism—such as a quarterly review of an objective 80% Basket—to ensure compliance with these definitions, the absence of issues regarding fund names over the past two decades suggests that such a measure is unnecessary.[269]

Lastly, the SEC may contend that the Modification could create discrepancies in how fund names are regulated across the industry,

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265. *See* Adopting Release, *supra* note 20, at 70444.

266. For example, this disclosure would clarify what investments are or are not included in the funds' definitions of certain terms.

267. *See generally Comment Letters*, U.S. SEC. & EXCH. COMM'N (Apr. 18, 2011), https://www.sec.gov/answers/commentletters.htm [https://perma.cc/9B92-ZAQK] ("The staff's comments are in response to a company's disclosure and other public information and are based on the staff's understanding of that company's facts and circumstances.").

268. *See* discussion *supra* Section II.A.1.

269. *See* discussion *supra* Section II.A.2.

conflicting with the SEC's preference for clear, enforceable standards that apply uniformly to all funds.[270] This is the SEC's strongest argument; permitting different approaches for funds that the SEC believes imply an investment focus (and thus could be materially deceptive or misleading if the fund does not invest accordingly) could result in inconsistent investor expectations and regulatory enforcement challenges. However, to address this concern, the Modification could propose a hybrid framework—funds could either comply with the 80% Policy or opt for enhanced disclosures subject to SEC oversight and periodic random audits. While implementing audit periods may increase the SEC's workload, the overall benefit (i.e., reducing the negative consequences while maintaining investor protection) outweighs this administrative cost.

Although the SEC may express concerns about the Modification, such concerns can often be addressed or even refuted—underscoring the overreach of the 2023 Amendment expansion.

IV. CONCLUSION

If an individual wants to purchase a banana and selects the "healthy food" option (under the assumption that a banana qualifies as "healthy food"), it would be difficult to claim they were deceived or misled if the order instead contains a steak.[271] If an investor invests in the "Growth Fund" expecting that the fund invests in company stocks with "growth" characteristics, it would be difficult to claim they were deceived or misled if the fund invests in bonds with the general objective of achieving "growth" results.[272] Just as ordering "healthy food" may require clarifying what the delivery service considers as healthy, investing in a fund with terms like "growth" or "value" in its name necessitates an extra step—understanding how the fund, in its disclosure, defines those terms in its specific context.

While the 2023 Amendment aims to protect investors, its expanded scope is unnecessary, unjustified, and results in significant negative consequences for the fund industry. Therefore, this Comment contends that the 2023 Amendment should be repealed or modified to mitigate its adverse effects, which include stifling innovation, creating interpretative challenges, and

270. *See generally* Adopting Release, *supra* note 20, at 70444 (stating that in expanding the scope of the 2001 Names Rule, the SEC explicitly chose not to differentiate between fund names—that is, those that suggest an investment type versus an investment strategy).

271. *See, e.g.*, *supra* notes 3–4 and accompanying text.

272. *See, e.g.*, *supra* text accompanying note 18.

imposing excessive costs and labor.[273] By mandating an 80% Policy for fund names that suggest a focus in investments with "particular characteristics," the SEC is attempting to address a non-existent problem while relying on a flawed "reasonable investor expectations" standard.[274]

It is important to recognize that as the Compliance Date approaches, the 2023 Amendment remains under scrutiny from the fund industry.[275] Consequently, the SEC and its staff may provide additional guidance and changes that could impact the Compliance Date and some of the arguments made in this Comment.[276]

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273. *See* discussion *supra* Section II.C.

274. *See* discussion *supra* Section II.A–B.

275. For an example of the fund industry recently providing comments on the 2023 Amendment, see Philip T. Hinkle et al., *Addressing Questions Under the Amended Registered Fund Names Rule*, 58 REV. SEC. & COMMODITIES REG. 9 (2025). *See also* Inv. Co. Inst., *supra* note 110.

276. For an example of the SEC and its staff providing additional guidance on the 2023 Amendment, see *2025 FAQ*, *supra* note 66. *See also* Compliance Extension, *supra* note 108. Notably, Paul Atkins was recently appointed as SEC Chair. *Paul S. Atkins Sworn in as SEC Chairman*, U.S. SEC. & EXCH. COMM'N (Apr. 21, 2025), https://www.sec.gov/newsroom/press-releases/2025-68 [https://perma.cc/U6ER-WGGJ]. As a result, Chairman Atkins may hold different perspectives on the 2023 Amendment, including what aspects could—or should—be revised.