&

WEALTH MANAGEMENT

150

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E., Washington, DC 20549-1090

RECEIVED
JUL 03 2007
OFFICE OF THE SECRETARY

June 26, 2007

Re: **File Number 4-538**

Re: **Payment of 12b-1 Fees As Violative of the "Incidental Advice" and "Special Compensation" Restrictions Of The Broker-Dealer Exemption From IAA of 1940**

Dear Ms. Morris:

I had planned on writing my own contribution to the Commission regarding its consideration of 12b-1 fees; however, Mr. Ron Rhoades has been gracious enough to share with me a copy of his earlier submission (attached). Having carefully reviewed Mr. Rhoades letter I realized that it would be futile for me to attempt to prepare a document that conveyed so thoughtfully my opinion. Hence, with Mr. Rhoades permission, please accept my wholehearted endorsement of his submission.

Cordially yours,

Harold Evensky, CFP®

Cc: Ron Rhoades

2333 Ponce de Leon Blvd, Penthouse Suite 1100, Coral Gables, FL 33134
TEL 305.448.8882 FAX 305.448.1326 www.evenskykatz.com

Ron A. Rhoades, JD, CFP®
2450 N. Citrus Hills Blvd.
Hernando, FL 34442-5348

Phone: 352.746.4460
E-mail: rrhoades@josephcapital.com

June 18, 2007

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E., Washington, DC 20549-1090

Re: **File Number 4-538**

Re: **Payment of 12b-1 Fees As Violative of the "Incidental Advice" and "Special Compensation" Restrictions Of The Broker-Dealer Exemption From IAA of 1940**

Dear Ms. Morris:

In these comments I note that 12b-1 fees, as they are currently being utilized – in large part to compensate broker-dealer firms and their registered representatives for the provision of ongoing investment advisory services – appear to be violative of the Investment Advisers Act of 1940. I submit these comments personally, and not as the member of any firm or industry organization.

<u>A. IAA – BD EXCLUSION PROVIDED SOLELY INCIDENTAL AND NO SPECIAL COMPENSATION.</u> Brokers and dealers are not subject to the requirements of the Investment Advisers Act ("IAA") where their investment advice is (1) "solely incidental to the conduct of [their] business as a broker or dealer," and (2) the broker or dealer "receives no special compensation therefore." 15 U.S.C. § 80b-2(a)(11)(C) (2000).

<u>B. 12b-1 FEES ARE BEING IMPROPERLY USED TO PAY FOR ONGOING, SIGNIFICANT ADVISORY SERVICES.</u> It is clear from various comments recently submitted by broker-dealer firm registered representatives, as well as published comments by broker-dealer industry representatives and the ICI, that 12b-1 fees are being utilized as "special compensation" for advice which is ongoing, covering a broad range of areas, and which clearly cannot be considered incidental to the mutual fund sales transaction. It cannot be denied that the original purpose of 12b-1 fees has completely changed. As a result, 12b-1 fees impermissibly compensate broker-dealer firms and their registered representatives and constitute "special compensation" for a wide range of ongoing advisory services which are not connected to a securities transaction.

Various participants in the securities industry itself recognizes this improper use of 12b-1 fees is occurring. "The advent of 12b-1 fees created an incentive for financial advisors to provide ongoing advice and service to their clients. There was an alignment of the customer's interests with the registered rep's. The financial advisor has an incentive to keep the customer's interests and needs satisfied by providing ongoing advice and service. Advice does not end with the purchase transaction. Clients need someone to answer questions during times of market turmoil. They need help in re-evaluating their risk tolerance and asset allocations. Guidance is necessary when life events cause a new financial need or a change in course. By growing their base of assets under management and the resulting 12b-1 fee income stream, financial advisors have been able to create the infrastructure needed to provide the ongoing advice and service to their clients." Comment letter of Nicholas H. Phelps, April 30, 2004, regarding File No. S7-09-04. [Emphasis added.]

Even regulatory bodies acknowledge the use of 12b-1 fees are not transactional sales charges, but rather ongoing "assets under management" fees. In its comment letter to the SEC of April 19, 2007, the NASD stated: "[W]e respectfully recommend that the Agencies amend proposed Regulation R to treat only Rule 12b-1 service fees - and not asset-based sales charges - as 'relationship compensation' ... The proposal defines the term 'relationship compensation' to mean any compensation a bank receives that consists of (1) an administration fee; (2) an annual fee (payable on a monthly, quarterly or other basis); (3) a fee based on a percentage of assets under management; (4) a flat or capped per order processing fee, paid by or on behalf of a customer or beneficiary, that is equal to not more than the cost incurred by the bank in connection with executing securities transactions for trust or fiduciary accounts; or (5) any combination of these fees ... the rule provides that a fee based on a percentage of assets under management (an "AUM fee") includes, without limitation – A fee paid by an investment company pursuant to a plan under 17 CFR 270.12b-1. Although Rule 12b-1 fees are related to mutual funds, we believe they should be viewed as relationship compensation because they are paid on an assets under management basis, rather than on a transactional basis ...." (NASD comments relating to SEC File No. S7-22-06, p. 32.) [Emphasis added.] This commentator submits that the NASD should not be permitted to state that 12b-1 fees are "relationship compensation" (and hence clearly "special compensation") for purposes of Regulation R (relating to banking exemptions from application of the securities acts), but take a different position with regard to the broker-dealer exemption from the application of the IAA and its fiduciary standards.

Additionally, as stated by the ICI, the use of 12b-1 fees to compensate registered representatives for ongoing advice (which, if ongoing, cannot be considered incidental advice to a transaction) is widespread. "Virtually all 12b-1 fees are used to compensate financial advisers for service provided to fund shareholders at the time of a purchase of fund shares or for administrative and advice services provided to the shareholder after the initial purchase." Investment Company Institute's 2004 Fact Book, p.52. [Emphasis added.]

Furthermore, as stated by Chet Helck, President, Raymond James Financial, Inc, in testimony before the U.S. Senate Committee On Banking, Housing, And Urban Affairs (Review Of Current Investigations And Regulatory Actions Regarding The Mutual Fund Industry: Fund Costs And Distribution Practices) on March 31, 2004:

"[B]ecause [12b-1 fees] are paid over an extended period of time, they promote a continuing relationship, encouraging the financial advisors to offer continued service over a period of time." [Emphasis added.]

Please refer to Appendices A, B, and C hereto for additional examples of industry recognition of 12b-1 fees as payment for ongoing advisory services.

Furthermore, if the broker-dealer and mutual fund industry were to take the position (despite all evidence to the contrary) that 12b-1 fees are not paid for the provision of ongoing advisory services by registered representatives, it must be asked whether the payment of 12b-1 fees over an extended time period (such as 10 years, or potentially much longer) would violate the general principles of NASD regulations which prohibit unreasonable compensation and excessive sales charges. This is especially true since most Class C shares (which often possess 12b-1 fees of 1% annually) cannot be converted into Class A shares at the option of the investment consumer. Would not the sale of Class C shares, rather than a Class A shares, be improper, in much the same way as Class B shares are often improper? Stated differently, if 12b-1 fees were to be viewed as transactional compensation, and since most mutual funds are designed as long-term holdings for investors, a recommendation to purchase Class C shares over Class A shares would, in many instances, be contrary to the interests of the investor. One would also question whether the conflicts of interest arising from such recommendation would be adequately disclosed to the investor.

C. THE INCIDENTAL ADVICE EXCLUSION RELATES TO BROKERAGE TRANSACTIONS FOR WHICH BROKER-DEALER FRIMS RECEIVE ONLY COMMISSIONS. "Before enactment of the IAA, broker-dealers and others who offered investment advice received two general forms of compensation. Some charged only traditional commissions (earning a certain amount for each securities transaction completed). Others charged a separate advice fee (often a certain percentage of the customer's assets under advisement or supervision). See 11 Fed. Reg. 10,996 (Sept. 27, 1946). The Committee Reports recognized that the statutory exemption for broker-dealers reflected this distinction; the Reports explained that the term 'investment adviser' was 'so defined as specifically to exclude ... brokers (insofar as their advice is merely incidental to brokerage transactions for which they receive only brokerage commissions).' S. Rep. No. 76-1775, at 22; H. R. Rep. No. 76-2639, at 28." *Financial Planning Association vs. SEC* (U.S. Ct. Appeals, D.C. Circuit, March 30, 2007) (slip opinion at p. 7). [Emphasis added.]

"The relevant language in the committee reports suggests that Congress deliberately drafted the exemption in subsection (C) to apply as written. Those reports stated that the 'term 'investment adviser' is so defined as specifically to exclude ... brokers (insofar as their advice is merely incidental to brokerage transactions for which they receive *only* brokerage commissions).' S. Rep. No. 76-1775, at 22 (emphasis added); see also H.R. Rep. No. 76-2639, at 28. By seeking to exempt broker-dealers beyond those who receive only brokerage commissions for investment advice, the SEC has promulgated a final rule that is in direct conflict with both the statutory text and the Committee Reports." *Financial Planning Association vs. SEC*, slip opinion at pp.14-15. [*Emphasis in original.*] [Emphasis added.] Hence, while Rule 12b-1 was adopted with the best of intentions, it subsequent evolution into a mechanism for providing additional compensation to brokerage firms and their registered representatives for ongoing investment advice is in direct conflict with the language of the IAA and Congressional intent.

It should be further noted that the U.S. Court of Appeals in its March 30, 2007 decision stated three times that the term "investment adviser" under the IAA should be broadly defined. Likewise, the very broad application of the IAA to financial planning activities was set forth in Advisers Act Release No. 1092, which states in pertinent part: "Generally, financial planning services involve preparing a financial program for a client based on the client's financial circumstances and objectives. This information normally would cover present and anticipated assets and liabilities, including insurance, savings, investments, and anticipated retirement or other employee benefits. The program developed for the client usually includes general recommendations for a course of activity, **or specific actions**, to be taken by the client. For example, recommendations may be made that the client obtain insurance or revise existing coverage, establish an individual retirement account, increase or decrease funds held in savings accounts, **or** invest funds in securities. A financial planner may develop tax or estate plans for clients or refer clients to an accountant or attorney for these services." Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisers Act Release No. 1092 (Oct. 8, 1987) [52 FR 38400 (Oct. 16, 1987)] ("Advisers Act Release No. 1092"). [**Emphasis added.**]

Moreover, it should be noted that the "incidental advice" which was provided by broker-dealers and their representatives at the time of the enactment of the IAA was not financial planning advice, but rather advice related to the security, contrasting research reports as to other securities, and/or general economic conditions. "[I]n providing historical context to the Investment Advisers Act of 1940, the Commission noted that the 'extensive and varied' 'brokerage house advice' described in the Adopting Release nearly all relates to advice about individual securities [FN11] not to the many varied planning issues confronted by consumers relative to their comprehensive or discrete financial planning needs ... [Fn.11 provides: The advice that broker-dealers provided as an auxiliary component of traditional brokerage services was referred to as 'brokerage house advice' in a leading study of the time. 'Brokerage house advice' was extensive and varied, and included information about various corporations, municipalities, and governments; broad analyses of general business and financial conditions; market letters and special analyses of companies' situations; information about income tax schedules and tax consequences; and 'chart reading.']" Advisers Act Release No. 2376 at pp.18-19, citing Twentieth Century Fund, THE SECURITY MARKETS (1935) at 633-646, and other publications." Please note that none of the "extensive and varied" advice provided by brokerage firms in 1940 was in the nature of financial planning advice; rather, all such advice related directly to the attributes or analysis of a security or broad analyses of general business and market conditions. Hence, it is clear that the "incidental" "brokerage house advice" provided in 1940 does not extend to ongoing personal advisory services and financial planning. Accordingly, 12b-1 fees do not constitute payment to broker-dealer for "incidental advice" for providing ongoing advice to investors; instead, they have developed over time to become an asset-based management fee.

In addition, it should be noted that the receipt of ongoing compensation by a registered representative is likely to be a significant factor in determining whether a registered representative is a fiduciary to his or her customer under state common law, even when the brokerage account is non-discretionary. A fiduciary relationship may arise under state common law by virtue of an informal relationship where both parties understand that a special trust or confidence has been reposed. A confidential relationship is defined as one in which one person comes to rely on and trust another in his important affairs and the relations there involved are not necessarily legal, but may be moral, social, domestic or merely personal. "A fiduciary relation does not depend on some technical relation created by or defined in law. It may exist under a variety of circumstances and does exist in cases where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *In re Clarkeies Market, L.L.C.*, 322 B.R. 487 (Bankr. N.H., 2005). It should be noted that once a relationship between two parties is established, its classification as fiduciary and its legal consequences are primarily determined by the law rather than any contract or agreement between the parties. Hence, the combination of ongoing financial advice to a customer, combined with the receipt of ongoing 12b-1 fees by a broker-dealer firm, and especially when a registered representative holds himself or herself out as a "financial consultant," "wealth manager," or some similar term, is highly likely to result in a finding of fiduciary status under state common law. Furthermore, it is clear that neither the '34 Act nor the IAA preempt state common law. While further discussion of this specific issue is beyond the scope of this commentary, registered representatives and their broker-dealer firms, as well as regulatory authorities, should recognize that state common law will in many instances likely impose fiduciary duties upon registered representatives where ongoing advisory relationships, especially when fueled by payment of repetitive special compensation. Rule-making at either the federal or state level should not seek to counter state common law when it provides important protections for individual investors.

The U.S. Congress, in its adoption of the Investment Advisers Act of 1940, intended that clients who receive ongoing advisory services be subject to broad anti-fraud requirements, which has been long been construed as the imposition of fiduciary status. "The IAA arose from a consensus between industry and the SEC 'that investment advisers could not 'completely perform their basic function – furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments – unless all conflicts of interest between the investment counsel and the client were removed.'" *Financial Planning Association vs. SEC*, slip opinion at pp.3-4, quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 187 (1963). "The overall statutory scheme of the IAA addresses the problems identified to Congress in two principal ways: First, by establishing a federal fiduciary standard to govern the conduct of investment advisers, broadly defined, *see Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 17 (1979), and second, by requiring full disclosure of all conflicts of interest. As the Supreme Court noted, Congress's "broad proscription against 'any ... practice ... which operates ... as a fraud or deceit upon any client or prospective client' remained in the bill from beginning to end." *Capital Gains*, 375 U.S. at 191." *Financial Planning Association vs. SEC*, slip opinion at p.16.

I would suggest that the Commission, in light of the recent U.S. Court of Appeals decision and its emphasis on the broad definition of "investment adviser," as well as the fact that no "special compensation" nor advice other than "incidental advice" relative to the product or transaction be provided under the broker-dealer exemption from the IAA, re-evaluate its position on 12b-1 fees.

It should be noted that the repeal of 12b-1 fees, at least as to those which are paid to those "financial consultants" (i.e., registered representatives and their broker-dealer firms) who are not subject to the IAA's imposition of fiduciary duties, will not result in an end to advice from broker-dealer firms. This is because registered representatives can undertake the effort and registrations necessary to become investment adviser representatives. The cessation of payment of 12b-1 fees to broker-dealer firms not acting as investment advisers will, however, raise substantially the standards of conduct to which those who provide ongoing advice to investment consumers are held – i.e., to the fiduciary standards of due care, loyalty, and utmost good faith - as the U.S. Congress intended.

It should further be noted that choice for consumers will not be affected. The argument that the disappearance of fee-based brokerage accounts as a result of the *Financial Planning Association vs. SEC* decision will limit consumer choice is nothing but a red herring. Fee-based accounts will continue, but as Congress intended they will all be subject to the IAA. What will change are the substantially higher standards of conduct governing the provision of advisory services – with the application of broad fiduciary standards of due care, loyalty, and utmost good faith.

I would further take note of recent incomprehensible statements by certain securities industry officials, to the effect that NASD rules and other broker-dealer regulation somehow equate or exceed the broad fiduciary standards imposed upon investment advisers by the IAA. Broker-dealer and NASD rules are numerous and complex because of the many diverse activities which broker-dealer firms are involved (agency transactions, principal transactions, investment underwriting, securities analysis, custodial duties, etc., etc., etc.). Broker-dealer rules are hence more numerous in order to cover such diverse activities and the many conflicts of interest which arise as a result. Moreover, the fiduciary standard of conduct has long been recognized in legal circles to constitute the highest duty under the law. It is without logic to state that broker-dealer regulation, including the duty of suitability (which relates mainly to risk tolerance of an investor, not as to the total fees and costs the investor may bear, nor as to tax suitability of the investment in the context of the customer's overall portfolio and personal tax situation, in most instances), is equivalent or exceeds the broad fiduciary standards of conduct imposed upon investment advisers. Recent statements by industry officials touting the supremacy of broker-dealer regulation must result in the query as to whether our securities regulation should be entrusted to persons within self-regulatory organizations who fail to understand of fiduciary standards of conduct and the important role such standards perform in the preservation of our capital markets system in an ever-more-complex society.

<u>D. THERE MAY EXIST PROPER, BUT LIMITED, PURPOSES FOR 12b-1 FEES</u>. I do not suggest that there are never legitimate purposes for 12b-1 fees. Rule 12b-1 permits funds to adopt written plans for using fund assets to pay for "distribution and servicing costs." These costs, which can be shifted from a mutual fund to a broker-dealer

firm under the 12b-1 arrangement, include payments for processing fund transactions; maintaining customer accounts; mailing prospectuses and confirmation statements; and other tasks that mutual funds otherwise perform themselves.

However, the amount of such fees should be directly related to the actual costs shifted from the mutual fund complex to the broker-dealer firm. Moreover, the amount should be annually reviewed by the mutual fund's board of directors in adherence to the board's fiduciary duty to fund shareholders. Furthermore, such cost-shifting from the mutual fund to the broker-dealer firm should only be undertaken if the class of fund shareholders bearing the brunt of such 12b-1 fees benefit from the cost-shifting (by lower costs, as may occur when brokerage firm economies of scale or systems are more efficient with regard to such distribution and servicing functions).

It should be queried why, in the instance of such cost-shifting, administrative fees paid by shareholders to the mutual fund are not reduced, at least pro rata for any 12b-1 fees which are paid. Query as well why Class C shares cannot be converted to Class A shares if the shareholder transfers the fund to another brokerage firm or chooses to receive service directly from the mutual fund itself, where available, in order that the fund shareholder bear the dual burden of administrative fees and 12b-1 fees imposed for the same services.

E. IN CONCLUSION, 12B-1 FEES ARE NOT PROPER WHEN USED TO COMPENSATE FOR ONGOING ADVISORY SERVICES PROVIDED UNDER A BROKERAGE PLATFORM. The NASD, ICI, SIFMA, and many broker-dealer firm representatives all recognize that 12b-1 fees are utilized under current practices, and especially with regard to Class C shares, to primarily compensate broker-dealer firms for the provision of ongoing investment advisory services to brokerage customers. When utilized for such purpose, 12b-1 fees are indistinguishable from "special compensation" arrangements, such as those paid as a percentage of assets under management (i.e., fee-based brokerage accounts), and such special compensation is not permitted under the IAA.

Many commentators have pointed out that 12b-1 fees can be utilized to more closely align the interests of investors, especially smaller investors, with broker-dealers. There is no denying the truth in this statement. Indeed, fee-based brokerage accounts were advanced under the "Merrill Lynch Rule" utilizing the same proposition. However, and regardless of the good intentions of these commentators, the same fatal flaws exist. Providing ongoing advisory services under a standard of conduct which is far less than that of the fiduciary standard of conduct can lead to substantial abuse of investors, results in non-functional regulation of the securities industry, and economically places investment advisers at a disadvantage, for reasons I have set forth in prior comments on other rule proposals. Moreover, and more importantly, the payment of fee-based ongoing compensation, even when indirectly paid by a mutual fund company to the broker-dealer firm and not directly by the individual investor (although the individual investor's returns are reduced dollar-for-dollar by the amount of such fee payments), violates the letter, spirit, and intent of the IAA.

As seen in this comment and the Appendices hereto, 12b-1 fees are often utilized to compensate a registered representative and/or his or her broker-dealer firm for providing ongoing investment advice to a customer in a brokerage arrangement. Such advice extends far beyond a purchase or sale transaction. Indeed, much of such advice extends far beyond investment activities. Hence, I would submit that the payment of 12b-1 fees for such purposes violates the Investment Advisers Act, when such fees are paid in connection with brokerage (not investment advisory) accounts.

There are many other policy issues involving SEC proposals to either eliminate or further restrict 12b-1 fees, and these issues are not addressed in this memorandum. However, the issue of violation of the IAA by current practices involving payment of 12b-1 fees to broker-dealers, under the law constituting special compensation for non-incidental advice provided by registered representatives who are at the time of receipt of such compensation not providing services under an account governed by the IAA, should be addressed by the Commission promptly and decisively. Adherence to the IAA and its spirit should be restored.

Furthermore, as a matter of public policy, the Commission should promote the adoption of fiduciary standards by those who provide advisory services to investment consumers. The rightful application of fiduciary standards of conduct to all those who provide financial planning and other advisory services will serve to substantially enhance the financial advice provided to tens of millions of Americans and enable them to better prepare to meet the financial challenges in the years ahead.

Respectfully submitted,

Ron A. Rhoades, JD, CFP®
2450 N. Citrus Hills Blvd.
Hernando, FL 34442-5348
Ph: 352.746.4460
rrhoades@josephcapital.com

Appendix A:
Excerpts From Investment Company Institute's *Research Fundamentals* (April 2007).

"ICI's study is based on a survey that identifies the benefits that investors say they receive from using professional financial advisers. The ICI survey is based on interviews with more than 1,000 households owning mutual funds outside workplace retirement plans, and reflects the experiences of investors who have ongoing advisory relationships and those who do not. This issue of *Fundamentals* presents the results of the survey relating to shareholders' use of advisers ... Professional financial advisers offer investors a wide array of services in addition to helping them select and purchase mutual fund shares. About two-thirds of shareholders with ongoing advisory relationships receive at least five distinct services from their primary advisers."

Table: "Shareholders Receive Numerous Investment Services from Professional Financial Advisers"
Percent of respondents with ongoing advisory relationships, 2006

Types of Services Currently Received from Primary Adviser

Investment Services
- 85% Regular portfolio review and investment recommendations
- 61% Review of allocation of investor's employer-sponsored retirement plan assets

Planning Services
- 83% Periodic discussion of financial goals
- 75% Planning to achieve specific goals, such as saving for retirement or paying for college
- 75% Comprehensive financial planning
- 60% Managing assets in retirement
- 51% Access to specialists in areas such as tax planning

Number of Services Received
- 14% One or two services
- 23% Three or four services
- 63% Five or more services

(Multiple responses are included. Source: Investment Company Institute.)

Appendix B:
Excerpts From SIMFA's White Paper (June 2007).

"Although the SEC adopted Rule 12b-1 to assist no-load mutual funds to finance their distribution expenses, the vast majority of load mutual funds have adopted Rule 12b-1 plans as a complement to, or a substitute for, a front-end sales load ... the text of Rule 12b-1(a)(2) provides that permissible activities include, but are not necessarily limited to, 'advertising, compensation of underwriters, dealers, and sales personnel, the printing and mailing of prospectuses to other than current shareholders, and the printing and mailing of sales literature' ... The development of the relations between broker-dealers and fund complexes is a story of innovation and creating choices for investors.

• The SEC adopted Rule 12b-1 at a time of moribund fund sales and high loads.

• The SEC's adoption of that rule and other revenue sharing arrangements fostered many innovations by the brokerage and fund industries. Broker-dealers and fund complexes have developed new approaches to meeting investors' needs. Investors now have a multitude of choices as to the funds that they wish to buy, how they wish to pay for those funds and the services that support those investments.

- Investors who so choose may buy low cost no-load funds from distributors.

- **But investors may also choose:**

    • Professional advice – some investors prefer to buy funds with the assistance of a broker-dealer, who will help them select the fund and **consider the fund in the context of a suitable investment strategy and asset allocation plan.**

    • Diversity of Fee Arrangements – investors may choose to pay front load, spread load, contingent deferred sales charge, or some combination of these fee arrangements.

    • Variety of Platforms – some investors may choose to buy funds from a broker-dealer that the registered representative recommends. Others may select their own funds or use a financial planner and purchase through a fund supermarket."

Excerpt from White Paper, Mutual *Fund Distribution And Shareholder Servicing Practices*, submitted by Securities Industry And Financial Markets Association (June 13, 2007). [**Emphasis added.**]

Appendix C:
Excerpts From Submitted Comments on 4-538 and Published Articles.

A. "The problem with 12b-1 fees isn't that they exist but rather how they are disclosed. I am a financial advisor who provides comprehensive financial planning services to clients. **Over the years the purpose of these fees has changed, where today they __primarily__ provide __compensation__ to advisors for __advisory services__ delivered.**" Scott E. Cooper, CFP, CFS, Vice President, Economic Concepts, Inc. - Securities America, Inc. (June 13, 2007). [**__Emphasis added.__**]

B. "John Rafal, of Essex Financial Services, an RIA/BD in Essex, CT. Rafal says that of his firm's roughly $12 million in revenue last year, about 20 percent came from 12b-1 fees. But Rafal says he either rebates those fees back to clients or deducts the cost from product prices. He's quite clear on what the fee is really going towards: 'It's a service fee,' he says. From **__financial planning, to estate planning advice__**, to research and **__quarterly meetings__** and reports, Rafal says the fees allow his team to offer a higher level of service, a point he feels a lot of regulators seem to miss." *Wealth Management Letter, Registered Representative, "SEC to Decide Fate of Advisor Revenue Stream, 12b-1" by John Churchill* (June 13, 2007). [**__Emphasis added.__**]

C. "Tom James, Chairman and CEO of Raymond James Financial ... thinks 12b-1 fees should just be accepted for what they are. They work well for both clients and advisors, he says, especially considering the growth of alternatives like fee-based products, where those fees are often rebated anyway. 'What they need to do is reconsider the purpose and definition of the fee and call it a sales and marketing assistance and **__client advisory fee__**,' says James. *Wealth Management Letter, Registered Represenative, "SEC to Decide Fate of Advisor Revenue Stream, 12b-1" by John Churchill* (June 13, 2007). [**__Emphasis added.__**]

D. "Today, the Financial Services industry is more about Financial Planning and Advice - and less about simple product distribution - although, in the end, the sale of products still pays the bills. The current **__'Class C' share is really the next step toward a more 'advice driven' model__** ... removing a "transaction cost" from the equation - and **__applying an 'always-on' Advisory Fee__** to a DISCRETIONARY investment vehicle - the mutual fund ...." *Comment of Gregory A. Keil, Wealth Management Advisor, Citi Family Office, The Monument Group at Smith Barney, Inc., June 1, 2007, on 4-538.* [**__Emphasis added.__**]