

November 4, 2010

VIA EMAIL TO [RULE-COMMENTS@SEC.GOV](mailto:RULE-COMMENTS@SEC.GOV)

Ms. Elizabeth Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

RE: Mutual Fund Distribution Fees and Confirmations  
File No. S7-15-10; release No. IC-29367 (the "Release")

Dear Ms Murphy:

Pershing LLC ("Pershing") appreciates this opportunity to comment on the U.S. Securities and Exchange Commission's (the "Commission") proposed repeal of Rule 12b-1 under the Investment Company Act of 1940, as amended (the "1940 Act"), and the corresponding proposed new rule and rule amendments that would limit fund sales charges, require a conversion feature on certain shares, require enhanced disclosure about fund sales charges on investor transaction confirmations, and permit dividends and distributions in a share class with ongoing sales charges at the same conversion schedule as the shares on which the dividend or distribution was declared.

Pershing, member FINRA/NYSE/MSRB/SIPC, is a leading global provider of financial business solutions to a broad representation of institutional and retail financial organizations and independent registered investment advisers who collectively service approximately five million active investors with assets of over \$850 billion. Located in many offices worldwide, Pershing and its affiliates are committed to delivering dependable operational support, including clearing and custody services, trading services, flexible technology, investment solutions and practice management support. Pershing is a member of every major U.S. securities exchange and its international affiliates are members of the Deutsche Brose, the Irish Stock Exchange and the London Stock Exchange. Pershing is a subsidiary of The Bank of New York Mellon Corporation and a broker-dealer affiliate of (and clearing firm for) Pershing Advisor Solutions LLC ("PAS") which provides services to unaffiliated investment advisers. Pershing also provides clearing and custodial services for its registered investment adviser Lockwood Advisors, Inc., which provides services to Pershing's introducing brokers, investment advisers and other financial institutions.

As a leading provider of securities clearing and custody services to more than 1,150 introducing brokers and investment advisers, we believe Pershing can provide a distinct perspective on the issues raised in the Proposing Release.

Pershing conceptually supports the Commission's stated goals of (a) protecting individual investors from paying disproportionate amounts of sales charges in certain share classes; (b) enhancing

transparency and fairness; (c) promoting investor understanding of fees; and (d) eliminating outdated requirements. However, we respectfully disagree with certain provisions which are first summarized below.

## Summary

Money Market Funds. The proposal does not appear to recognize the distinction between variable net asset value mutual funds and money market funds used in sweep accounts. We strongly oppose the proposed framework as it would apply to money market funds.

The 25 basis point “marketing and service fee.” This letter recommends that the Commission provide more guidance around the scope of Rule 12b-2 and, in particular, clarify that non-distribution related service fees are permitted to be paid outside of the scope of Rule 12b-2.

Investor Confirmation Disclosures. The proposal includes a number of new disclosure requirements on the investor confirmation statements designed to assist investors in their investment decision making process. We believe the investor confirmation, which is a post-trade statement, would not help meet the Commission’s objective.

Reinvested Dividends and Distributions. The proposal would permit the reinvestment of dividends and distributions in a share class with an ongoing sales charge, subject to the same conversion schedule as the shares on which the dividend or distribution were declared. We contend this is not practical given the manner (i.e. frequent purchases through automatic investment plans) in which many mutual fund investors accumulate shares.

These comments are discussed more fully below.

### **The proposal does not appear to recognize the distinction between variable net asset value mutual funds and money market funds used in sweep accounts.**

While the Commission addressed the potential impact the proposal may have on the distribution of variable net asset value mutual funds, it did not address the potential impact the proposal may have on the distribution of money market funds used in sweep accounts. The transfer agency systems used to facilitate the flow of assets into and out of these sweep accounts are not designed to track and age assets by share lot, which would be necessary if 12b-1 fees above 25 basis points were to be treated as ongoing sales charges.

When used with a sweep account, money market funds are much different than when used as stand alone investments. These sweep accounts offer unique services (e.g. automatic investment of excess cash, automatic redemption to cover debits, checkwriting privileges, debit card access, etc.) and, in many instances, 12b-1 fees are used to reimburse intermediaries for the cost associated with these unique services.

It does not appear that the proposal contemplated the differences between money market funds and variable net asset value mutual funds, particularly with respect to the services provided in support of sweep accounts offered by financial intermediaries. Sweep assets are generally considered overnight cash balances, not long term investments. Requiring systems be overhauled to track share lots, with an eye towards an automatic conversion years down the road, is contrary to the investment’s intended

purpose. In addition, the prohibitive costs associated with these systems changes may result in unintended consequences, such as reducing the breadth of sweep services currently made available to investors.

**The proposal is ambiguous in regards to the interplay between Rule 12b-2 and the FINRA service fee limit.**

The proposal appears to suggest that, if a fund's combined distribution related expenses (i.e. marketing and service fees) and non-distribution related expenses (i.e. sub-transfer agency, custodial, etc.) fall below the 25 basis point distribution related cap imposed by 12b-2, the entire fee can continue to fall under the 12b-2 marketing and service fee. If the combined fee exceeds the 25 basis point distribution related cap, the fund advisor will need to carefully identify the non-distribution related portion and re-characterize this portion as "other expenses." This environment, where two funds categorize the same expense differently, does not appear to achieve the Commission's desired level of transparency.

Also, the proposal would permit funds to deduct a "marketing and service" fee from fund assets and the marketing and service fee would be capped with reference to FINRA's limits on "service fees" in NASD Conduct Rule 2830. This relationship between Rule 12b-2 and the FINRA service fee limit is unclear.

We strongly encourage the Commission to make clear which fees constitute a "marketing and service fee" within Rule 12b-2. In addition, we would encourage the Commission to confirm that these non-distribution related service fees are not subject to any 25 basis point cap.

**The proposed use of the investor confirmation statement, for additional fee related disclosures, does not satisfy the Commission's stated objective of improving transparency in the investment decision making process.**

The proposal would require investor trade confirmation statements to include (a) annual marketing and service fee amounts; (b) annual amount of any ongoing sales charge; (c) the aggregate amount of the ongoing sales charge that may be incurred over time, expressed as a percentage of net asset value; and (d) the maximum number of months or years that a customer will incur the ongoing sales charge.

We believe the investor would be better served with this level of information prior to making an investment decision. Providing the investor with the disclosure in the confirmation statement, after the investor has already decided to purchase the mutual fund, would not achieve the Commission's goal of assisting investors in their investment decision making process. Further, making changes to the already complex confirmation process may be more costly than providing that information in an appropriately designed, plain English disclosure document.

**The proposed changes involving reinvested dividends and distributions are not practical.**

The proposal would permit the reinvestment of dividends and distributions in a share class with an ongoing sales charge, subject to the same conversion schedule as the shares on which the dividend or distribution were declared.

We believe it would be impractical to implement such a reinvestment process given the manner in which many mutual fund investors accumulate shares. For example, an investor purchasing through an automatic purchase plan, has potentially hundreds of individual share lots. The proposal would require

the allocation of portions of that investor's reinvested share amounts among hundreds of original purchase lots.

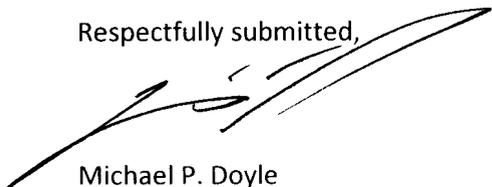
In addition, this proposal would not be possible in cases of cross-dividend reinvestment, where the reinvestment takes place in a fund other than that containing the original purchase lots.

## **Conclusion**

Pershing acknowledges and agrees, in principle, with the SEC's stated goals in this proposal. However, we strongly encourage the SEC to consider the points discussed in this comment letter, specifically the unintended consequences and practical implications of this proposal.

If you have any questions concerning these comments, please contact the undersigned at 201-413-4561 or Gary Johnson, Managing Director - Compliance at 201-413-3135. Thank you in advance for your time and consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael P. Doyle', written over a horizontal line.

Michael P. Doyle  
Director  
Mutual Funds  
Pershing LLC, a BNY Mellon company