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August 16, 2022

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

Re: File No. S7-17-22
File No. S7-16-22

Dear Ms. Countryman:

Nasdaq, Inc. ("Nasdaq")[1] appreciates the opportunity to comment on the Securities and Exchange Commission's ("SEC" or "Commission") proposal to enhance disclosures by certain investment advisers and funds about environmental, social, and governance ("ESG") investment practices (the "ESG Fund Disclosures Proposal")[2] and the Investment Company Names Rule Proposal (the "Names Rule Proposal").[3] Nasdaq operates regulated entities in the United States, Canada, the Nordics, and Baltics, which are home to over 5,500 listings worldwide that drive the global economy and provide investment opportunities for institutional and Main Street investors. We are a self-regulatory organization mandated to protect investors and the public interest. We also offer ESG-focused marketplace solutions designed to help our customers to achieve their ESG objectives, through technology, tools, data and insights. For example, we offer Nasdaq OneReport, an ESG workflow and reporting platform, and recently acquired Metrio, a provider of ESG data collection, analytics and reporting services based in Montreal. We also provide access to comprehensive ESG data sets through our ESG Data Hub and ESG Advisory services to help companies develop board and investor engagement strategies. Thus, Nasdaq brings a unique, global perspective to these issues.

Our European Markets—which include Puro.earth, Nasdaq Sustainable Bond Network, Nasdaq Sustainable Debt Markets, and Green Equity Designations—support both our corporate community and investment community through the provision of instruments that help achieve ESG ambitions and

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1 Nasdaq (Nasdaq: NDAQ) is a S&P 500 global technology company serving the capital markets and other industries. Our diverse offering of data, analytics, software and services enables clients to optimize and execute their business vision with confidence.

2 See Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, Securities Exchange Act Release No. 94985 (May 25, 2022), 87 FR 94985 (June 17, 2022) (hereinafter, "ESG Fund Disclosures Proposal").

3 See Investment Company Names, Securities Exchange Act Release No. 94981 (May 25, 2022), 87 FR 36594 (June 16, 2022), available at https://www.federalregister.gov/documents/2022/06/17/2022-11742/investment-company-names.

targets.[4] Nasdaq Investment Intelligence serves the asset management and asset owner communities with ESG Indices as well as a range of workflow, data, and analytics capabilities to help them manage their portfolios and enhance their asset allocation decision-making processes.

Informed by this perspective, we recognize the increasingly complex and dynamic ESG landscape faced by asset owners and asset managers. Nasdaq commends the Commission for its commitment to improve the disclosures provided to investors, including its recent efforts to enhance and standardize climate-related disclosures in the annual reports and financial statements of foreign and domestic issuers (the "Climate-Related Issuer Disclosures Proposal").[5] We agree with the Commission's stated goals of providing consistent, comparable and reliable disclosures that are decision-useful for investors. However, we believe that any additional disclosure regime designed to promote investor protection must be balanced alongside the other prongs of the Commission's tripartite mission—to facilitate capital formation and maintain fair, orderly, and efficient markets—and therefore must provide a reasonable degree of flexibility to issuers, while avoiding the increases in cost and complexity associated with a rigid one-size-fits-all framework. Nasdaq is concerned that the ESG Fund Disclosures Proposal and Names Rule Proposal will impose undue costs and burdens on funds, listed companies, and ultimately, investors themselves. We respectfully request the Commission to consider the concerns we have identified, which include:

- The ESG Fund Disclosures Proposal may create unintended consequences if funds self-classify into the least burdensome fund category to avoid more stringent disclosure burdens.

- The prescriptive nature of the ESG Fund Disclosures Proposal is burdensome, complex, and costly, and could disincentivize funds and advisers from considering ESG investment strategies at all, thus stifling innovation in this area.

- The ESG Fund Disclosures Proposal lacks alignment with the Climate-Related Issuer Disclosures Proposal, which creates complexity and could result in disclosure of unreliable and inconsistent data, or heavy reliance on estimates.

- Expanding the scope of the Fund Names Rule[6] under the Names Rule Proposal may inadvertently impose undue burdens and costs on funds by requiring funds to make subjective judgements without clear guidance on ESG terminology.

We believe several of these concerns could be addressed by delaying the implementation of the ESG Fund Disclosures Proposal until the final deadline for compliance under the Climate-Related Issuer Disclosures Proposal. We urge the Commission to consider this approach, which would help to ensure

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[4] Nasdaq 2021 TCFD Report, available at: https://www.nasdaq.com/esg/sustainability-report/tcfd/2021, at 12 [hereinafter Nasdaq *2021 TCFD Report*].

[5] <u>See</u> The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Exchange Act Release No. 34-94478 (March 21, 2022), 87 FR 21334 (April 11, 2022) (hereinafter "Climate-Related Issuer Disclosures Proposal").

[6] <u>See</u> Investment Company Names, Investment Company Act Release No. 24828 (Jan. 17, 2001), 66 FR 8509 (Feb. 1, 2001) ("Names Rule Adopting Release").

that all investors have access to consistent, reliable information disclosed in publicly available sources.

A. Overview of the Proposals

ESG Fund Disclosures Proposal

The ESG Fund Disclosures Proposal aims to promote consistent, comparable, and decision-useful regulatory framework for disclosure of ESG investment practices in the annual reports and financial statements of investment advisors, investment companies, and business development companies. The ESG Fund Disclosures Proposal does not attempt to define "ESG," but requires funds to disclose to how they incorporate ESG factors in their investment selection processes and investment strategies. Requirements would apply to both "open-end" and "closed-funds" that fall within the definitions of "Integration Fund," "ESG-Focused Fund," or "Impact Fund."[7] Depending on in which category funds fall, they will generally have to disclose the following in their fund prospectuses:

- **Funds categorized as "Integration Funds," meaning they incorporate ESG factors alongside other non-ESG investment priorities, would be required to include ESG disclosure in their registration statements and permitted to include ESG disclosure in marketing materials.** The ESG Fund Disclosures Proposal would require Integration Funds to describe, in a few sentences, how they integrate ESG factors, including what ESG factors the fund considers. To reduce the potential for "greenwashing," Integration Funds cannot overemphasize the role of ESG factors in investment decisions compared to other non-ESG factors. If an Integration Fund considers GHG emissions in its portfolio holdings, it would be required to provide additional detail on how GHG emissions are considered as well as surrounding methodologies surrounding GHG emissions.

- **Funds categorized as "ESG-Focused Funds," meaning they (i) include an ESG term in the fund's name or (ii) advertise the incorporation of ESG factors as "significant" or "main" investment priorities, would be subject to the Integration Fund requirements as well as an additional requirement to disclose an "ESG Strategy Overview"** table. The ESG Strategy Overview is a table which includes the methods through which a fund implements its ESG strategy, how a fund incorporates ESG factors in its investment decisions, and how the fund votes proxies and/or engages with companies about ESG issues.

- **Funds characterized as "Impact Funds," a subset of ESG-Focused Funds in which the funds' investment strategies include the achievement of an ESG-related goal, would be subject to the same requirements as ESG-Focused Funds discussed above. Impact Funds would also be required to further describe their particular ESG goal in the ESG Strategy Overview table.** The overview would require: (i) how the fund measures progress towards the ESG-related goal, (ii) the time horizon the fund uses to analyze progress, and (iii) the relationship between the desired impact and financial return(s).

The ESG Fund Disclosures Proposal includes other changes to annual reports to include ESG-related disclosures for ESG-Focused Funds and Impact Funds:

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[7] See ESG Fund Disclosures Proposal, supra note 2, at 316-17.

- ESG-Focused Funds that use proxy voting or engagement as significant components of their ESG strategies would be required to disclose information concerning those activities. Additionally, ESG-Focused funds would be required to disclose the carbon footprint and weighted average carbon intensity ("WACI") of its portfolio in the MDFP or MD&A section of the fund's annual report, even if the fund does not purport to consider GHG emissions as part of its investment strategy, but not if the fund affirmatively states it does not consider GHG emissions.

- Impact Funds would be required to provide investors with investors with qualitative and quantitative information about the fund's progress towards its ESG goals.

Finally, the ESG Fund Disclosures Proposal includes ESG-related disclosure requirements for investment advisors and amendments to Form N-CEN and Form ADV Part 1A to collect more ESG information.

Names Rule Proposal

The Names Rule Proposal would amend the Fund Names Rule to prohibit funds from using "ESG" in their name if ESG factors are not central to their investment decisions. The Fund Names Rule currently requires a registered investment company whose name suggests a focus in a particular type of investment (among other areas) to adopt a policy to invest at least 80% of the value of its assets in those investments, consistent with its name. The Commission's goal of the Names Rule Proposal is to modernize the Fund Names Rule for today's markets through:

- broadening scope of 80% requirement to apply to funds whose names suggest that they invest in issuers or investments with particular characteristics (e.g., ESG-related fund names),

- requiring funds that "drift" below the 80% requirement to come back into compliance in a timely manner (in most cases within 30 days),

- enhancing transparency on how a fund's investment methods match its name by requiring a fund to disclose how it defines the terms in its name and selects investments in line with its name, and

- requiring funds to use the notional amount of derivatives, rather than the market value, for determining compliance with the 80% requirement.

B. General Concerns with the ESG Fund Disclosures Proposal

Self-Classification by Funds May Create Unintended Consequences

Based on our discussions with clients, including ETF issuers, we believe that the proposed fund categories, and the self-classification thereunder, may generate further ambiguity and more subjectivity in applying the proposed fund categories. We believe this ambiguity is exacerbated through the ESG Fund Disclosures Proposal's eschewal of explicitly defining "ESG" while incorporating "ESG" into the definitions of the types of funds subject to additional disclosures under the ESG Fund Disclosures Proposal (i.e., Impact Funds, ESG-Focused Funds, and Integration Funds). Given that ESG terminology is rapidly evolving, we agree with the Commission that definitions would not be appropriate or feasible at

this point. However, requiring funds to ascertain whether they are an Integration, ESG-Focused, or Impact Fund without precise parameters around what constitutes ESG raises significant risk of subjective judgments through funds developing and applying their own internal policies and standards to make this determination. Different funds may use different methodologies to self-classify themselves into one of the three fund categories, making it difficult for investors to make meaningful comparisons across funds that integrate ESG factors into their investment practices.

Further, more funds may self-classify as an Integration Fund because of the more stringent disclosure burdens associated with an ESG-Focused Fund or Impact Fund. Nasdaq believes that this risk is compounded by the lack of safe harbors from liability for ESG-Focused Funds and Impact Funds disclosing GHG emissions, specifically relating to the estimated Scope 1 and Scope 2 emissions, as further discussed below. Accordingly, the ESG Fund Disclosures Proposal could inadvertently discourage any significant consideration of ESG factors in a fund's investment strategy.

Prescriptive Disclosures are Burdensome, Complex, and Costly

The ESG Fund Disclosures Proposal would create a much more expansive disclosure scheme than currently exists by prescribing new disclosures related to ESG. The Commission recognized that the ESG landscape is an emerging and evolving area, and noted that the ESG Fund Disclosures Proposal would provide consistent, comparable, and reliable information for investors regarding the incorporation of ESG factors by funds and advisers while "facilitating further innovation in this evolving area of the asset management industry."[8] We agree with the Commission's stated goals of providing investors with consistent, comparable, and reliable information to promote more informed investment decision-making. By requiring very detailed and prescriptive disclosures, however, Nasdaq is concerned that the ESG Fund Disclosures Proposal could disincentivize funds and advisers from considering ESG investment strategies at all, thus stifling innovation in this area at a time when innovative products and solutions are needed to address the pressing issues of climate change.

Indeed, Commissioner Hester Peirce in her dissent noted that "markets are dynamic and equipped in ways we can never duplicate when it comes to the efficient dissemination of information. This proposal would displace the market's efficient signaling mechanisms with value-laden regulatory nudges."[9] Nasdaq concurs with Commissioner Peirce in that the overly prescriptive disclosures under the ESG Fund Disclosures Proposal may impose an ill-fitting framework on a still evolving and dynamic area.

Lastly, Nasdaq notes that funds investing in multiple jurisdictions already or will face disclosure requirements and related compliance considerations from ESG frameworks either in place or in development internationally. As the Commission observed in the ESG Fund Disclosures Proposal, the trend toward developing disclosure frameworks has accelerated globally in recent years as the asset management industry has increasingly focused on ESG issues.[10] This trend has resulted in a "complex

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8 See ESG Fund Disclosures Proposal, supra note 2, at 1.

9 See Commissioner Peirce's Statement on ESG Fund Disclosures Proposal (May 25, 2022), available at https://www.sec.gov/news/statement/peirce-statement-esg-052522.

10 See ESG Fund Disclosures Proposal, supra note 2, at 11 (citing to various voluntary and regulatory frameworks such as the United Nations Principles for Responsible Investment, the recommendations from

and fragmented environment for affected advisory firms to navigate. Differences in scope of applicability, sustainability objectives covered, and technical criteria and methodologies may mean that advisers and their advised products have to collect varying information, or at least analyze information differently, to comply with different regimes."[11] This fragmentation creates the risk of affected multinational funds providing different data in different formats to domestic and foreign investors, which not only adds to reporting costs but importantly would make comparisons challenging for investors.

Portions of the ESG Fund Disclosures Proposal (namely, the disclosures around GHG emissions data) are modeled after the framework developed by the Task Force on Climate-Related Financial Disclosures, which has been incorporated into other voluntary climate disclosure frameworks (such as the Sustainability Accounting Standards Board, Global Reporting Initiative, and Climate Disclosure Standards Board) and several regulatory disclosure regimes.[12] While we welcome the Commission's efforts to align to a globally recognized standard, we also encourage further work with securities regulators in other jurisdictions to enhance coordination across various ESG disclosure regimes with the aim of achieving as much interoperability and comparability as possible. Doing so would streamline compliance for multinational funds that face multiple ESG disclosure regimes so that they can present a more consistent picture and facilitate usability, especially in terms of comparability, for investors.

Interplay of ESG Fund Disclosures Proposal and Climate-Related Issuer Disclosures Proposal

The ESG Fund Disclosures Proposal would require an environmentally focused fund[13] to disclose two separate GHG emission metrics every year in its annual report: the fund portfolio's carbon footprint and WACI, each based on the Scope 1 and Scope 2 GHG emissions of the portfolio companies.[14] In addition, these funds would be required to separately disclose Scope 3 emissions of their portfolio companies if such information is publicly available. Nasdaq believes that the proposed disclosures associated with these GHG metrics will pose unique challenges to funds.

The Commission believes that "[d]isclosure of GHG metrics could better prevent exaggerated

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the Task Force on Climate-Related Financial Disclosures, the Sustainability Accounting Standards Board, the Global Reporting Initiative, the Climate Disclosure Standards Board, and the EU's Sustainable Finance Disclosure Regulation and Taxonomy Regulation).

[11] See Latham & Watkins LLP, "SEC Proposes ESG Disclosure Requirements for Investment Advisers and Investment Companies," at 10, available at: https://www.lw.com/thoughtLeadership/sec-proposes-esg-disclosure-requirements-for-investment-advisers-and-investment-companies.

[12] The SEC points to eight jurisdictions that have implemented formal TCFD-aligned disclosure requirements for domestic issuers, and to the UK's new asset manager rules that require mandatory climate-related disclosures consistent with TCFD recommendations. See ESG Fund Disclosures Proposal, supra note 2, at 192 and 230.

[13] Under the ESG Fund Disclosures Proposal, ESG-Focused Funds and Impact Funds that indicate that they consider environmental factors would be considered environmentally focused funds, unless they affirmatively state that they do not consider issuers' GHG emissions as part of their investment strategy in the proposed "ESG Strategy Overview" table in the fund's prospectus. See ESG Fund Disclosures Proposal, supra note 2, at 88.

[14] These metrics are meant to reflect the fund portfolio's absolute GHG emissions and the extent to which the portfolio is exposed to carbon-intensive companies, respectively.

claims in this space by providing consistent, comparable, and reliable data that investors can use when reviewing funds that market themselves as focusing on climate factors in their investment processes."[15] However, the GHG metrics involve complex calculations, on which the ESG Fund Disclosures Proposal includes over twenty pages of discussion. The challenges of calculating GHG metrics are compounded by the ESG Fund Disclosures Proposal's requirement to use good faith estimates for Scope 1 and Scope 2 GHG emissions when portfolio companies do not publicly disclose this information, without specifying the use of any particular estimation method.

Nasdaq urges the Commission to align the methodology, timing and scope of the ESG Fund Disclosures Proposal with the Climate-Related Issuer Disclosures Proposal, in order to ensure that funds are disclosing consistent, comparable and reliable data obtained from public sources under robust internal controls and procedures. Neglecting to do so will lead to unreliable, inconsistent data, or require funds to heavily rely on estimates rather than verifiable data, thereby failing to promote the Commission's stated goals of enhancing the disclosures provided to investors.

The practice of disclosing Scopes 1, 2 and 3 GHG emissions among public companies is nascent and evolving, and companies are at various levels of maturity in their data collection and reporting processes. For example, a survey of 263 public companies we conducted with TechNet from April 19 to June 10, 2022 (the "2022 Survey"), found that 93% of respondents with less than a $700 million market cap do not report emissions.[16] Another study we conducted found that small-cap companies tend to be more "focused on growing their businesses and also making sure they're satisfying their shareholders first," rather than engaging in ESG conversations with shareholders.[17]

As noted above, if Scope 1 and 2 data is not publicly available, funds may instead provide a "good faith estimate of the portfolio company's Scope 1 and 2 emissions."[18] However, Nasdaq agrees with Commissioner Peirce's concern that:

> Forcing ESG-Focused funds to make good faith estimates of a portfolio company's greenhouse gas emissions, when they cannot get such data from "non-reporting portfolio companies," will in turn play a coercive role. This time the coercion will be on companies to disclose greenhouse gas emissions so that funds will invest in them without the burden of greenhouse gas guessing (and subsequent enforcement second-guessing).[19]

This risk of coercion is heightened by the lack of a safe harbor for any good faith estimates disclosed by the fund. While the Climate-Related Issuer Disclosures Proposal provides a safe harbor for

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[15] See ESG Fund Disclosures Proposal, supra note 2, at 22.

[16] See Nasdaq, Inc. and TechNet, The SEC's Proposal on Climate Change Disclosure: A Survey of U.S. Companies (2022), available at: https://nd.nasdaq.com/rs/303-QKM-463/images/1497-Q22_SEC-Climate-Change-Survey-Findings-Report-Listings-CP-v3.pdf?utm_medium=Email&utm_source=Marketing&utm_programid=4743&mkt_tok=MzAzLVFLTS00NjMAAAGFK9dFrOizg9ddnoKLldfEyQvA1H8z-859VMxY8L3W-DCi6fL8Zc-Zzx-AUlIhn7kykt6VFAahuzea8vjhSJg.

[17] See Nasdaq, Inc., ESG on the Earnings Call: Nasdaq Data Shows Huge Quarterly Jump in Conversations (2022), available at: https://www.nasdaq.com/articles/esg-on-the-earnings-call%3A-nasdaq-data-shows-huge-quarterly-jump-in-conversations.

[18] See ESG Fund Disclosures Proposal, supra note 2, at 104.

[19] See Commissioner Peirce's Statement on ESG Fund Disclosures Proposal, supra note 9.

a company's Scope 3 emissions disclosures, unless the statement was "made or reaffirmed without a reasonable basis or was disclosed other than in good faith,"[20] there is no proposed safe harbor available to funds under the current ESG Fund Disclosures Proposal. Nor does the Commission clarify whether the Private Securities Litigation Reform Act ("PSLRA") safe harbor for forward-looking statements is available to funds who satisfy its criteria, including funds or business development companies registered under the Investment Company Act of 1940.

Nasdaq is concerned that funds may be reluctant to provide estimates in their publicly filed reports without a safe harbor, and we encourage the Commission to consider a safe harbor for the ESG-related disclosures, including the carbon footprint and WACI of a fund's portfolio companies. This safe harbor could be effective for at least a five year transition period, or until any litigation related to the Climate-Related Issuer Disclosures Proposal is settled. We are concerned that the Climate-Related Issuer Disclosures Proposal, in whole or in part, could be subject to litigation and create uncertainty for companies about the level of disclosure they will need to provide, and the liability and enforcement risks they could be subject to, during the litigation period. This could in turn impact the quality of emissions disclosure publicly available to funds. A safe harbor would provide funds, and their underlying portfolio companies, with additional comfort on any disclosures made during this period.

Reliance on estimates could also be reduced by aligning the effective dates of the ESG Fund Disclosures Proposal with the Climate-Related Issuer Disclosures Proposal. Currently, funds would be required to provide the proposed ESG disclosures one year after the adoption of any final rules,[21] while large accelerated filers will not be required to disclose Scope 1 and 2 GHG emissions until 2024 (for fiscal year 2023) if the Climate-Related Issuer Disclosures Proposal is adopted as proposed. Accelerated and non-accelerated filers have an additional year to provide climate-related disclosures (2025 for fiscal year 2024), and smaller reporting companies have even longer (2026 for fiscal year 2025).

This delayed implementation recognizes that smaller companies may need additional time to develop the resources and expertise necessary to collect and provide the disclosures required under the Climate-Related Issuer Disclosures Proposal, and provides them a longer phase-in period to comply. While this appropriately recognizes that smaller companies may face additional compliance burdens compared to larger companies, it may result in information asymmetry for investors if funds are able to calculate the GHG emissions of larger portfolio companies based on publicly reported data, but must rely on estimates of such emissions for smaller companies until they are required to begin reporting. Further, smaller reporting companies are exempt from providing any Scope 3 disclosures under the Climate-Related Issuer Disclosures Proposal, making it unlikely that funds will have access to Scope 3 data for such companies even after the Climate-Related Issuer Disclosures Proposal is effective.

Nasdaq is not advocating for shorter compliance periods for smaller companies in order to reduce this information asymmetry. On the contrary, Nasdaq believes that the Commission's efforts to calibrate the implementation of the Climate-Related Issuer Disclosures Proposal appropriately recognizes that one-size does not fit all, yet does not provide sufficient time for any companies to implement the robust controls and procedures necessary to provide the disclosure contemplated by that proposal. To address this concern, Nasdaq encouraged the Commission to adopt a comply-or-

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[20] See Climate-Related Issuer Disclosures Proposal, supra note 5, at 211.

[21] See ESG Fund Disclosures Proposal, supra note 2, at 168.

explain framework rather than compelling mandatory disclosures for all issuers.[22] A comply-or-explain disclosure regime would provide the necessary time and flexibility for companies to evolve and mature their climate-related disclosure practices in parallel with the emergence of consolidated global standards and frameworks.

To ensure that all investors have access to consistent, reliable information disclosed in publicly available sources, the Commission should delay the implementation of the ESG Fund Disclosures Proposal until the final deadline for compliance under the Climate-Related Issuer Disclosures Proposal. Failing to do so will require funds to rely on disparate data sources for larger and smaller companies, and could potentially penalize smaller companies if funds exclude them from their portfolios because they do not have such data publicly available. In turn, this could reduce the investor demand and liquidity for such securities, resulting in a wider-bid ask spread and more volatile trading; inadvertently limit the investable universe by reducing the number of choices available for investors who seek to invest in environmental funds; and defer funding for innovation in the ESG sector. Facing increased burdens with compiling and reporting data on GHG emissions in their portfolios, funds may be disincentivized from considering GHG emissions at all.

In addition, BDCs that are also environmentally focused funds would be required to provide "climate-related information in their annual reports on Form 10-K, including a BDC's Scope 3 emissions if material or if Scope 3 emissions are part of an announced emissions reduction target"[23] under the Climate-Related Issuer Disclosure Proposal, and the fund's carbon footprint and WACI under the ESG Fund Disclosures Proposal. The timing for compliance with the Climate-Related Issuer Disclosures Proposal would depend on the BDCs filing status. While the Commission believes that "the GHG emission disclosure we are proposing in this release would complement that climate disclosure, if both proposals were adopted,"[24] failure to align the implementation and scope of the proposal could increase the compliance burden on BDCs subject to both proposals. Nasdaq believes that subjecting BDCs to both proposals will simply provide duplicative information to investors and increase the compliance burden on issuers. The Commission should exempt BDCs from the ESG Fund Disclosures Proposal if they provide the information required under the Climate-Related Issuer Disclosures Proposals.

C. General Concerns with the Names Rule Proposal

It has been over twenty years since the SEC adopted the Fund Names Rule under the Investment Company Act of 1940 (the "1940 Act"),[25] which requires a fund to adopt a policy to invest at least 80% of the value of its assets in accordance with its name.[26] Nasdaq believes that the SEC should tread carefully in its efforts to amend this rule or risk the unintended consequence of disadvantaging investors. As Commissioner Peirce correctly noted in her dissent to the Names Rule Proposal,[27] in applying the 80%

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22 See Letter from John A. Zecca to Ms. Vanessa Countryman, dated June 14, 2022, available at: https://www.sec.gov/comments/s7-10-22/s71022-20131426-301608.pdf.

23 See ESG Fund Disclosures Proposal, supra note 2, at 89.

24 Id.

25 See 17 C.F.R. § 270.35d-1.

26 See 17 C.F.R. § 270.35d-1(a)(2).

27 See Commissioner Peirce's Statement on Investment Company Names (May 25, 2022) at https://www.sec.gov/news/statement/peirce-fund-names-statement-052522.

investment policy requirement to investment strategies it "may have the detrimental effect of forcing homogeneity in the way funds are managed" and this may work against the best interests of investors.

As Commissioner Peirce observed concerning the subjectivity baked into the Names Rule Proposal, "[g]iven the breadth of terms such as ESG, growth, and value, how will industry implement the rule and how will we enforce it without engaging in Monday morning asset managing?"[28] The Names Rule Proposal makes this especially difficult since it asks funds to use plain English or industry-established terms, particularly when ESG terms are rapidly evolving and often hard to classify. For example, terms including "sustainable," "ethical," and "socially responsible" are being used with greater frequency and, although they appear to fit generally within what is considered ESG, it is also fair to say none fit squarely within the "E" the "S" or the "G."

Nasdaq believes that transparency-based initiatives promote stronger investor protections by informing and empowering investors to make more educated investment decisions and that enhanced prospectus disclosures is a better alternative than making Rule 35d-1 as overly restrictive as currently proposed. Thus, Nasdaq supports efforts to augment investor protections through improved prospectus disclosure rather than expanding the scope of the current Fund Names Rule, which would shift the burden onto funds to make a subjective judgment as to which term or terms in its name would become subject to the Fund Names Rule.

Additionally, Nasdaq believes the elimination of the phrase "under normal circumstances" from the Rule 35d-1 80% investment policy requirement[29] is troublesome. In its stead, the Names Rule Proposal includes a more specific, prescriptive set of circumstances that would permit a fund to deviate temporarily from its 80% investment policy requirement and sets a 30-day time period for funds to come back into compliance. Commissioner Peirce stated in her Names Rule Proposal dissent that "the consequence of this intentionally inflexible approach may include inducing portfolio managers to make undesirable investments in order to remain in compliance with the rule or forcing funds to shut down in times of even relatively short-lived market stress."[30] We concur with Commissioner Peirce's concerns and request that this change not be adopted in the final rule.

Finally, we believe that if the Names Rule Proposal is adopted that a longer phase-in period is necessary. The Names Rule Proposal requires funds to comply within one year of adoption. This timing stands in contrast to longer-term phase-in periods for other rule proposals, including the SEC's Climate-Related Issuer Disclosures Proposal.[31] If the Names Rule Proposal is adopted as proposed, the resulting large number of funds falling under the scope of Rule 35d-1, coupled with the considerable policy adjustments that would be necessary to guarantee compliance with this rule, would likely prove this time frame as unworkable.

D. Conclusion

Nasdaq is deeply committed to corporate sustainability as we contribute to building a more

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28 Id.

29 See supra note 6.

30 See supra note 27.

31 See Climate-Related Issuer Disclosures Proposal, supra note 5 at 289-291.

inclusive and prosperous world. Our perspective on the fast-evolving ESG landscape is informed by our unique experiences as both a public company on our own ESG journey, and by our vantage point at the intersection of technology and the capital markets. Our perspective is also informed by our role as a listing venue for, and regulator of, over 5,500 listings worldwide, a self-regulatory organization mandated to protect investors, and a service provider of marketplace solutions supporting our corporate and investment management community. In that respect, Nasdaq is committed to improving the U.S. capital markets for public companies, investors, and investment managers in order to keep our capital markets the envy of the world. Issuers, investors, and other market participants benefit from healthy capital markets that promote trust and transparency.

Nasdaq appreciates the opportunity to provide feedback on aspects of the ESG Fund Disclosures Proposal and Names Rule Proposal that could be improved to decrease the burden and costs on investment managers and listed companies without compromising investor protection. While the SEC's goals to increase consistency, reliability, and comparability are laudable, it could achieve these goals while imposing lower burdens and costs on funds and issuers through targeted and effective investor protections. In this respect, Nasdaq strongly encourages the Commission to consider the concerns we outlined above for the ESG Fund Disclosures Proposal and Names Rule Proposal, including our concerns around the timing of both proposals, especially in relation the Climate-Related Issuer Disclosures Proposal.

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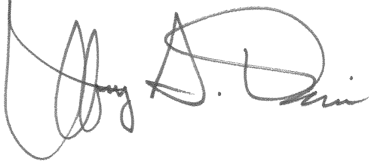
Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Sincerely yours,



Jeffrey S. Davis