

MEMO# 35388

July 31, 2023

ICI Files Supplemental Comment Letter on Proposed Names Rule Amendments

[35388]

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TO: ICI Members
ESG Advisory Group
ESG Fund Disclosure Working Group
SEC Rules Committee SUBJECTS: Disclosure
ESG RE: ICI Files Supplemental Comment Letter on Proposed Names Rule Amendments

On July 31, ICI submitted a letter supplementing our comments[\[1\]](#) on the SEC's proposed amendments ("Proposal") to Rule 35d-1 ("Names Rule") under the Investment Company Act of 1940 ("1940 Act").[\[2\]](#) In the letter, we point out that regulatory processes and requirements already exist to ensure that fund communications with the public contain key information. In support of our view, we describe how FINRA's review of fund sales material promotes consistency between a fund's prospectus and its marketing materials. We also note that fund disclosure is subject to the Commission staff's review and that the Commission has its own robust set of requirements that govern fund advertising. We point out that SEC and FINRA rules, accompanied by comprehensive, multifaceted staff review, serve to ensure that fund communications are clear and not misleading, making many of the proposed amendments to the Names Rule unnecessary.

We also supplement our prior comments regarding the Commission's authority to adopt the Proposal under Section 35(d) of the 1940 Act. Section 35(d) gives the Commission the authority to "define such names or titles as are materially deceptive or misleading." The letter states that the Proposal is too vague and ambiguous to be an exercise of the Commission's "defining" authority. We also explain that the Proposal does not satisfy the materiality requirement and would not be an appropriate exercise of the Commission's authority under Section 35(d).

Finally, we describe a June 2023 Supreme Court decision that underscores that the First Amendment protects commercial speech as well as noncommercial speech,[\[3\]](#) and we cite other case law that provides guidance on how the government may regulate protected commercial speech and on the government's ability to compel speech. We discuss how the proposed content-based restrictions on fund names, proposed expanded scope of the Names Rule, and proposed Form N-PORT reporting requirements raise significant constitutional concerns under the First Amendment.

Erica Evans
Assistant General Counsel

Notes

[1] See Letter from Eric J. Pan, President & CEO, ICI, and Susan M. Olson, General Counsel, ICI, to Vanessa A. Countryman, Secretary, SEC, dated August 16, 2022, available at <https://www.ici.org/system/files/2022-08/22-ici-cl-names-rule.pdf>; Letter from Dorothy M. Donohue, Deputy General Counsel, Securities Regulation, ICI, to Vanessa A. Countryman, Secretary, SEC, dated May 22, 2023, available at <https://www.ici.org/system/files/2023-05/23-cl-proposed-names-rule-amend.pdf>.

[2] See Investment Company Names, SEC Release No. IC-34593 (May 25, 2022).

[3] See 303 Creative, LLC v. Elenis, 143 S. Ct. 2298, 2316 (2023).

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