WHAT'S IN A NAME? ESG MUTUAL FUNDS AND THE SEC'S NAMES RULE

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ABSTRACT

As investor money flows into environmental, social and governance ("ESG") mutual funds, regulators have raised growing concerns about greenwashing—specifically that a fund's name will falsely suggest that the fund invests in companies that meet certain ESG standards. To address these concerns, the Securities & Exchange Commission ("SEC") proposed amendments to the Investment Company Act ("Names Rule"). The amendments extend the scope of the Names Rule to funds whose names include terms such as ESG, green, or sustainable. If adopted, they will require such funds to invest at least 80% of the value of their assets in companies that meet the standards suggested by these terms.

We interrogate the SEC's concern about greenwashing and the extent to which the extension of the Names Rule is rationally directed toward addressing that concern. One challenge is that the term ESG is too broad and imprecise to provide an objective basis for determining which companies appropriately fall within an 80% bucket. A second challenge is that the concept of an 80% requirement is in tension with most mainstream ESG investment strategies. Third, and perhaps most problematic, are the limitations of fund names in conveying the extent of information necessary to ensure that a fund meets the expectations of its investors.

We demonstrate these concerns empirically. First, to address the SEC's concern that investors are not getting a meaningfully different product, we

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compare the composition of ESG funds with their most closely analogous non-ESG sister funds. Second, through the creation of synthetic Women in Leadership funds, we demonstrate the limitations of fund names in conveying sufficient information about a fund's investment strategy, even for portfolio criteria that can be measured objectively. Our findings demonstrate that the SEC's proposal is unlikely to increase investor protection and is likely to impede a variety of legitimate ESG strategies.

We conclude that the SEC's effort to address greenwashing through the Names Rule reflects an overly simplistic and unworkable approach to characterizing portfolio companies and a narrow perception of plausible ESG investment strategies. Both are at odds with existing market practices and threaten further innovation.

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INTRODUCTION

Names matter.[1] Mutual fund names have the power to impact the flow of investor funds substantially.[2] In recent years, this power has been reflected through large inflows into mutual funds with names conveying a strategy reflecting environmental, social and governance ("ESG") considerations,[3] funds that we will refer to as ESG funds.[4]

Concerned that the shareholders who invest in these funds may not be receiving a product that meets their expectations, and that mutual fund sponsors may inappropriately label their products with ESG names to capitalize on investor demand, in May 2022, the Securities & Exchange Commission proposed changes to Rule 35d-1 (the "Fund Names Rule"), designed to increase the likelihood that mutual funds align more closely with investor expectations.[5] Specifically, the amendments would, among other requirements, extend the Names Rule to investment strategies and would require that, if a fund's name suggests "an investment focus in companies that meet certain ESG standards," at least 80% of the value of the fund's investments be consistent with that focus.[6]

The proposed amendments reflect a misguided understanding of both the concept of an ESG investment and what it means to use an ESG investment strategy. By extending the Names Rule's categorization approach to ESG, the SEC introduces an overly simplistic taxonomy into a subject rife

1. *Cf.* WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2 ("[T]hat which we call a rose [b]y any other name would smell as sweet.").

2. We use the term mutual fund in this article to include both traditional open end mutual funds and exchange traded funds (ETFs). *See generally* Jill Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U. PA. L. REV. 1961 (2010) (explaining the differences between mutual funds and ETFs).

3. *See* Elizabeth Pollman, *The Making and Meaning of ESG* 3 (U. Pa Carey L. Sch. Inst. L. Econs., Working Paper No. 659, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857 [https://perma.cc/2XYC-9MNG] (explaining that "trillions of dollars flow into ESG- labeled investment products."); Ryan Clements, *Why Comparability Is a Greater Problem than Greenwashing in ESG ETFs*, 13 WM. & MARY BUS. L. REV. 441, 443 (2022) (footnote omitted) ("Numerous ESG-designated funds have captured massive capital inflows in what is likely the most popular investment product since the 2008 global financial crisis—the ETF.").

4. In using the term ESG to refer generally to these funds and investment strategies, the SEC explains that "The term 'ESG' encompasses terms such as 'socially responsible investing,' 'sustainable,' 'green,' 'ethical,' 'impact,' or 'good governance' to the extent they describe environmental, social, and/or governance factors that may be considered when making an investment decision." Investment Company Names, Investment Company Act, Release No. 34593, 17 C.F.R. §§ 232, 270, 274, at 19 n.32 (proposed May 25, 2022).

5. While this article was in the editorial process, we submitted it as part of the public comment file on the proposed rule. Shortly before this article went to press, the SEC adopted a revised version of the rule. In its adopting release, the SEC discusses our article and the concerns it raises. Investment Company Names, Investment Company Act, Release No. 3500, 17 C.F.R. §§ 230, 232, 239, 270, 274 (adopted Sept. 20, 2023) (adopting and describing the final amendments to Rule 35d-1).

6. Investing Company Names*, supra* note 4 at 13–14.

with ambiguity. As Elizabeth Pollman explains, the term ESG includes a range of usages that can be applied to both companies and investment strategies, and "consensus on the meaning of ESG does not currently exist."[7] That ESG is a "big tent"[8] makes it appealing to use the term in fund names, but, consequently, its use does not convey very much information. Commentators can, and do, reasonably disagree about whether it is appropriate to characterize a particular portfolio company as ESG or not,[9] and market-based ratings organizations often differ widely in the ratings they assign to the same company.[10] Notably, because ESG involves a range of factors, a company that appears to fall short in one dimension may nonetheless warrant a high overall score.[11]

At the same time, investors can implement a variety of approaches to ESG investing.[12] Some strategies are relatively simplistic, such as inclusion—selecting companies based on certain characteristics or screening—excluding certain types of companies.[13] Other ESG investing strategies can be more complex. They may involve overweighting companies with high ESG scores or underweighting companies with lower scores. An ESG strategy can also seek to maximize diversification by constructing a portfolio consisting of the more highly rated companies in each industry rather than excluding whole industry categories such as oil and gas.[14] An

7. Pollman, *supra* note 3, at 20.

8. *See id.* at 30.

9. *See, e.g.*, *Tesla Is Being Booted from the ESG Index*, FORBES, (May 20, 2022, 1:48 PM), https://www.forbes.com/sites/qai/2022/05/20/tesla-is-being-booted-from-the-esg-index/?sh=5443bfab25d6 [https://perma.cc/PH4X-XM2Y] (explaining that Tesla, despite being an electric car manufacturer, was being removed from the S&P 500 ESG index after allegations of "rampant racism").

10. *See*, *e.g.*, Florian Berg, Julian F. Kölbel & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings*, 26 REV. FIN. 1315, 1316 (2022) (analyzing data from six rating agencies and finding "correlations between ESG ratings range from 0.38 to 0.71").

11. *See* FORBES, *supra* note 9 (commenting on the fact that Exxon is included in the S&P 500 ESG index despite being an oil company).

12. *See* Letter from Anne Robinson, Managing Dir. & Gen. Couns., The Vanguard Grp, Inc. to Vanessa A. Countryman, Sec'y, Sec. & Exch. Comm'n 3 (May 5, 2020), https://www.sec.gov/comments/s7-04-20/s70420-7153862-216465.pdf [https://perma.cc/4SA8-PFDS] ("The ESG market is continuing to evolve as portfolio managers explore different strategies to incorporate ESG considerations that may or may not be indicated by a term in the fund's name. Some funds may use screens to exclude or underweight sectors, countries, and companies that do not meet certain ESG criteria. Other funds may use screens to include sectors or companies with higher ESG ratings than their industry peers. Some funds are focused on generating a positive societal or environmental impact and a financial return. Others may focus investing on specific sectors of the sustainable economy. Still others regularly include ESG factors alongside traditional investment analysis performed by active managers.").

13. Worth noting is that an ESG investment strategy need not align with the political left. For examples, see *CATH, S&P 500 Catholic Values ETF*, GLOBAL X, https://www.globalxetfs.com/funds/cath/#:~:text=ETF%20Summary,excludes%20those%20that%20do%20not [https://perma.cc/V3RC-HQCF]; *see also It's Time to Capitalize on Being BAD*, BAD, https://badinvestmentco.com/bad-etf [https://perma.cc/2WWS-JF9G] (tracking price movements of a portfolio of U.S. listed companies with exposure to the following "B.A.D. market segments: Betting, Alcohol, Cannabis, and Drugs").

14. For example, the S&P 500 ESG Index excludes "[c]ompanies with an S&P DJI ESG score that

ESG strategy can also be more targeted—such as seeking to obtain a portfolio level of conformity with one or more ESG characteristics such as low carbon emission or board gender diversity. And of course, ESG funds may strive for impact—endeavoring not to choose portfolios of companies with high ESG characteristics, but instead to improve the ESG profile of their portfolio companies.

As a result, there is little logic to policing the use of terms such as ESG through the Names Rule's 80% investment requirement. In our empirical analyses we demonstrate both the impotency of an 80% requirement preventing the inclusion of companies that some investors would view as problematic from an ESG perspective, as well as the incoherence of applying an 80% requirement to portfolio-wide ESG investment strategies.[15]

We start by interrogating the concept of "greenwashing."[16] The SEC worries that managers are simply naming or renaming funds as ESG in order to capture investment flows without engaging in an ESG investment strategy.[17] For the reasons suggested above, this proposition is difficult to test empirically. Unlike the categories of securities to which the Names Rule has traditionally been applied, such as tax-exempt securities or technology companies, the concept of ESG does not readily lend itself to determining whether a particular security belongs in a fund's 80% bucket.

To overcome this problem, we adopt a different approach. For each ESG fund in our sample, we identify a "sister fund"—the non-ESG fund in the same fund family most comparable to the ESG fund. We then compare the portfolio composition of each fund pair.

falls within the worst 25% of ESG scores from each Global Industry Classification Standard (GICS) Group." *S&P Dow Jones Indices Launches S&P 500 ESG Index*, SUSTAINABLEINVESTING, https://sustainableinvest.com/sp500-esg-index-launched [https://perma.cc/Z9B5-N5G7].

15. A related issue is the extent to which ESG funds employ a more ESG-friendly voting strategy than non-ESG funds. The proposed amendments to the Names Rule do not address voting policy, although the SEC has elsewhere proposed requirements to increase disclosure of mutual fund voting decisions. Two recent studies provide empirical evidence indicating that ESG funds are more likely than non-ESG funds to support ESG shareholder proposals. *See* Shane S. Dikolli, Mary Margaret Frank, Zhe Michael Guo & Luann J. Lynch, *Walk the Talk: ESG Mutual Fund Voting on Shareholder Proposals*, 27 REV. ACCT. STUD. 864 (2022); Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393 (2021).

16. *See, e.g.*, Bertrand Candelon, Jean-Baptiste Hasse & Quentin Lajaunie, *ESG-Washing in the Mutual Funds Industry? From Information Asymmetry to Regulation*, 9 RISKS 1, 3 (2021) (defining greenwashing as "communicating unsubstantiated or misleading information about a financial product to give it the appearance of a socially responsible mutual fund").

17. *See* Investment Company Names, *supra* note 4 at 114–15*; cf.* K.J. Martijn Cremers & Quinn Curtis, *Do Mutual Fund Investors Get What They Pay For? Securities Law and Closet Index Funds*, 11 VA. L. & BUS. REV. 31 (2016) (suggesting that investors who pay higher fees to invest in actively-managed funds do not get what they pay for if the fund is really a "closet index fund").

Our comparison spans two dimensions. First, we test the extent to which ESG funds hold different portfolio companies than non-ESG funds. We find that, although a nontrivial number of ESG funds' holdings overlap significantly with those of their sister funds, the vast majority of ESG funds look quite different. We then compare the performance of ESG funds to their sister funds. We find that ESG funds do not underperform their sister funds, nor do they charge higher fees. This holds both across the distribution of similarity and among ESG funds that are most similar to their sister funds.

While our findings cannot determine whether investors receive what they expect when they purchase an ESG fund, they cast doubt on the claim that ESG funds simply reflect opportunistic rebranding by fund managers. The ESG funds in our sample appear to be meaningfully different from their non-ESG sister funds, and we find no evidence that investors are paying more or receiving inferior returns.

Next, we consider the extent to which a fund name can do the work contemplated by the SEC in conveying sufficient information to meet investor expectations. We create a series of synthetic Women in Leadership funds that seek, through their investment strategy, to promote women in corporate leadership. We identify how modest differences in the implementation of this strategy—all of which are plausibly faithful to the fund name—result in substantial differences in fund composition. Our analysis also reveals how easily a portfolio that is consistent with the strategy conveyed by the fund's name may nonetheless fail to meet the expectations of some fund investors.

Our findings demonstrate that the SEC's proposed amendments to the 80% rule are misguided. Not only are they unlikely to reduce the potential for greenwashing, but they are also likely to deter innovation in fund offerings and investment strategies, potentially depriving investors of new products that better align with their investment goals.[18]

I. THE REGULATION OF MUTUAL FUND NAMES

A. THE IMPORTANCE OF MUTUAL FUND NAMES

An emerging finance literature emphasizes the important role of fund names in driving investment decisions. Fund names can convey the characteristics of a fund's investment portfolio—such as whether the fund invests in equity or fixed income securities.[19] They can seek to attract

18. Our findings further raise questions about the logic behind the 80% requirement in the unamended Names Rule, but those questions are beyond the scope of this article.

19. The SEC does not require that fund names convey the composition of the fund or its investment

investor attention by being clever or catchy.[20] A trade or generic name may also convey the quality of the fund's management.[21]

As early as 2005, Cooper, Gulen, and Rau demonstrated that mutual fund name changes had a significant impact on fund flows.[22] Responding to a newspaper article reporting that mutual funds were changing their names from growth funds to value funds, the authors found that mutual funds that changed their names to reflect a current hot investment style received substantial inflows whether or not the change was associated with a difference in fund holdings or performance.[23] They argued that investor responsiveness to these "cosmetic" changes is consistent with the fact that "most investors have little knowledge about the products that they are buying."[24]

Subsequent research found similar results. For example, Esplenlaud, Haq, and Khurshed studied fund name changes from 2002 to 2011.[25] They found that investors responded with increased fund flows to superficial name changes—specifically name changes that did not attempt to reflect the fund's portfolio composition and that were not accompanied by meaningful portfolio adjustments.[26] They further found that these investors gained no benefit from the changes in the form of improved performance or lower fees. In another study, Greene and Stark found that sponsors were successful in attracting inflows by launching funds with trendy names.[27]

The finding that investors respond to fund names extends to the use of names that convey an ESG-related investment strategy. A substantial number of mutual fund sponsors have repurposed and rebranded funds to

strategy, although it has regulated fund names that attempt to do so.

20. Larry Barnett warned in 2005 that cute and catchy names could potentially manipulate investors, citing examples such as the Vice Fund. *See* Larry D. Barnett, *The Regulation of Mutual Fund Names and the Societal Role of Trust: An Exploration of Section 35(d) of the Investment Company Act* DEPAUL BUS. & COMM. L.J. 345, 373 (2005). A variety of similar examples exist today, such as the God Bless America Fund, the MAGA Fund and the BAD Fund. *See* BAD, *supra* note 13.

21. Historically, some funds have successfully used names as a form of branding. For example, Peter Lynch turned Fidelity's Magellan Fund into "the world's best known fund." Barry Ritholtz, *Peter Lynch Is the GOAT*, THE BIG PICTURE (March 2, 2021, 8:00 AM), https://ritholtz.com/2021/03/peter-lynch-goat [https://perma.cc/9ZQG-Y49S].

22. Michael J. Cooper, Huseyin Gulen & P. Raghavendra Rau, *Changing Names with Style: Mutual Fund Name Changes and Their Effects on Fund Flows*, 60 J. FIN. 2825 (2005).

23. *See id*. at 2826.

24. *Id.* at 2855.

25. Susanne Espenlaub, Imtiaz ul Haq & Arif Khurshed, *It's All in the Name: Mutual Fund Name Changes After SEC Rule 35d-1*, 84 J. BANKING & FIN. 123 (2017).

26. *See id.* at 124.

27. Jason T. Greene & Jeffrey R. Stark, What's Trending? The Performance and Motivations for Mutual Fund Startups (2016) (unpublished manuscript) (on file with the University of Alabama Huntsville College of Business Administration), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2826677 [https://perma.cc/FZ9Y-VFRV].

take advantage of the popularity of ESG investing.[28] In one account that drew substantial media attention, BlackRock changed the name of a fund from impact, to ESG, and then to sustainable.[29] The name change purportedly attracted millions of dollars in inflows. Notably, however, the name changes did not appear to be cosmetic—along with changing the fund's name, BlackRock modified the fund's investment strategy.[30]

A recent paper by Aymen Karoui and Sadok El Ghoul looked at twenty-eight funds that changed their names over the period from 2003 to 2018 to convey a sustainability-related strategy.[31] They found that the name changes were correlated with substantial fund inflows in the first year after the change. Importantly, however, Karoui and El Ghoul investigated the extent to which the name changes were cosmetic and found that the name changes were accompanied by substantial rebalancing.[32] They further found that investors were able to distinguish between cosmetic and non-cosmetic name changes, and that only the non-cosmetic changes drew increased asset flows.[33] To examine the potential of ESG fund names to mislead, Candelon, Hasse, and Lajaunie evaluated ESG funds according to their ESG ratings from Morningstar and MSCI.[34] They found that although the sample of ESG funds obtained higher average ESG ratings than those obtained by conventional funds, there was a substantial overlap between the two distributions.[35]

Arguably the documented extent to which investors rely on fund names is problematic. The SEC requires mutual funds to make extensive disclosures about their holdings and strategy in a prospectus and a statement of additional information ("SAI"), as well as to provide periodic disclosure

28. For example, one article reports that from 2019 to July 2022, at least sixty-five US mutual funds were "repurposed" as sustainable. *See* Silla Brush, *One Fund, Three Names and Lots of Questions for 'ESG'*, BLOOMBERG (July 25, 2022, 2:00 AM), https://www.bloomberg.com/news/articles/2022-07-25/how-blackrock-rebranded-one-sustainable-mutual-fund?leadSource=uverify%20wall [https://perma.cc/UA6Q-U6F8].

29. *Id.*

30. *See Id.*

31. Sadok El Ghoul & Ayman Karoui, *What's in a (Green) Name? The Consequences of Greening Fund Names on Fund Flows, Turnover, and Performance*; 39 FIN. RSCH. LETTERS (2021) ("The most frequent name changes include the words 'sustainable', 'ESG', 'green', and 'impact.' ").

32. The SEC's Proposing Release reports, somewhat misleadingly, that the Karoui & El Ghoul paper found no significant increase in socially responsible investing by the renamed funds. *See* Investment Company Names, *supra* note 4, at 115 n.165. In truth, the paper found that the funds were better aligned with social values although the increase was not statistically significant, an unsurprising result in a sample of 28 funds. *See* El Ghoul & Karoui, *supra* note 31.

33. El Ghoul & Karoui, *supra* note 31, at 5 ("[I]nvestors seem to be able to distinguish between cosmetic and non-cosmetic changes, and direct their flows to the non-cosmetic-change group.").

34. Candelon et al., *supra* note 16.

35. *See id.* at 6–7.

about their holdings and voting records.[36] Fund sponsors are required to post these documents on the internet and to make the information contained in them user-friendly. These disclosures provide substantial details on the nature of fund investment strategies and, for the most part, would effectively eliminate the risk that an investor would misunderstand how an ESG fund determines which securities qualify for inclusion in its portfolio.[37] The problem, of course, is that investors do not read these documents.[38]

The situation is further aggravated by the fact that a substantial component of mutual fund investing today takes place through employer-sponsored employee-directed retirement plans.[39] In these plans, employers construct a menu of funds that are available to their employees, and employees choose the funds in which their money will be invested.[40] The standard menu provides employees with a list of fund names and possibly additional information such as asset class and fees, but an investor typically must make an affirmative effort to seek out additional information, and it is unclear how many investors do so.[41]

B. SECTION 35(D) & THE NAMES RULE

Section 35(d) of the Investment Company Act of 1940 makes it unlawful for a mutual fund name to use any word or words that the Commission finds are materially deceptive or misleading.[42] The statute authorizes the SEC to use its rulemaking authority to designate the circumstances under which a firm name is deceptive or misleading.

In 2001, the SEC used this authority to adopt Rule 35d-1, the Names Rule.[43] Rule 35d-1 requires funds using certain types of names to invest at

36. *See*, *e.g*., Fisch, *supra* note 2 (describing required disclosures).

37. *See* Investment Company Names, *supra* note 4, at 6 (observing that "investors should go beyond the name itself and look closely at a fund's underlying disclosures").

38. *See*, *e.g*., Anne M. Tucker & Yusen Xia, *Promise & Perils of Plain English Mutual Fund Disclosure Readability,* 13 HARV. BUS. L. REV. 59, 77 (2023) (recounting that "common experience suggests that few people actually read [mutual fund] disclosures, even the summary prospectus" and reporting that an average of 138 individuals access each mutual fund disclosure document directly through the SEC's website).

39. *See 401(k) Plan Research: FAQs*, INVESTMENT COMPANY INSTITUTE (Oct. 11, 2021), https://www.ici.org/faqs/faq/401k/faqs_401k [https://perma.cc/CW6W-PA5X] (reporting that, as of the end of June 2021, money held in retirement plans represented 47% of total mutual fund assets, and that 19% of fund assets were held in 401(k) plans).

40. *See* Jill E. Fisch, Annamaria Lusardi & Andrea Hasler, *Defined Contribution Plans and the Challenge of Financial Illiteracy*, 105 CORNELL L. REV. 741, 749 (2020) ("[E]mployers offer their employees a menu of investment choices, and individual plan participants designate how their money is to be invested from among those choices.").

41. *See id.* at 762.

42. 15 U.S.C. § 80a–34(d).

43. Prior to the adoption of Rule 35d-1, the SEC implemented its policies on an ad hoc basis. *See* Barnett, *supra* note 20, at 382.

least 80% of the value of their investments in a manner that is consistent with that name.[44] Under the current form of the rule, the 80% requirement applies to names suggesting investment in certain asset types of industries, names suggesting a focus on investments in a particular country or geographic region, names indicating that fund distributions are exempt from federal or state income tax, and names suggesting guarantee or approval by the United States government. In addition, the rule explicitly states that it does not apply to common investment strategies.[45] In adopting the rule, the SEC explicitly stated that the 80% requirement is not a safe harbor from liability; a fund may be found to have a misleading name despite its compliance with the 80% requirement.[46]

The SEC has not amended Rule 35d-1 since 2001 although a variety of market developments have occurred in the subsequent two decades.[47] In particular, after the 2008 financial crisis, the SEC observed that a number of investors appeared to be misled by their investments in target date funds—funds that purported to shift their asset allocation between debt and equity in accordance with the approach of the designated target date. These funds, which are widely used for retirement investing, varied substantially in their asset allocations and glide paths, creating differing levels of risk exposure for investors in the funds.[48] The SEC's proposed solution, however, was not to attempt to regulate the use of the term "target date" in a fund's name, but instead to require changes to the marketing materials for target date funds.[49] Ultimately, the SEC did not adopt new regulations to address the problem.[50]

44. 17 C.F.R. § 270.35d-1 (2001).

45. *See*, *e.g.*, Investment Company Names, *supra* note 4, at 13 n.23 ("[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.").

46. *Id.* at 69 n.101 (quoting Investment Company Names, Investment Company Act Release No. 24828, 66 Fed. Reg. 8509 (Jan. 17, 2001)) ("A name may be materially deceptive and misleading even if the investment company meets the 80% requirement.").

47. *Id.* at 11.

48. *See* Investing Company Advertising: Target Date Retirement Fund Names and Marketing, Securities Act Release Nos. 33-9126, 34-62300, Investment Company Act Release No. 29301, 75 Fed. Reg. 35920, at 35921 (proposed June 23, 2010) (to be codified at 17 C.F.R. pts. 230, 270) ("Target date funds that were close to reaching their target date suffered significant losses in 2008, and there was a wide variation in returns among target date funds with the same target date.")

49. *See id.*; Investment Company Advertising: Target Date Retirement Fund Names and Marketing, Securities Act Release Nos. 33-9570, 34-71861, Investment Company Act Release No. 31004, 17 C.F.R. §§ 230, 270 (Apr. 3, 2014).

50. *See* Marla J. Kreindler, William J. Marx & Elizabeth S. Goldberg, *Target Date Funds: Facing Increasing Congressional, Regulatory, and Legal Scrutiny*, MORGAN LEWIS (July 16, 2021), https://www.morganlewis.com/pubs/2021/07/target-date-funds-facing-increasing-congressional-regulatory-and-legal-scrutiny [https://perma.cc/3XKH-WH5A].

C. THE 2022 PROPOSED AMENDMENTS

On May 25, 2022, the SEC proposed amendments to the Names Rule.[51] The amendments are explicitly designed to address ESG fund names. As SEC Chair Gary Gensler outlined in the remarks introducing the proposed rule, the release proposes four changes.[52] First, it extends the scope of the 80% requirement to names that designate specific investment characteristics, including ESG-related names.[53] Second, it requires funds that "drift" out of compliance with the 80% requirement to become compliant within 30 days. Third, it requires funds to designate the specific holdings in their portfolios that count toward the 80% requirement.[54] Finally, it requires funds to use the notional value of derivatives for determining compliance with the 80% requirement.

The proposing release goes further in targeting ESG funds. For example, the proposal would codify the fact that a fund's name may be materially misleading if the fund's portfolio contains investments that are inconsistent with its investment strategy, even if it complies with the 80% requirement.[55] By way of example, the release cites a "fossil fuel-free fund" that makes a substantial investment in fossil fuel reserves.[56] Similarly the release expressly observes that a fund's name can be misleading if it invests in an index that is included in the fund's name, but that index contains "components that are contradictory to the index's name."[57]

The proposing release explains the SEC's justification for the amendments. In particular, the release singles out ESG funds as presenting particular investor protection concerns.[58] The release observes that the use

51. *See* Investing Company Names, *supra* note 4.

52. Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n, Statement on Proposed Updates to Names Rule (May 25, 2022), https://www.sec.gov/news/statement/gensler-statement-proposed-updates-names-rule-052522#:~:text=Under%20the%20current%20Names%20Rule,assets%20consistent%20with%20its%20name [https://perma.cc/J69K-FXNA].

53. The proposal would also require funds to provide disclosure in their prospectus of the meaning of terms such as ESG that are used in their names. It further explains that "funds that consider ESG factors along with, but not more significantly than, other factors—sometimes called integration funds—cannot use ESG-related terms in their names." *Id.*

54. *See* Investment Company Names, *supra* note 4, at 18-19 (the proposal includes "a new reporting item requiring a fund subject to the 80% investment policy requirement to indicate, with respect to each portfolio investment, whether the investment is included in the fund's 80% basket").

55. *See id.* at 69 ("A fund's name could be materially deceptive or misleading for purposes of section 35(d) if, for example, a fund complies with its 80% investment policy but makes a substantial investment that is antithetical to the fund's investment focus.").

56. *Id.*

57. *Id.* at 70.

58. *See id.* at 13 ("The potential investor protection issues . . . are particularly evident in the treatment of funds with names that suggest an investment focus in companies that meet certain ESG standards.").

of ESG terminology may be particularly powerful in attracting investors and that subjecting those funds to the 80% requirement would "help to prevent potential 'greenwashing.' "[59] The release is explicit in calling out investment advisors for adopting and changing fund names out of "self-interest" in order to attract greater inflows.[60]

II. ESG FUND NAMES AND GREENWASHING

A. THE SEC'S CONCERNS

The proposing release offers some insight into the SEC's concerns about ESG mutual funds. These concerns can be divided into three categories. The first is that an ESG fund will invest in securities that are not ESG. The SEC illustrates this through its example of a Fossil Free fund that is not, in fact, fossil free because it invests in fossil fuel companies.[61] The greenwashing concern expressed in the media, however, is broader—that a variety of companies in the portfolios of ESG mutual funds are simply inconsistent with an ESG or sustainability investment mandate. For example, the media has questioned whether an ESG fund can legitimately invest in companies in the oil and gas industry.[62] This is the rationale for requiring funds to designate the securities that fall within their 80% basket—to highlight, and potentially expose a fund for claiming that its investment in Exxon conforms with its ESG investment strategy.[63]

A related concern is the use of fund names that simply reference an underlying ESG index. Many ESG indexes involve complex strategies similar to those discussed above, including overweighting and underweighting or choosing the companies in each industry with (relatively) higher ESG scores. These strategies may result in an index including companies that the average investor might not view as reflecting ESG values. For example, funds that invest in accordance with the S&P 500 ESG index

59. *Id.* at 14; s*ee also id*. at 82 ("A number of commenters noted the growth of funds with ESG terminology in their names and expressed concerns about 'greenwashing.' ").

60. *See id.* at 116.

61. By way of comparison, the SPDR S&P 500 Fossil Fuel Reserves Free ETF purports only to avoid investments in fossil fuel reserves, and it holds $81.44 million in fossil fuel investments. *See SPDR® S&P 500 Fossil Fuel Reserves Free ETF,* FOSSIL FREE FUNDS, https://fossilfreefunds.org/fund/spdr-sp-500-fossil-fuel-reserves-free-etf/SPYX/fossil-fuel-investments/FS0000C3K4/F00000WAP7 [https://perma.cc/EB9R-AR48]. It is unclear whether the SEC would consider the ETF's name misleading under the terms of the proposed rule.

62. *See* Emma Goring, *Sustainable Finance Is Rife with Greenwash. Time for More Disclosure*, THE ECONOMIST (May 22, 2021), https://www.economist.com/leaders/2021/05/22/sustainable-finance-is-rife-with-greenwash-time-for-more-disclosure [https://perma.cc/25KH-ZXUC] (reporting that the world's 20 biggest ESG funds hold, on average, investments in 17 fossil-fuel producers and further observing that the funds also "invest in gambling, booze and tobacco").

63. *See id*.

reflect one of the largest categories of ESG funds in terms of assets under management.[64] The S&P 500 ESG index is specifically designed to maintain the same industry group weights as the S&P 500 index, meaning that, by necessity, it invests in oil and gas, fossil fuel, and similar industries.[65]

A second, and somewhat different concern, is that an ESG fund's overall portfolio will not differ sufficiently from a fund that does not bear the ESG name. The SEC's concern here is that asset managers are using ESG branding to attract asset flows, but not adopting genuine ESG investment strategies.[66] To this point, the proposing release cites empirical literature indicating that fund name changes are not associated with changes in fund styles.[67] A related consideration is that ESG funds may cost more than "plain vanilla" funds despite failing to provide additional screening of their investments.[68] A 2021 Bloomberg article, for example, cited a number of ESG funds with higher fees but with portfolio compositions that closely matched the comparable lower cost non-ESG index funds.[69]

A third concern—the concern most frequently repeated by the SEC—is that ESG funds do not meet investor expectations. It is not entirely clear what this means. One possibility is that the fund manager and investors just disagree about which companies constitute ESG investments. As noted

64. As of early February, 2023, two ETFs tracking this index managed a total of over $1.4 billion. *See SPDR S&P 500 ESG ETF*, STATE ST. GLOB. ADVISORS SDPR, https://www.ssga.com/us/en/intermediary/etfs/funds/spdr-sp-500-esg-etf-efiv [https://perma.cc/6BEF-TM4M] (indicating assets under management of $738.4 million as of February 2, 2023); *Xtrackers S&P 500 ESG ETF*, XTRACKERS BY DWS, https://etf.dws.com/en-us/SNPE-sp-500-esg-etf [https://perma.cc/M7HV-CEGZ] (indicating assets under management of $683.3 million as of February 3, 2023).

65. Dow Jones, the index provider, explains "[t]he S&P 500 ESG Index is a broad-based, market-cap-weighted index that is designed to measure the performance of securities meeting sustainability criteria, while maintaining similar overall industry group weights as the S&P 500." *S&P 500 ESG Index*, S&P DOW JONES INDICES, https://www.spglobal.com/spdji/en/indices/esg/sp-500-esg-index/#overview [https://perma.cc/N7C5-HG6F]. It targets the top 75% of companies within the S&P 500, using S&P DJII ESG scores. *Id.* (click "Factsheet" drop-down under the "Documents" heading; then click "S&P 500 ESG Index (USD) Factsheet").

66. *See* Investment Company Names, *supra* note 4, at 20–21 ("[A]cademic research indicates that a significant number of funds follow an investment strategy that does not align with the investment strategy identified in the fund's name.").

67. *See id*. at 115. Somewhat problematically, the research provides limited evidence that funds do not change their style in accordance with their name changes, and the most convincing evidence in support of this proposition is from the Cooper et al. paper which draws from a period prior to the SEC's adoption of its original names rule. *See id.* at n.166.

68. *See*, *e.g.*, Kenneth P. Pucker & Andrew King, *ESG Investing Isn't Designed to Save the Planet*, HARV. BUS. REV. (Aug. 1, 2022), https://hbr.org/2022/08/esg-investing-isnt-designed-to-save-the-planet [https://perma.cc/EBF5-8G4H] ("ESG funds typically charge fees 40 percent higher than traditional funds making them a timely answer to asset management margin compression. All too often these higher fees are unwarranted given that ESG funds often closely mirror 'vanilla' funds.").

69. *See* Aaron Brown, *Many ESG Funds Are Just Expensive S&P 500 Indexers*, BLOOMBERG (May 7, 2021, 4:00 AM), https://www.bloomberg.com /opinion/articles/2021-05-07/many-esg-funds-are-just-expensive-s-p-500-indexers [https://perma.cc/AHM7-Z6SD].

above, there is broad disagreement about this, and it is unlikely that fund names have the capacity to provide greater clarity, a point we interrogate through our empirical analysis below. A different and more subtle point is that investors may overestimate the impact of ESG investing on underlying social issues such as climate change or wealth inequality.[70]

B. HOW PREVALENT IS THIS TYPE OF GREENWASHING?

In this section, we probe the empirical basis for the SEC's proposed rule. Rather than relying on anecdotes or generalized concerns about greenwashing, we investigate the extent to which ESG funds resemble the other funds that their sponsors offer.

To do so, we identify a non-ESG sister fund for each ESG fund in the market each year. We define the sister fund as the non-ESG fund in the same fund family (funds offered by the same management company) that most closely resembles the ESG fund in terms of the securities in the ESG fund's portfolio that year.[71] Following the logic of the proposed Names Rule, and, in particular, the proposition that an ESG fund should exclude non-ESG companies, the initial measure of similarity that we adopt—which we call the "portfolio inclusion"—is the percentage of the assets in the non-ESG sister fund's portfolio that are also in the ESG fund's portfolio. This measure captures the extent to which the ESG fund excludes assets that its sister fund owns.

Like the proposed Names Rule upon which it is based, portfolio inclusion is binary with respect to each asset in the fund's portfolio: the asset is either included or it is excluded. Accordingly, this measure does not contemplate the fact that a fund can engage in a tilt-based strategy, which involves over- or under-weighting particular securities.[72] As discussed in more detail in Part III.A, we view this as an important conceptual limitation of the proposed Names Rule. Accordingly, while we believe this to be a conceptual limitation of the measure in the abstract, we view it as a feature for the purposes of evaluating the Names Rule.

We begin with the universe of mutual funds in the CRSP Survivorship Bias Free database. Consistent with the proposed Names Rule, we identify ESG funds using the fund's name[73] and restrict attention to domestic equity

70. *See* Pucker & King, *supra* note 68 (observing that investing in ESG funds does not reduce climate change).

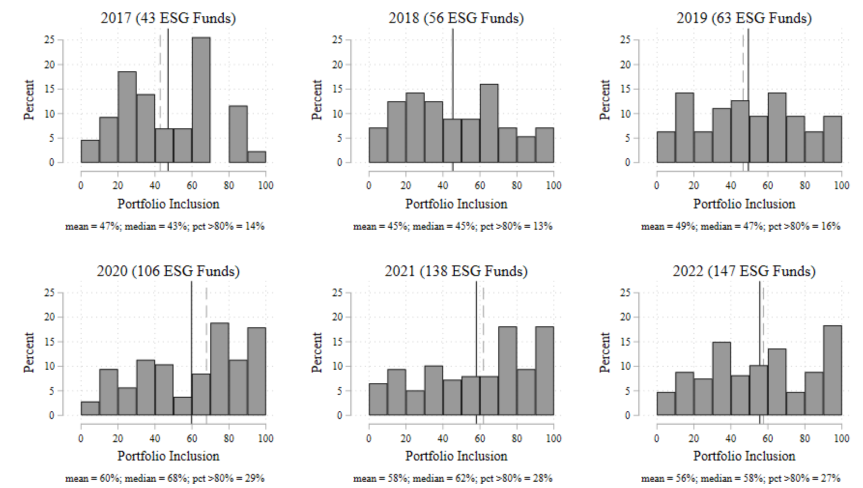
71. Formally, we calculate this value for each ESG fund and each potential sister fund each quarter using quarterly holdings. We then take the average of these quarterly measures within a given year.

72. We provide a simple example of what tilt looks like in Table 5.

73. Specifically, we include all funds with the following in their names: "esg" "sustaina" "enviro" "responsib" "clean" "fossil" "ethic" "impact" and "governance." We manually checked the resulting list

funds.[74] Because all classes of a particular fund share a common portfolio, we construct the portfolio inclusion measure at the fund (rather than class) level. We perform the analysis for each year between 2015 and 2022. The distribution of portfolio inclusion is presented in Figure 1. In the interest of space, we present the results from 2017 through 2022, but the results from 2015 and 2016 are broadly similar to those from 2017. Because the ESG market is relatively young, we break the results out by year to make it easier to spot trends over time.

FIGURE 1. Distribution of Portfolio Inclusion, by Year



Portfolio inclusion captures the extent to which each ESG fund excludes assets that are held by its sister fund, where sister fund is the non-ESG fund in the same family with the largest portfolio inclusion. A portfolio inclusion of 0 means that none of the assets in the sister fund's portfolio are in the ESG fund's portfolio.

The results make clear that the large majority of ESG funds are substantially different from their sister funds, based on this measure. In 2021, the average ESG fund excluded securities making up 42% (100%-58%) of its sister fund's portfolio, with a median of 38%. There is, however, some evidence of "bunching" at the high end. In the "worst" year—2020—29% of ESG funds excluded securities making up less than 20% of their sister fund's portfolio. Of course, this also means that 71% of funds excluded more than 20%. While there is some evidence that this bunching at the high end (say, 80% or more) increased in recent years, the pattern is not consistent: it dipped

and removed a small number of non-ESG funds that were captured by this approach (such as the Renaissance Capital Greenwich Funds, Renaissance IPO ETF and the GreenHaven Coal Fund).

74. We identify domestic equity funds using CRSP objective codes beginning with "ED."

between 2017 and 2018 before rising through 2020 and then dipping again in 2021 and 2022. In 2022, 27% of ESG funds held assets making up at least 80% of the assets in their sister fund's portfolio.

This bunching—the fact that a substantial number of funds only exclude a small percentage of the assets in their sister funds' portfolios—is, at least superficially, consistent with the SEC's greenwashing concern. Moreover, the SEC might reasonably conclude that evidence suggesting greenwashing at 27% (or, in 2020, 29%) of ESG funds is more than enough to warrant a regulatory intervention. As an agency primarily charged with enforcing an antifraud regime, the SEC is right to be much more focused on the fact that a relatively large group is concerning than on the attributes of the average fund.

But before jumping to the greenwashing conclusion, it is worth remembering that the portfolio inclusion measure is just part of the story. While excluding assets that are inconsistent with the fund's ESG strategy is an intuitive, and very common, approach to ESG investing, it is not the only one. For example, rather than excluding companies, an ESG fund might seek out and invest in top ESG companies, based on whatever ESG metric(s) the fund employs. One can imagine an environmental fund, for example, seeking out companies that are producing innovative solar or wind energy products, as opposed to excluding fossil fuel companies. Even if a fund doesn't exclude many companies, if it is affirmatively seeking out different assets, it is providing investors with something different from its sister fund. Accordingly, we develop a second measure, "portfolio overlap," which is the percentage of the assets in the ESG fund's portfolio that are also in the non-ESG fund's portfolio. We use these two measures in combination to calculate a more refined measure that we call "portfolio similarity" between each ESG fund and its sister fund. This is simply the lesser of the portfolio exclusion and the portfolio overlap. Table 1 illustrates how these measures work.

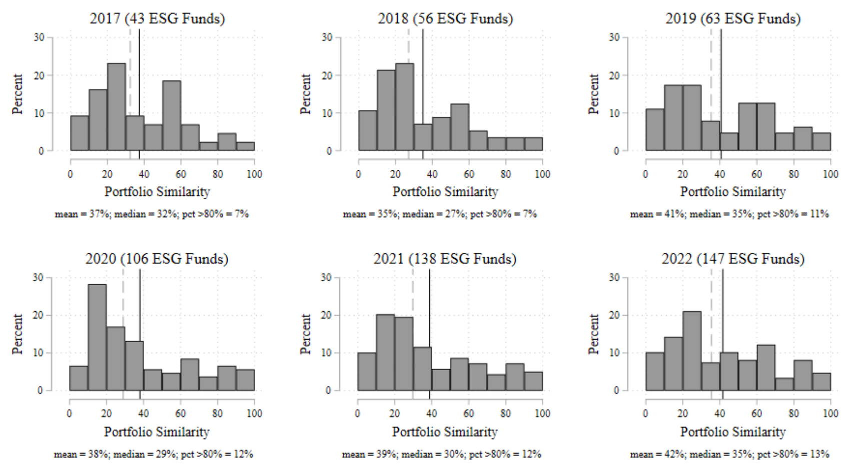
TABLE 1. Example of Portfolio Overlap and Portfolio Inclusion

Asset	*Portfolio Weight*		
	Fund A (ESG Fund)	*Fund B (ESG Fund)*	*Fund Z (Non-ESG Fund)*
A	25%	0%	30%
B	35%	10%	40%
C	20%	45%	25%
D	0%	45%	5%
E	20%	0%	0%

In the example in Table 1, Fund A's portfolio overlap with Fund Z is 80%, because 80% of the assets in its portfolio are assets that are also in the Fund Z's portfolio. By the same logic, Fund B's portfolio overlap with Fund Z is 100%. This is true even though there are assets in Fund Z's portfolio that are not in Fund B's, and even though the two portfolios differ substantially. At the same time, Fund A's portfolio inclusion with Fund Z is 95%, because assets making up 95% of Fund Z's portfolio can be found in Fund A's portfolio (and 5% of the assets in Fund Z's portfolio as excluded from Fund A's portfolio). Fund B's portfolio inclusion with Fund Z is only 70%. Accordingly, Fund A's portfolio similarity to Fund Z is 80% (the lesser of 80% and 95%), and Fund B's is 70% (the lesser of 100% and 70%).

We plot the distribution of portfolio similarity in Figure 2. These plots show much less cause for concern. Rather than something in the neighborhood of 30%, we now have fewer than 15% of funds even in the "worst" year whose portfolios are substantially similar to those of their sister funds. More strikingly, Figure 2 makes clear that the overwhelming majority of ESG funds are substantially different from their sister fund (as measured in the ways contemplated by the proposed Names Rule). We emphasize that the sister fund is defined as being the non-ESG fund in the same family that is *most similar* to the ESG fund—by definition, all other funds in the family are at least as different.

FIGURE 2. Distribution of Portfolio Similarity, by Year



Portfolio similarity captures the extent to which each ESG fund is similar to its sister fund. The portfolio similarity between two funds is defined as the minimum of the portfolio overlap and portfolio inclusion of the two funds. Each ESG fund's sister fund is the non-ESG fund in the same family with the largest portfolio similarity. A portfolio overlap of 0 means that none of the assets in the ESG fund's portfolio are in the sister fund's portfolio. A portfolio inclusion of 0 means that none of the assets in the sister fund's portfolio are in the ESG fund's portfolio.

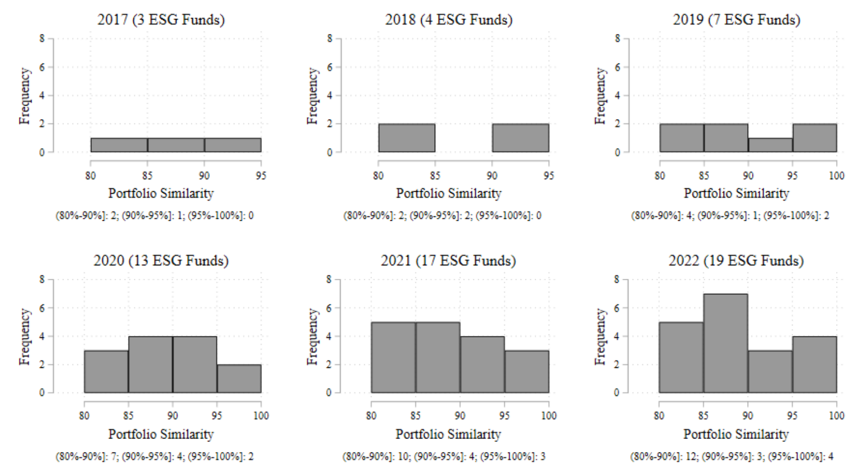
Nevertheless, recognizing the SEC's focus on the most concerning funds, we zoom in on the funds at the top of the distribution—those with a portfolio similarity of 80% or more. We present this in Figure 3. Several features stand out from this: first, even in the worst year, this group consists of, at most, 19 funds. It is unclear that this group of potentially concerning funds is large enough to warrant a rulemaking, particularly since the SEC does not need to revise the Names Rule to use its existing enforcement authority against funds with fraudulent and misleading names. Moreover, we note that the very top end—above 95%, say—is even more thinly populated. Using that cutoff, we are down to a total of no more than 4 funds.

Overall, while there are a small number of outliers, the evidence suggests that the overwhelming number of ESG funds are substantially different—based on the logic of the Names Rule—from the other funds in their family. This evidence seems to undercut the SEC's apparent concern that fund sponsors are just slapping the ESG name onto a fund that is otherwise the same as one of its other offerings.

We stress that nothing in this analysis speaks to the question of whether these funds are giving investor what they want or expect. We simply ask whether they are different from the other funds. In other words, are investors getting something. The answer appears to be yes.

While misleading investors is a harm in and of itself, the concern about greenwashing is generally accompanied by a claim that greenwashing is motivated by a desire to charge investors higher fees. While a higher fee might be warranted if investors were truly receiving a different product, investors should not pay more for a fund that carries the ESG name but does not differ substantially from a non-ESG product. We therefore extend the sister fund analysis to investigate the empirical basis for this concern. Specifically, we investigate the extent to which the ESG funds that are more similar to their sister funds (as measured by portfolio similarity) tend to have higher fees and/or worse risk-adjusted (net of fees) performance than those that are more different.

FIGURE 3. Distribution of Portfolio Similarity Over 80%



Portfolio similarity captures the extent to which each ESG fund is similar to its sister fund. The portfolio similarity between two funds is defined as the minimum of the portfolio overlap and portfolio inclusion of the two funds. Each ESG fund's sister fund is the non-ESG fund in the same family with the largest portfolio similarity. A portfolio overlap of 0 means that none of the assets in the ESG fund's portfolio are in the sister fund's portfolio. A portfolio inclusion of 0 means that none of the assets in the sister fund's portfolio are in the ESG fund's portfolio.

To do so, we estimate a series of ordinary least squares ("OLS") regression models. We begin by simply asking whether ESG funds tend to be more expensive, and lower performing, than their sister funds, and present the results in Table 2. The dependent variable in columns 1 and 2 is the difference between the ESG fund's expense ratio and that of its sister fund. The dependent variable in columns 3 and 4 is the difference between the ESG fund's alpha[75] and that of its sister fund. A higher expense ratio is generally interpreted as being bad for investors; the opposite is true with respect to alphas.

75. Annual one-factor alpha using monthly data. Market is the CRSP value weighted portfolio. We drop fund x years for which we have fewer than 6 months of data.

TABLE 2. Expenses and Performance of ESG Funds Relative to their Sister Funds

	Expense Ratio		*Alpha*	
	(1)	*(2)*	*(3)*	*(4)*
Mean Difference	-0.10164***	-0.11374**	0.00245	0.01622
	(-4.56)	(-2.98)	(-0.09)	(-0.30)
ESG Fund Size Control	NO	YES	NO	YES
Adjusted R^2	0.00000	0.00001	0.00000	-0.00003
N	7,701	7,695	10,176	10,170

Notes: [a] This table presents results from OLS regression models using data from 2015 through 2022. [b] The dependent variable in columns 1 and 2 is the difference between an ESG fund's expense ratio and that of its sister fund (expressed in percent). [c] The dependent variable in columns 3 and 4 is the difference between an ESG fund's one-factor alpha (estimated using 12 monthly observations) and that of its sister fund (expressed as monthly alpha, in percent). [d] These regressions are estimated at the class level, since fees, and therefore alphas, vary by class within a fund. [e] Standard errors are clustered at the (ESG) fund level. + p<0.1, * p<0.05, ** p<0.01, *** p<0.001.

If anything, the ESG funds may be slightly cheaper than their sister funds. This is not to say that they are cheaper than the cheapest funds in the market.[76] While the point estimates are statistically significant, we note that the magnitudes of the point estimates are small: the standard deviation of the difference in expense ratios is about 0.6 (the standard deviation of the expense ratios of the ESG funds is similar, at about 0.5). The point estimates in columns 1 and 2 therefore represent less than a quarter of a standard deviation. A conservative conclusion is that the expenses of ESG funds do not differ substantially from those of their sister funds. Certainly, we find no evidence that ESG funds are more expensive. The analysis in columns 3 and 4 is consistent with this conclusion: we find no statistically significant difference in the alphas between ESG funds and their sister funds. The point estimates are also very small relative to the standard deviation of the dependent variable.[77]

76. An extensive literature has documented that mutual funds are subject to economies of scale and scope. As a result, we expect larger funds and funds offered by larger sponsors to have lower fees overall, and the data support this conclusion. On an absolute basis, ESG funds differ from the cheapest funds in the market because they tend to be significantly smaller. By comparing ESG funds to sister funds in the same family, we implicitly control for the impact of sponsor size and, as noted, our regressions control for fund size.

77. The standard deviation of the dependent variable is 0.95, which means that the point estimate in column 4 represents less than a fifth of a standard deviation. The point estimate in column 3 is even

By construction, these analyses focus on the average. As discussed, the SEC may (reasonably) be more concerned about the most concerning funds than it is about the average funds. We therefore extend the analysis in Table 2 by adding the portfolio difference measure. We present the results in Table 3. In columns 1 to 3 we use an indicator variable equal to one if the portfolio similarity measure is over 80% to focus on funds at the top end of this measure.[78] In columns 4 to 6 we use the measure itself to explore the relationship between portfolio similarity and fund characteristics across the distribution.[79] The dependent variable in Panel A is the difference between the expense ratio of the ESG fund and that of its sister fund. The dependent variable in Panel B is the difference between the alpha of the ESG fund and its sister fund.[80] Because fees and performance are reported at the class level (rather than the fund level), all results are clustered at the fund level.

As in Table 2, we present the baseline relationship with no controls in column 1. In column 2 we include fixed effects for year, fund family (management company), whether the ESG fund is an index fund, and whether the ESG fund is an ETF. In column 3 we further add a control for the natural log of the assets under management in the ESG fund. We use the same pattern of controls in columns 4 through 6. The results are in Panel A of Table 3.

Panel A of Table 3 shows that there is no consistent relationship between portfolio similarity and ESG fund expenses, relative to their sister funds. The point estimates in columns 1 through 3 are small (relative to the standard deviation of the dependent variable, which is about 0.6) and statistically insignificant. Importantly, this analysis compares the funds that are most similar to their sister funds—and are therefore, from the perspective of the SEC, the most concerning—to the rest of the ESG funds in the market. The results in columns 4 through 6, in contrast, suggest that there is, at best, a modest relationship between fees and portfolio difference, although this difference is not statistically significant once we include the full battery of fixed effects. Even in column 4, the practical implications of the point estimates are likely to be small: the results in column 4 imply that going from a portfolio similarity of 0 to 100—the most extreme change possible—is

smaller than that.

78. This allows us to compare funds at the top of this measure to the rest of the funds.

79. This implicitly assumes a linear relationship between portfolio similarity and the characteristic of interest (expense ratio or alpha).

80. In untabulated results, we repeat the analysis using the expense ratio and alpha of the ESG funds and find similar patterns. Implicitly, this approach compares ESG funds with a higher portfolio similarity to ESG funds with a lower portfolio similarity. In contrast, the analysis in Table 3 compares the *relative* performance of ESG funds (compared to their sister funds) with high portfolio similarity to the relative performance of ESG funds (again, compared to their sister funds) with low portfolio similarity.

associated with a change in relative expense ratios representing roughly a quarter of a standard deviation, and this is only marginally statistically significant. Once we add controls, this marginal statistical significance vanishes and the point estimates fall. Overall, the results in Panel A provide no evidence that ESG funds that are most clonelike (i.e., most similar to their sister funds) charge systematically higher fees than others.

TABLE 3. Relationship Between Portfolio Difference and Fund Characteristics (Expenses and Performance)

	(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*
			Panel A: Expense Ratio			
Portfolio Similarity > 80%	-0.07272 (-1.25)	0.01682 (-0.31)	-0.03979 (-0.89)			
Portfolio Similarity				0.00135+ (-1.67)	0.00037 (-0.44)	-0.00005 (-0.06)
Year, Fund Family, Index Fund, & ETF FE	NO	YES	YES	NO	YES	YES
ESG Fund Size Control	NO	NO	YES	NO	NO	YES
Adjusted R^2	0.0026	0.13833	0.14307	0.00229	0.13841	0.14300
N	7,701	7,687	7,681	7,701	7,687	7,681
			Panel B: Alpha			
Portfolio Similarity > 80%	0.04021 (-1.05)	0.09501 (-1.15)	0.08173 (-0.90)			
Portfolio Similarity				0.00069 (-0.75)	-0.00045 (-0.22)	-0.00054 (-0.26)
Year, Fund Family, Index Fund, & ETF FE	NO	YES	YES	NO	YES	YES
ESG Fund Size Control	NO	NO	YES	NO	NO	YES
Adjusted R^2	-0.00005	0.23960	0.23967	0.00015	0.23948	0.23962
N	10,176	10,159	10,153	10,176	10,159	10,153

Notes: [a] This table presents results from OLS regression models. [b] The dependent variable in columns 1–3 is the difference between an ESG fund's expense ratio and that of its sister fund. [c] The dependent variable in columns 4–6 is the difference between an ESG fund's one-factor alpha (estimated using 12 monthly observations) and that of its sister fund. [d] Standard errors are clustered at the (ESG) fund level. + p<0.1, * p<0.05, ** p<0.01, *** p<0.001.

Turning to Panel B, we again find no statistically significant relationship between portfolio similarity and performance. To some extent, this should not be surprising: 12-month alphas are quite noisy, making statistical inference difficult. We stress that we do not interpret this as evidence either for or against ESG funds as an investment option. Such a determination would require investigating the particular fund's characteristics and matching those characteristics to an investor's particular goals. But we do not find an evidentiary basis for the SEC's specific regulatory intervention. Moreover, to the extent that the SEC believes that a specific fund is misleading investors, it has the power to bring an enforcement action under existing law.

III. SHORTCOMING OF THE PROPOSED RULE

Even if, contrary to the evidence presented in Part II.B, there were a problem with greenwashing of the type that the SEC is concerned about, the Names Rule is a poor solution. In this Part, we highlight two fundamental shortcomings of the proposed rule. First, in Part III.A, we show that the proposed rule ignores a wide variety of legitimate investing strategies. To accommodate these strategies would stretch the proposed Names Rule beyond recognition, but declining to do so would effectively outlaw funds that employ them. Then, in Part III.B, we extend that analysis to show that mutual fund names cannot bear the weight of fully describing a fund's investment strategy. In other words, the SEC may be expecting too much from a name.

A. THE NAMES RULE IGNORES A WIDE VARIETY OF LEGITIMATE STRATEGIES

While superficially plausible, the proposed Names Rule takes an artificially narrow view of investing strategies. We discuss this problem analytically, and then illustrate it using a simple example: a synthetic "Women in Leadership" fund. The advantage of focusing on women in leadership—as opposed to more commonly described ESG characteristics such as climate change—is that the number of women on a company's board of directors or in the executive suite can be quantified objectively—and uncontroversially—in a way that a firm's environmental sustainability may not.

Underlying the Names Rule is an assumption that whether an investment in a particular security is consistent with the strategy conveyed by the fund's name is objective and binary—the security either belongs in the fund or it does not. This approach is based on one common approach to ESG investing— the use of screens. Some funds employ exclusive screens, meaning that they eliminate from consideration portfolio companies or securities with certain characteristics. These screens can vary substantially in their stringency, which creates a tradeoff between the breadth of the resulting portfolio and the prioritization of the ESG characteristic(s) at issue. Others employ inclusive screens (a "buy winners" approach), where they target high performers based on the fund's preferred metric. While different in important respects, both approaches involve restricting the fund's portfolio to securities that meet certain criteria. As a result, we can think of these strategies as being based on security selection.

The Names Rule polices a strategy based on security selection by limiting the quantity of assets in a fund's portfolio that do not conform to the selection criteria. This may be sensible in the contexts that the old names rule policed: a security is either tax exempt or it is not. Similarly, although exotic securities theoretically populate a grey area between debt and equity, most of the securities held in mutual funds can easily be characterized as one or the other. With respect to ESG investing, however, as noted above, the characterization of a specific security is less straightforward.

At the same time, common ESG strategies do not necessarily focus on individual securities, but rather on the overall composition of the portfolio.[81] For example, a fund manager could look at the average or target level of the characteristic in question across the whole portfolio. In the carbon emissions setting, for example, a portfolio manager might seek to reduce carbon emissions across an entire portfolio by 10%, while at the same time making individual exclusion choices based on a range of criteria (rather than simply excluding the "dirtiest" companies).

Another option is to deploy an exclusionary (or inclusive) screen within particular portions of the portfolio. For example, the S&P 500 ESG index uses a variation on the basic exclusionary strategy, excluding the worst performing 25% of securities within each industry,[82] rather than overall. While some have criticized this approach,[83] it is a sensible strategy for an investor interested in achieving some level of sustainable investing while retaining the benefit of diversification.

Still other approaches are based on security weighting rather than outright exclusion Under this approach to style investing, the portfolio manager implements her strategy by over-weighting certain securities in the

81. The same is true for other investment strategies such as growth or value investing.

82. *See* discussion *supra* notes 63–64 and accompanying text.

83. *See e.g.*, Elon Musk (@elonmusk), TWITTER (May 18, 2022, 9:09 AM), https://twitter.com/elonmusk/status/1526958110023245829?s=20&t=jhtEM3RLuXrDJKdnZBMK-Q [https://perma.cc/HCT9-PXNY] (calling ESG a "scam" when Exxon Mobil was included in the S&P 500 ESG index while Tesla was not).

fund's portfolio and under-weighting others. These are sometimes called "tilt-based" strategies, because the portfolio is tilted towards (or away from) certain characteristics or securities without eliminating them entirely.

Tilt-based strategies are common across the financial markets and are not unique to ESG-based styles. For example, FTSE Russell, the maker of the popular Russell family of indices, offers a variety of tilt-based style indices that have nothing to do with ESG. One example of this is its line of minimum variance indices, which are designed to provide a portfolio that is less volatile than the base index while maintaining full allocation to the relevant market.[84] We provide a simple example of how tilt can affect a portfolio in Table 4.

TABLE 4. Examples of Portfolio Tilt

Asset	*Portfolio Weight*		
	Fund A (ESG Fund)	*Fund B (ESG Fund)*	*Fund Z (Non-ESG Fund)*
A	22%	5%	25%
B	22%	5%	25%
C	22%	45%	25%
D	22%	45%	25%
E	12%	0%	0%

Finally, an asset manager might use voice to achieve her ESG goals. Such approaches are sometimes called "impact" strategies: the fund makes investments in poorly performing issuers (or just invests broadly across the market), and then uses her clout to advance her ESG priorities. Despite their wide acceptance in the ESG space, the proposed Names Rule does not appear to contemplate their existence: Do poorly performing assets "count" towards the fund's 80% basket because the manager intends to exert pressure on the issuers to improve? Even under this interpretation, how much pressure must the asset manager exert in order for it to do so? The proposed Names Rule is silent on this.

In Table 5, we illustrate how some of these strategies can be deployed in the ESG context with a very simple example, what we term a synthetic

84. *See FTSE Global Minimum Variance Index Series*, FTSE RUSSELL, www.ftserussell.com/products/indices/min-variance [https://perma.cc/RRC6-AJ8R].

"Women in Leadership Fund."[85] Assume the fund manager's strategy is to use the S&P 500 index as the basis for the portfolio and to implement an investment approach that focuses on female leadership.

We start with five approaches that focus on board-level leadership. The first is a portfolio wide strategy: the fund manager targets a portfolio where the average number of women on the board of the companies in the portfolio is substantially higher than that of the base index. Specifically, she wants the average number of women on boards in her portfolio to be at least the number of women at the 75th percentile of the base index. The portfolio manager accomplishes this by recording the number of women on the board of all companies on the base index. She then ranks companies by number of women (from smallest to largest) and then by weight in the index (again from smallest to largest). She then eliminates companies one after another until the average in the portfolio of the remaining securities meets her target. We call this the "Portfolio Wide 75th Percentile" strategy.

The second is a tilt-based strategy. The portfolio manager sorts companies into quartiles by the number of women on their boards. She then under-weights the companies in the lower quartiles relative to the higher quartiles, meaning that she invests more assets, on a relative basis, in the companies with a higher number of women on the board, and fewer assets in the companies with a lower number of women. Specifically, she assigns a factor of 1 to the bottom quartile, a factor of 2 to the second quartile, and a factor of 3 and 4 to the third and fourth quartiles, respectively.[86] This means that the fund holds every company in the index, but it puts relatively more weight on companies with more women in leadership. We call this the "Board Tilt" strategy.

The final three strategies employ three simple types of exclusionary screens: (i) excluding companies with no women on their boards, (ii) excluding companies with fewer than two women on their boards, and (iii) excluding companies where the number of women on the board is in the bottom quartile of the index. From the perspective of the SEC's concern about greenwashing, the obvious question is what each of these strategies implies for the companies that make it into the funds. We summarize this in Table 5.[87]

85. The fund is synthetic in the sense that, unlike our previous examples, we are not basing this analysis on funds that currently exist in the market.

86. After applying this factor, all weights are adjusted so that the total adds up to 100%, so that 100% of the assets in the mutual fund are invested in the portfolio.

87. The analysis in Table 5 uses S&P 500 constituent and weight data as of December 31, 2021. Board member and gender data are from BoardEx and reflect board composition on the same date.

TABLE 5. Hypothetical Women in Leadership Funds, Selected Characteristics

	Average Number of Women Directors	*Percent of Portfolio with ≥50% Women Directors*	*Percent of S&P 500*	*Number of Securities*
	Panel A: Director Based Strategies			
Portfolio Wide 75th Percentile	4.0	4%	67%	197
Board Tilt	3.9	5%	100%	505
Exclude Bottom Quartile	3.8	3%	84%	369
Exclude Companies with < 2 Women	3.5	3%	99%	490
Exclude Companies with No Women	3.5	3%	100%	505
	Panel B: S&P 500			
S&P 500	3.5	3%	100%	505

Panel A in Table 5 demonstrates that the board tilt strategy is extremely effective at increasing the average number of women directors, as well as the proportion of the portfolio invested in high-achieving companies (that is, companies with boards consisting of at least 50% women). On both dimensions, it is comparable to the portfolio wide strategy, and, if the goal is to invest in companies with a substantial number of women directors, it is considerably more successful than the three exclusionary strategies, all while preserving a very wide portfolio (in terms of number of securities).

While the "exclude companies with no women directors" strategy might run into trouble with the Names Rule on other grounds (the criterion doesn't eliminate any companies, and might therefore be fairly viewed as illusory), it is hard to object to the other two director-focused exclusionary strategies on the basis of their names. In contrast, it is not at all clear that the (more effective) tilt strategy satisfies the Names Rule, or how the Names Rule would even be applied to it. How should the portfolio manager "indicate, with respect to each portfolio investment, whether the investment is included in the fund's 80% basket[?]"[88] Should she list the securities that she underweights as "included in the basket" even though they are, by her own estimation, the least consistent with her strategy? Doing so would permit her to include every security in the basket, effectively nullifying the rule. If not, which securities should she exclude, and on what basis? Without further clarity, this approach risks outlawing a large class of legitimate strategies entirely.

B. THE NAMES RULE EXPECTS TOO MUCH PRECISION FROM NAMES

The proposed Names Rule's limitations might be justified if it were likely to accomplish an important objective. Unfortunately, we fear that it may not be able to deliver on its promises. On March 3, 2022, SEC Chair Gensler released an "Office Hours" video that appeared to illustrate the SEC's rationale for its proposal.[89] In the video, Chair Gensler explained that buying a mutual fund should be as easy as buying milk, where you can tell whether milk is fat-free or not simply by looking at the label.

Arguably, mutual funds are somewhat more complex and subject to a greater degree of variation than milk.[90] As we show in this section, by identifying as a regulatory concern that a fund may not meet an investor's expectations, the proposed Names Rule is asking names to do too much. To do so, we continue the example of synthetic Women in Leadership funds. We again use this example to demonstrate that a variety of plausible approaches to constructing such a fund—all of which would presumably comply with the proposed Names Rule—would provide investors with very different portfolios. Given the range of possible portfolios that would be consistent with the fund's name, it is hard to predict what investors might reasonably expect from that name.

To do so, we begin with the two strategies based on exclusionary screening in Table 5 that exclude at least one security from the index. We limit ourselves to exclusionary strategies to keep the exposition as simple as

88. Investing Company Names, *supra* note 4, at 19 and accompanying text.

89. *Office Hours with Gary Gensler: ESG Investing*, U.S. SEC. & EXCH. COMM'N (March 3, 2022), https://www.sec.gov/news/sec-videos/office-hours-gary-gensler-esg-investing [https://perma.cc/NC6D-7LC6].

90. It is unclear that milk labels are as unambiguous as Chair Gensler suggests. In addition to whole milk and non-fat milk, it is also possible to buy low fat milk, reduced fat milk, and a variety of non-dairy products that bear the milk label. Indeed, the latter category has generated controversy as the dairy industry has sought federal regulation to prevent what it terms the "bogus marketing of fake milk." Chuck Abbott, *Amid Tussle over Milk Labeling, FDA Proposes 'Voluntary Nutrients Statements,'* SUCCESSFUL FARMING (Feb. 23, 2023), https://www.agriculture.com/news/business/amid-tussle-over-milk-labeling-fda-proposes-voluntary-nutrient-statements [https://perma.cc/KLN7-8MMV].

possible, and to make sure that the strategies are as close to "apples-to-apples" comparisons as possible.[91] To this, we add four strategies that focus on corporate officers. In the first, we limit the portfolio to companies with a female CEO. In the second, we expand the portfolio to also include companies with a female CFO. In the third, we exclude companies with fewer than 2 female executives among the top-5 most highly compensated executives (as reported in the proxy statement). The fourth excludes companies with no women in that group.[92]

We then calculate the extent to which the holdings overlap between these six hypothetical funds and present the results in Table 6. The entries in the table indicate the percentage of the row fund's portfolio that is also in the column fund's portfolio. So, for example, the "84%" in the bottom row of the first column means that 84% of the S&P 500 is in the portfolio that excludes companies that have fewer than three women directors (representing the bottom quartile), which corresponds to the information in Panel A of Table 5.

91. As this analysis will demonstrate, even when we do so, the resulting funds are very far from "apples-to-apples."

92. Our data on executives comes from ExecuComp. When more than five executives are listed in ExecuComp, we limit attention to the five most highly compensated.

TABLE 6. Overlap Between Hypothetical Women in Leadership Funds Using the S&P 500 as the Base Index

	Women Directors		*Women Executives*				
	Exclude Bottom Quartile	*Exclude Companies with < 2*	*Require CEO*	*Require CEO or CFO*	*Exclude Companies with < 2*	*Exclude Companies with 0*	*S&P 500*
Exclude Bottom Quartile of Woman Directors	100%	100%	5%	30%	24%	70%	100%
Exclude Companies with < 2 Women Directors	85%	100%	5%	27%	22%	65%	100%
Require Woman CEO	89%	100%	100%	100%	69%	100%	100%
Require Woman CEO or CFO	95%	100%	18%	100%	36%	100%	100%
Exclude Companies with < 2 Women Executives	96%	100%	16%	44%	100%	100%	100%
Exclude Companies with No Women Executives	90%	100%	7%	41%	33%	100%	100%
S&P 500	84%	99%	5%	26%	21%	65%	100%

At the risk of stating the obvious, Table 6 makes clear that these hypothetical funds deliver very different results to investors, yet all could presumably be sold under the name "Women in Leadership Fund" under the proposed Names Rule. For example, the fund that requires that the company have a female CEO—indisputably consistent with women in leadership—contains only 5% of the companies in the fund that excludes companies in the bottom quartile of female directors, another completely respectable approach. Interestingly, this is not solely because the former has a stricter criterion: 11% of the assets in the fund that requires a female CEO are excluded from the fund that excludes companies that are laggards with respect to female board representation. Similar patterns emerge between other pairs of hypothetical funds: 44% of the "require at least two female executives" strategy is also in the "require a female CEO or CFO" strategy;

36% of the "require a female CEO or CFO" strategy is on the "require at least two female executives" strategy. They are, in other words, different strategies. And yet both are clearly consistent with the same fund name.

While firms on the S&P 500 represent a substantial majority of the U.S. public equity market, an analysis that focuses on firms in the S&P 500 may not be representative of the universe of public companies. This is because firms on the S&P 500 have some of the largest institutional ownership and have been the subject of extensive pressure to increase the number of women in their senior leadership. Smaller firms, in contrast, have received significantly less attention. We therefore repeat the analysis using the S&P SmallCap 600 index and present the results in Table 7. If anything, these results are even more striking. For example, 54% of the assets in the "exclude companies with fewer than 3 women directors" strategy are also in the "exclude companies with no women executives" fund. Conversely, only 41% of the assets in the "exclude companies with no women executives" fund are also in the "exclude companies with fewer than 3 women directors" fund. In short, the overlap between these different funds is often minimal. Even in this very simple setting, this example demonstrates that a fund's name simply cannot provide enough information to give investors even a general sense of which companies are included in the fund's portfolio.

TABLE 7. Overlap Between Hypothetical Women in Leadership Funds Using the S&P SmallCap 600 as the Base Index

	Women Directors		*Women Executives*				
	Exclude Companies with < 3	*Exclude Companies with < 2*	*Require CEO*	*Require CEO or CFO*	*Exclude Companies with < 2*	*Exclude Companies with 0*	*S&P SmallCap 600*
Exclude Companies with < 3 Women Directors	100%	100%	11%	24%	20%	54%	100%
Exclude Companies with < 2 Women Directors	47%	100%	7%	20%	15%	52%	100%
Require Woman CEO	65%	95%	100%	100%	62%	100%	100%
Require Woman CEO or CFO	49%	85%	33%	100%	50%	100%	100%
Exclude Companies with < 2 Women Executives	54%	88%	27%	68%	100%	100%	100%
Exclude Companies with No Women Executives	41%	84%	12%	38%	28%	100%	100%
S&P SmallCap 600	38%	82%	6%	19%	14%	51%	100%

These differences may well matter to the type of investors interested in a Women in Leadership fund. Such investors may be motivated by a wide variety of different underlying goals.[93] Perhaps these investors are interested in ensuring that women are represented on corporate boards, a strategy that is consistent with both the California board diversity statute and the NASDAQ board diversity requirement. In such a case, the investors may be satisfied with any of the director-based strategies, but not necessarily the executive-based ones. Alternatively, perhaps they are focused on gender equality. Strategies that focus on having 2 or 3 women on corporate boards

93. *See generally* Adriana Z. Robertson & Sarath Sanga, *Aggregating Values: Mutual Funds and the Problem of ESG*, U. CHI. L. REV. ONLINE (Mar. 29, 2023), https://lawreview blog.uchicago.edu/2023/03/29/robertson-sanga-evaluating-esg-funds [https://perma.cc/43YA-NB4P] (observing that investors can have differing and inconsistent preferences).

have been successful at producing that level of representation, but the road to gender equality appears to be stalled at near 25%.[94] Finally, they may be primarily interested in female empowerment, and might therefore care much more about seeing women in senior executive positions (perhaps even CEO or CFO positions) than in minority positions on boards.

C. THE CHALLENGES OF COMPLEXITY AND NUANCE

The results in Section III.B focus on the extremely simple context of women in leadership. Most ESG-related investing contexts are more complex. We therefore expand our analysis from Section II.B to probe the differences between ESG funds with similar names. To do so, we focus on funds using the same ESG trigger term that also employ the same approach to ESG investing. Specifically, we select funds that use either "sustainable" or "ESG" in their names, and that, according to their prospectus, employ an exclusionary strategy. This allows us to restrict our attention to funds that look, at least superficially, relatively similar to a modestly attentive investor. We then look at the portfolio similarities of all pairs of funds within each of the two groups (that is, within exclusionary "sustainable" funds and within exclusionary "ESG" funds). Recognizing that the industry has been evolving rapidly, we do this only for 2022, so all comparisons are made at the same point in time.

Even within these two relatively narrow universes, we find substantial variability in holdings: in other words, different "sustainable" exclusionary funds turn out to have quite different holdings. Digging deeper, we find that some of this difference comes from the fact that the relevant exclusionary strategy has been layered over very different baseline funds. For example, it should come as no surprise that the holdings of an exclusionary small-cap sustainable fund are very different from those of an exclusionary large-cap sustainable fund. This further highlights the challenges associated with comparing funds under the broad ESG umbrella. Digging deeper still, we find evidence that suggests that fund families have a "house" approach to their various ESG strategies: different sustainable or ESG funds within a fund family appear to be more consistent (other things equal) than such funds across fund families.

The normative implications of this finding are, to some extent, in the eye of the beholder. On the one hand, within-family consistency is consistent with bona fide efforts to implement a coherent strategy, suggesting that asset

94. *See*, *e.g.*, Alexandra Olson, *Women Hold a Record Number of Corporate Board Seats. The Bad News: It's Barely Over 25%, and It's Slowing Sown*, FORTUNE (Sep. 30, 2022, 2:38 AM) https://fortune.com/2022/09/30/how-many-women-sit-corporate-boards-record-28-percent-russell-3000 [https://perma.cc/J7TQ-7G4L].

managers are making good faith efforts to deliver the product that they are promising. On the other hand, the substantial across-family differences suggest meaningful limitations in the amount of information that can be conveyed through a term like ESG or sustainable. This analysis complements the analysis in section III.B. Finally, we think that, given the different approaches, attempts to impose a standardized meaning on ESG trigger words (like “sustainable” or “ESG”) may be ill-conceived.

IV. IMPLICATIONS

What are the implications of our analysis? First, consider the SEC’s concern that funds’ use of ESG names may be inappropriately attracting investor assets. Our empirical findings demonstrate that, using the logic underlying the SEC’s rule, the overwhelming majority of ESG funds differ substantially from their sister funds. At least by this logic, the ESG fund names in our study do not appear to be cosmetic. Nor do they appear to be a means of raising fees on unsuspecting investors. Rather, it seems more likely that fund sponsors are offering ESG funds because that is what investors want, and in doing so are offering a distinct product from their non-ESG offerings. Whether they are doing so in the best way, or even in a sensible way, is beyond the scope of both the proposed Names Rule and our analysis.

Concededly, our results reveal that there is a substantial degree of overlap between ESG and non-ESG funds. It is unclear, however, why that overlap should be viewed as problematic. Mutual funds are designed to provide investors with a diversified market rate of return. A fund that differed too substantially from the overall market could expose an investor to an unacceptably high level of risk, particularly if, in some cases, an ESG investing strategy may sacrifice returns. At the same time, other commentators have argued that some ESG investing considerations are associated with better economic performance. To the extent that they are right, one would expect to see components of an ESG investing strategy in a fund that was managed and marketed exclusively to maximize economic value. We, like the SEC, take no position on whether an ESG-based portfolio is the “right” investment strategy for any particular investor. We also, like the SEC, believe that it is not our place to decide “how ESG” a strategy needs to be in order to use that name. Unlike the SEC, however, we do not believe that the existing evidence warrants additional regulatory intervention.

Our findings also raise questions that we cannot fully explore within the confines of this article, about what it means for an investment to fall within the 80% bucket contemplated by the names rule. From the SEC’s description of the Fossil Free Fund, it doesn’t seem like the SEC really contemplates allowing ESG funds to hold 20% of securities that fall outside the ESG bucket. Rather, the example suggests that ESG funds should be holding 100% of their portfolios in investments that are consistent with their investing strategies. But how does one apply this requirement? In addition to evading precise definition, ESG appears to be more of a range or a spectrum than a binary, and while it may be possible to identify a handful of companies that most investors would characterize as "green" or "brown," it is likely that the vast majority of publicly traded companies are more accurately described as "gray."[95] Both ESG and non-ESG funds will invest primarily in these companies, an intuition that is supported by our tilt analysis. But it would be hard to describe most gray securities as within an 80% ESG bucket.

Finally, our analysis of the Women in Leadership funds suggests the limitations in using fund names to convey detailed information about a fund's investment strategy. It is reasonable to demand that a fund's name conveys that the securities in its portfolio comply with some objective criteria. A self-described bond fund should not be investing in equities; a tax-exempt fund should not invest in taxable securities. But what should a MAGA fund, a Magellan fund, or a God Bless America fund invest in? The reason investors rely heavily on fund names is that they convey information. As the ESG investment space continues to evolve, investors will demand, and sponsors will offer, an increasing variety of investment strategies. Although the process of describing those strategies through fund names is imperfect, it is likely far superior to a world in which a fund sponsor offers a series of products named Fund One, Fund Two, and Fund Three.

CONCLUSION

The debate around ESG investing has reached a fevered pitch, with a constant drumbeat of concerns about greenwashing. The SEC has an enormously difficult job, and it is understandable that it would endeavor to reduce fraudulent and misleading marketing. Fortunately, we find little evidence that such greenwashing—at least of the sort that the SEC's proposed rule could curb—exists. Less fortunately, our analysis also shows that the SEC's proposed rule is not benign. Because it fails to recognize tilt-based strategies, it is inconsistent with a large class of well-accepted investment strategies. Instead of amending the Names Rule, the SEC should focus its efforts on taking enforcement action against the small number of funds that do, in fact, have fraudulent or misleading names, whatever their purported strategy may be.

95. By way of example, the largest holdings in Vanguard's ESG US Stock ETF include Apple, Microsoft, Amazon, Alphabet, United Health and JP Morgan Chase. *Vanguard ESG U.S. Stock ETF: Portfolio Composition*, VANGUARD, https://investor.vanguard.com/investment-products/etfs/profile/esgv#portfolio-composition [https://perma.cc/AH6F-RFF6].