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June 18, 2007

Ms. Nancy Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20006

Re: File No. 4-538 – Roundtable Discussion Regarding Rule 12b-1

Dear Ms. Morris:

On May 29, 2007, the Securities and Exchange Commission ("SEC" or "Commission") announced that it would host a roundtable discussion on issues surrounding Rule 12b-1 under the Investment Company Act of 1940, as amended ("1940 Act"). The SEC requested feedback on the topics to be addressed at the roundtable, including the historical circumstances that led to the promulgation of Rule 12b-1 and the original intended purpose of the rule.[1]

Recently, the regulatory history of Rule 12b-1 has been the subject of much discussion by regulators and industry participants.[2] We believe, however, that certain aspects of the regulatory

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1 Press Release, Commission Announces Roundtable Discussion Regarding Rule 12b-1 (May 29, 2007), *available at* www.sec.gov/news/press/2007/2007-106.htm. *See also* Press Release, Commission Announces Agenda for June 19th Roundtable on Rule 12b-1 (June 12, 2007), *available at* www.sec.gov/news/press/2007/2007-112.htm. Other topics to be covered include: (i) the evolution of the uses of Rule 12b-1 and the rule's current role in fund distribution practices; (ii) the costs and benefits of the current use of Rule 12b-1; and (iii) the options for reform or rescission of Rule 12b-1.

2 *See, e.g.*, Christopher Cox, Chairman, Securities and Exchange Commission, Address to the Mutual Fund Directors Forum Seventh Annual Policy Conference (Apr. 13, 2007), *available at* www.sec.gov/news/speech/2007/spch041207cc.htm; Andrew J. Donohue, Director, Division of Investment Management, Securities and Exchange Commission, Address to the 2007 Mutual Funds and Investment Management Conference (Mar. 26, 2007), *available at* www.sec.gov/news/speech/2007/spch041207cc.htm; and Report on the Working Group on Rule 12b-1, Submitted to the Investment Company Institute Board of Governors (May 2007), *available at* www.ici.org/statements/ppr/rpt_07_12b-1.pdf.

history of Rule 12b-1 have been missing from these discussions. This comment letter seeks to highlight additional aspects of the regulatory history of Rule 12b-1 that we believe would be relevant to any future Commission action or comments on the rule.

II. Discussion and Analysis

A. We believe that the regulatory history of Rule 12b-1 supports the proposition that it was not intended solely as a temporary measure.

1. The Rule 12b-1 Adopting Release does not indicate that Rule 12b-1 was meant to be temporary.

Recent statements have suggested that the SEC intended Rule 12b-1 to be a "temporary" measure to address specific distribution problems in the industry at the time it was adopted, such as net redemptions. We note that neither the proposing release nor the adopting release for Rule 12b-1 ("Rule 12b-1 Proposing Release" and "Rule 12b-1 Adopting Release," respectively) suggest that Rule 12b-1 was intended to be a temporary measure.[3] Rather, the Rule 12b-1 Adopting Release stated that the SEC and its staff will "monitor the operation of the rules closely and would be prepared to adjust the rules in light of experience to make the restrictions on use of fund assets for distribution either more or less strict."[4] This suggests that Rule 12b-1 was expected to have more than a temporary existence, albeit with possible adjustments based on observations from the SEC and its staff regarding the operation of Rule 12b-1 in practice.

We believe that the first characterization of Rule 12b-1 as a temporary measure to address specific distribution problems extant when the rule was adopted may have appeared in a 2000 report on mutual fund fees and expenses prepared by the SEC's Division of Investment Management ("2000 IM Report"), which characterized Rule 12b-1 as follows: "The rule essentially requires fund directors to view a fund's 12b-1 plan as a temporary measure even in situations where the fund's existing distribution arrangements would collapse if the 12b-1 plan

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[3] *See* Bearing of Distribution Expenses by Mutual Funds, 1979 SEC LEXIS 735, Release No. IC-10862 (Sept. 7, 1979) (proposing release) [hereinafter, Rule 12b-1 Proposing Release]; 1980 SEC LEXIS 444, Release No. IC-11414 (Oct. 28, 1980) (adopting release) [hereinafter, Rule 12b-1 Adopting Release].

[4] We note that, if the SEC had determined that Rule 12b-1 should have a finite existence, it could have promulgated it as a temporary rule, as it did with Rule 6e-3(T). *See* Separate Accounts Funding Flexible Premium Variable Life Insurance Contracts, Release No. IC-14234 (Nov. 14, 1984) (adopting temporary rule to provide exemptive relief for separate accounts offering flexible premium variable life insurance).

were terminated."[5] The 2000 IM Report goes on to state that factors the board should consider when adopting a 12b-1 plan, which are discussed in greater detail below, presupposed "that funds would typically adopt rule 12b-1 plans for relatively short periods of time in order to solve a particular distribution problem or respond to specific circumstances, such as net redemptions."[6] For this proposition, the 2000 IM Report cites "Revisiting Rule 12b-1 under the Investment Company Act," an article by former Division of Investment Manager Director Joel Goldberg ("Goldberg Article").[7]

The Goldberg Article calls for revision of the procedural requirements of Rule 12b-1 to better align them with the industry's current use of 12b-1 plans. In fact, the Goldberg Article states, "the rule (and the SEC's interpretive guidance) should be modified to recognize that 12b-1 plans are used not only to remedy temporary distribution problems, but also (and even mainly) as a permanent substitute for, or supplement to other types of sales charges."[8] The Goldberg Article focuses on the use of 12b-1 plans in conjunction with contingent deferred sales loads ("CDSL") and on how this situation relates to the board's approval of a 12b-1 plan.

Prior to proposing Rule 12b-1, the SEC issued a notice of proposed rulemaking, which mentions that in the late 1970s mutual funds were experiencing more redemptions than sales, and as a result, fund assets were declining, expense ratios were rising and fund performance was not being maximized.[9] At the time, the mutual fund industry argued that investors would no longer pay large front-end loads, but that some other means was needed to finance fund share sales.[10] Whereas nurturing fund growth may have been the original impetus for the SEC to consider

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5 SEC Division of Investment Management, REPORT ON MUTUAL FUND FEES AND EXPENSES (Dec. 2000) [hereinafter, 2000 IM REPORT]. This sentiment is also reflected in a 2003 report from the Government Accountability Office. *See* MUTUAL FUNDS: GREATER TRANSPARENCY NEEDED IN DISCLOSURES TO INVESTORS, GAO REPORT TO CONGRESSIONAL REQUESTERS 03-763 (June 2003) [hereinafter, 2003 GAO REPORT] ("Rule 12b-1 plans were envisioned as temporary measures to be used during periods of declining assets.").

6 2000 IM REPORT at n. 130.

7 Joel H. Goldberg and Gregory N. Bressler, *Revisiting Rule 12b-1 under the Investment Company Act*, 31 REV. SEC. & COMMODITIES REG. 147 (July 1998) [hereinafter, Goldberg Article].

8 *Id.* at 152.

9 Bearing of Distribution Expenses by Mutual Funds, Release No. IC-10252 at 3-4 (May 23, 1978) (advance notice of proposed rulemaking).

10 "Response to Letter from Chairman Dingell Concerning Rule 12b-1 Under the Investment Company Act of 1940" from Kathryn B. McGrath, Director, SEC Division of Investment Management to John Shad, Chairman, SEC (Sept. 12, 1986) (1986 SEC No-Act. LEXIS 2866) [hereinafter, 1986 Dingell Letter].

regulatory action, the SEC strongly suggested in the Rule 12b-1 Adopting Release that simply shoring up redemptions with sales was, by itself, not enough of a basis for approving a 12b-1 plan.

As originally proposed, Rule 12b-1 included enumerated factors that a board should consider in implementing a 12b-1 plan. Such factors included:

(1) consider the need for independent counsel or experts to assist the directors in reaching a determination;

(2) consider the nature of the problems or circumstances which purportedly make implementation or continuation of such a plan necessary or appropriate;

(3) consider the causes of such problems or circumstances;

(4) consider the way in which the plan would address these problems or circumstances and how it would be expected to resolve or alleviate them, including the nature and approximate amount of the expenditures; the relationship of such expenditures to the overall cost structure of the fund; the nature of the anticipated benefits, and the time it would take for those benefits to be achieved;

(5) consider the merits of possible alternative plans;

(6) consider the interrelationship between the plan and the activities of any other person who finances or has financed distribution of the company's shares, including whether any payments by the company to such other person are made in such a manner as to constitute the indirect financing of distribution by the company;

(7) consider the possible benefits of the plan to any other person relative to those expected to inure to the company;

(8) consider the effect of the plan on existing shareholders; and

(9) consider, in the case of a decision on whether to continue a plan, whether the plan has in fact produced the anticipated benefits for the company and its shareholders.[11]

Two observations may be made here. First, the SEC ultimately decided not to include these factors in Rule 12b-1 itself, so as not to constrain the directors' decision making process.[12] In other words, the SEC recognized implicitly that there may be myriad factors that could justify adoption of a 12b-1 plan, and that the identification and evaluation of those factors was best left

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11 Rule 12b-1 Proposing Release, *supra* note 3, at *30 -*38.

12 Rule 12b-1 Adopting Release, *supra* note 3, at *37.

to the business judgment of a fund's independent directors. Second, we believe it is important to note that several of the SEC's proposed factors would have required the board to consider the nature and cause of a fund's distribution problems and whether the implementation of a 12b-1 plan would be a solution for such problems.[13] Based on consideration of these factors, it is reasonable that boards could determine there were, in fact, a number of "problems" apart from an increase in a fund's rate of redemptions that may justify adoption of a 12b-1 plan. Therefore, it is possible for one to conclude that the SEC did not intend 12b-1 plans solely as a means to stave off net redemptions or asset depletion.

The Rule 12b-1 Adopting Release supports the conclusion that the SEC did not intend for 12b-1 plans to be short lived. Although not part of the text of Rule 12b-1, the Rule 12b-1 Adopting Release discusses the nine factors listed above as both initial and on-going factors for boards to consider. Interestingly, neither the listed factors nor other text in the Adopting Release call on a board to consider discontinuing the use of a 12b-1 plan once a fund's initial distribution problem is resolved. One factor instructs a board to "consider, in the case of a decision on whether to continue a plan, whether the plan has in fact produced the anticipated benefits for the company and its shareholders."[14] This suggests that boards consider discontinuing or revamping a plan that has not performed, not one that has achieved its purpose and is performing as desired.

2. The state of the mutual fund industry in 1979 is not the only impetus for Rule 12b-1.

Some have suggested that the discussion of the state of the mutual fund industry in 1979 that accompanied the adoption of Rule 12b-1 means that the rule was intended only to be a short-lived fix for specific distribution problems that existed at that time. In a 1986 memorandum to the SEC staff ("Staff") written several years after the adoption of Rule 12b-1 ("1986 Staff Memorandum"), then-SEC Chief Counsel Thomas Lemke refers to the struggling state of the fund industry at the time Rule 12b-1 was adopted.[15] The 1986 Staff Memorandum, however, makes this observation along with citing other arguments in support of Rule 12b-1 that had been

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13 *Id.* at *38-*39.

14 Rule 12b-1 Adopting Release, *supra* note 3, at *39.

15 "Memorandum for Staff Use in Responding to Public Inquiries Regarding Disclosure and Other Issues Raised by Certain Types of 12b-1 Plans" from Thomas Lemke, SEC Chief Counsel, to Mary Joan Hoene, SEC Associate Director (May 21, 1986) (pub. avail. June 1986) [hereinafter, 1986 Staff Memorandum].

The 1986 Staff Memorandum has been incorporated into several subsequent Staff reply letters. The 1986 Staff Memorandum is included as Attachment A to the 1986 Dingell Letter.

presented during public hearings for the proposed Rule.[16] The other arguments in favor of the adoption of Rule 12b-1 included:

- More fund sales would increase the size of assets and thereby benefit shareholders via
  - economies of scale,
  - opportunities for funds to employ a greater variety of management techniques, and
  - the ability of funds to maintain a significant degree of portfolio diversification.
- Greater fund assets would also permit funds to obtain better, lower cost portfolio execution services and attract useful research reports from Wall Street analysts.
- If funds eschewed a front-end sales load, a greater proportion of investors' money could be invested immediately.
- Precluding the use of a variety of distribution channels with different fee structures made mutual funds less competitive when compared with other investment products.[17]

We note that the Rule 12b-1 Adopting and Proposing Releases may provide some support for the notion that Rule 12b-1 would be used to solve specific distribution problems as they arose. Looking again to the factors a board should consider initially and on an on-going basis, one factor instructs a board to "consider the nature of the problems or circumstances which purportedly make implementation or continuation of such a plan necessary or appropriate."[18]

While the 2000 IM Report suggests in passing that it was presumed that funds would typically adopt 12b-1 plans for short periods of time "in order to solve a particular distribution problem or respond to specific circumstances, such as net redemptions,"[19] as noted above, the 2000 IM Report relies mainly on the Goldberg Article as support for this proposition. The Goldberg Article argues for the SEC to recognize that 12b-1 plans are used as a "substitute for, or

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16 *Id.* at 4.

17 *Id.* *See also* SEC Division of Investment Management, *Protecting Investors: A Half-Century of Investment Company Act Regulation* (May 1992) [hereinafter, Protecting Investors].

18 Rule 12b-1 Adopting Release, *supra* note 3, at *38.

19 2000 IM REPORT, *supra* note 5.

supplement to, other types of sales charges" and not only to remedy temporary distribution problems.[20]

B. Rule 12b-1 does not restrict the kind or amounts of payments a fund may make, including payments for administrative or shareholder services.

Neither the legislative history of Section 12(b) of the 1940 Act, nor the regulatory history of Rule 12b-1, nor Staff interpretations of Rule 12b-1 have identified the use of 12b-1 fees to pay for administrative or shareholder services as an issue for concern. Section 12(b) of the 1940 Act states that it is "unlawful for any registered open-end investment company...to act as a distributor of securities of which it is the issuer...in contravention of such rules and regulations as the Commission may prescribe..."[21] The legislative history of Section 12(b) indicates that the section was intended to protect, "the open-end company against excessive sales, promotion expenses, and so forth."[22] In fact, shortly after adoption of the 1940 Act, a commenter discussing Section 12(b) stated:

> Apparently, the [SEC] was particularly fearful of the possibility that open-end investment companies in their formative states might be made to shoulder the unprofitable burden of selling and distributing their shares during this period of heavy expense and small return, building up the investment company for the benefit of some controlling person.[23]

The legislative history of Section 12(b) does not raise any concern with expenses for administrative or shareholder services being paid by a fund, with or without a 12b-1 plan. Indeed, if the board of a fund, in the exercise of its business judgment, determines there is no distribution component to administrative or shareholder services proposed to be paid for by a fund, there is no need for a 12b-1 plan.[24] Many times, however, funds adopt 12b-1 plans covering

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20 Goldberg Article, *supra* note 7, at 152.

21 Investment Company Act of 1940 § 12(b).

22 *Investment Trusts and Investment Companies; Hearings on H.R. 10065 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 76th Cong., 3d Sess. 111 (1940).

23 *See* A. Jaretzki, *The Investment Company Act of 1940*, 26 WASH. U.L.Q. 303, 324-25 (1941).

24 Any fees paid by a fund to an affiliated service provider would be subject to the "reasonableness" standard of Section 17(d) and also could be an element of a "reasonableness" test in complying with Section 36(b).

In 1974, SEC staff proposed amendments to the "joint transaction" rules that would permit a fund to enter into service agreements with affiliated persons or principal underwriters without filing an (footnote continued)

fees for certain types of administrative or shareholder services out of an abundance of caution that any such services that might have a distribution component be properly covered by a 12b-1 plan.[25]

The Rule 12b-1 Adopting Release explicitly recognizes that "new distribution activities may continuously evolve in the future" and goes on to define distribution expenses in conceptual terms, rather than providing an all-inclusive list.[26] In discussing the important role fund directors play in connection with Rule 12b-1, the SEC notes Rule 12b-1 does not restrict the kinds or amounts of payments that a fund may make.[27]

In 1986, the Staff became concerned with certain industry uses of "compensation" and "reimbursement" 12b-1 plans. In a typical compensation plan, 12b-1 fees are paid as a percentage of the fund's average net assets and are not directly tied to distribution expenses currently incurred by the distributor. On the other hand, under a typical reimbursement plan, 12b-1 plan payments are made "up to" a specified percentage of net assets and then only to cover distribution expenses actually incurred. To the extent distribution expenses in a given period exceed the amount permitted to be paid under a reimbursement plan, such excess amounts may be rolled forward and, together with an interest component, reimbursed in subsequent years to the extent that actual distribution expenses in those periods are lower than any applicable expense limit.[28] For both compensation plans and reimbursement plans, the SEC expressed concern that fund boards would potentially be removed from key decisions about management of distribution activities and related expenses, including decisions concerning the amount and type of expenses,

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application with the SEC for an order approving such contracts, provided that a majority of the disinterested directors specifically found that: (1) the contract is in the best interest of the company and its shareholders; (2) the services to be performed pursuant to the contract are services required for the operation of the company; (3) the affiliated person or principal underwriter can provide services the nature and quality of which are at least equal to those provided by others offering the same or similar services; and (4) the fees for such services are fair and reasonable in light of the usual and customary charges made by others for services of the same nature and quality. Release No. IC-8245 (Feb. 25, 1974). Although the Staff ultimately withdrew this proposal in 1979, the above-listed factors provide additional guidance for the Board's review of payments to affiliated service providers.

25 This differs from a "defensive" 12b-1 plan, whereby the fund adopts a plan that provides that the fund's investment adviser is authorized to use a portion of management fee revenue to support the distribution of fund shares.

26 Rule 12b-1 Adopting Release, *supra* note 3.

27 *Id.*

28 1986 Dingell Letter, *supra* note 10, at *14.

categories of reimbursable expenses, and timing of reimbursements.[29] The Staff was also concerned that the existence of large unreimbursed distribution expense accounts on the books of fund distributors placed an implicit burden on funds of the specific type that Section 12(b) was intended to prevent.

In 1988, the SEC proposed a number of amendments to Rule 12b-1. In the release proposing these amendments ("1988 Proposing Release"), the SEC stated that "Rule 12b-1 does not specifically prohibit the payment of non-distribution expenses under a 12b-1 plan."[30] In that release, the SEC proposed to amend Rule 12b-1 to require each 12b-1 plan to limit the use of fund assets to payment for, or reimbursement of payment for, specific sales or promotional services or activities, identified in the plan, that actually have been or will be provided in connection with the distribution of fund shares. Thus, under the proposed amendment, funds would no longer have been able to pay administrative expenses using 12b-1 fees. A fund would still have been able to pay for on-going administrative expenses outside of a 12b-1 plan as long as that arrangement complied with applicable laws.[31] It is important to note that the SEC did not take further action to implement the amendments.

Many of the Staff's concerns were addressed by subjecting 12b-1 plan payments in their totality to the NASD sales load limits in Conduct Rule 2830.[32] In spite of the concerns expressed in the 1988 Proposing Release, the SEC and the Staff determined to leave questions regarding the structure and operation of 12b-1 plans to fund directors, and approached this variation in the structure and operation 12b-1 plans by requesting additional disclosure about the operation of

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29 Payment of Asset-Based Sales Loads by Registered Open-End Management Investment Companies, 1988 WL 1000015, at *14-19, Release No. IC-16431 (June 13, 1988) [hereinafter, 1988 Proposing Release].

30 1988 Proposing Release at n. 129.

31 *Id.* at n. 173.

32 The NASD amended the predecessor of Conduct Rule 2830 in 1992. *See* Order Approving Proposed Rule Change Relating to the Limitation of Asset-Based Sales Charges as Imposed by Investment Companies, Release No. 34-30897 (July 7, 1992). The amended NASD rule appears to be an acceptable response to the SEC's 1988 proposal to amend Rule 12b-1, and the SEC has since amended Rule 12b-1 in a manner that does not affect the NASD's sales charge limits. *See also* Protecting Investors, *supra* note 17, at 327 (stating that the NASD proposal was a "step in the direction of limiting fee levels").

such plans.[33] Moreover, the Staff has generally refrained from commenting on the merits of any particular 12b-1 plan that funds may implement.[34]

One situation in which Rule 12b-1 fees may be used for administrative purposes is in the context of "fund supermarkets" and "sub-transfer agency" arrangements with third party administrators. In a 1998 no-action letter addressed to the Investment Company Institute ("ICI letter"), the Staff describes its views on "fund supermarkets," allowing that 12b-1 plan fees may be used to compensate fund supermarkets for certain administrative services they provide to customers who purchase shares of the fund and distribution services they provide to the fund participating in the supermarket.[35] The administrative services provided by the fund sponsor might include shareholder sub-accounting, preparation and distribution of account statements and confirmations, distribution of prospectuses to current shareholders, and payment of fund distributions.[36] The Staff goes on to state that a "fund that pays all of its fund supermarket fee pursuant to a 12b-1 plan need not determine which portion of the fee is primarily for distribution services or which portion is primarily for administrative services."[37] This statement supports the conclusion that payment of administrative expenses with 12b-1 fees does not conflict with the rule.

More recently, the 2000 IM Report regarding fund expenses also acknowledged that a 12b-1 plan may be used to pay administrative expenses.[38] The Staff proposed that the SEC consider providing additional guidance to fund directors with respect to their review of 12b-1 plans and whether procedural requirements need to be revised in light of changes to the distribution practices of mutual funds. The Staff, however, did not propose any specific changes to Rule

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33 1986 Dingell Letter, *supra* note 10, at *14-15; *see also* 1986 Staff Memorandum, *supra* note 15, at 12-15. Note the 1988 Proposing Release proposed amendments to Rule 12b-1 that would have effectively placed limits on compensation and reimbursement plans; however, as noted above, such amendments have never been adopted by the SEC.

34 1986 Dingell Letter, *supra* note 10, at *19. *See, e.g.*, American Pension Investors Trust, SEC No-Action Letter (Nov. 27, 1985); Southeastern Growth Fund, Inc., SEC No-Action Letter (Apr. 27, 1986); Co-operative Bank Investment Fund, SEC No-Action Letter (June 29, 1988).

35 *See* Investment Company Institute, SEC No-Action Letter 1998 WL 1543541 (pub. avail. Oct. 30, 1998) [hereinafter, ICI letter].

36 *Id.* at *3; *accord* Charles Schwab & Co. Inc., SEC No-Action Letter (pub. avail. Aug. 6, 1992) at n. 2.

37 ICI letter, *supra* note 35, at *6.

38 2000 IM REPORT, *supra* note 5, at n. 61.

12b-1 regarding administrative expenses nor did it request that the SEC consider adopting the changes originally proposed in 1988, discussed above.

C. Rule 12b-1 has provided funds with a nonexclusive alternative means of financing distribution expenses.

Recent statements have suggested that the SEC did not intend Rule 12b-1 to operate as a substitute for front-end sales loads. Rule 12b-1 fees are in fact one of a range of options available to funds to finance the distribution of shares and provide for shareholder servicing. The availability of multiple distribution and administration servicing options to fund distributors provided the backdrop for a series of innovations in fund share distribution. As early as 1982, the SEC granted exemptive relief permitting a mutual fund to charge a CSDL of up to 5.0% and to finance its own distribution using a 12b-1 plan with a fee of 1.0%.[39] Later, the SEC approved the dual and multiple share class regime, first through a series of exemptive orders granted to fund firms in the late 1980s and early 1990s,[40] and subsequently through the adoption of Rule 18f-3 in 1995.[41] In the Multiple Class Adopting Release, the SEC characterized multiple class funds as benefiting shareholders and fund sponsors: "These structures may increase investor choice, result in efficiencies in the distribution of fund shares, and allow fund sponsors to tailor products more closely to different investor markets."[42] The Multiple Class Proposing Release highlights that some funds "use different classes to offer investors a choice of methods for paying for the costs of selling fund shares."[43] Against this backdrop, it is clear that the Commission has been willing to interpret Rule 12b-1 as a means of providing funds with nonexclusive alternative means of

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39 In the Matter of E.F. Hutton Investment Series, Inc., Release Nos. IC-12079 (Dec. 4, 1981) (Notice of Application) and IC-12135 (Jan. 4, 1982) (Order).

40 *See, e.g.*, PaineWebber America Fund, Release Nos. IC-18758 (June 4, 1992) (Notice of Application) and IC-18820 (June 30, 1992) (Order); SEI Liquid Asset Trust, Release Nos. IC-17878 (Nov. 27, 1990) (Notice of Application) and IC-17915 (Dec. 24, 1990) (Order).

41 Exemption for Open-End Management Investment Companies Issuing Multiple Classes of Shares, Release No. 20915 (Feb. 23, 1995) [hereinafter, Multiple Class Adopting Release]. The release notes that, prior to adopting Rule 18f-3, the SEC had issued approximately 200 exemptive orders permitting funds to offer multiple classes of shares. *See also*, Exemption for Open-End Management Investment Companies Issuing Multiple Classes of Shares, Release No. IC-19955 [hereinafter, Multiple Class Proposing Release].

42 Multiple Class Adopting Release.

43 Multiple Class Proposing Release, *supra* note 41. The release goes on to describe various types of classes, such as a class with "a front-end sales load and a low distribution fee (or no such fee)," a class with "a higher distribution fee and a contingent deferred sales load" and a class with a "relatively high distribution fee but no front-end load or contingent deferred sales load."

financing distribution-related expenses. Rather than simply serving as a substitute for front-end loads, the fund industry's current use of 12b-1 fees in practice allows funds to offer a variety of sales load alternatives to investors.

The practice of using 12b-1 fees as a nonexclusive alternative to the imposition of front-end loads is acknowledged without equivocation in the 1986 Dingell Letter. The letter states that, "[f]or many funds, Rule 12b-1 provides a means to finance the distribution of fund shares without imposing a front-end sales load on investors. Other funds use 12b-1 plans to supplement front-end loads."[44] The same view is discussed in the 1988 Proposing Release, which states that, "[m]any of the distribution financing techniques that have been developed under Rule 12b-1, including reimbursement plans, have been developed in an attempt by the mutual fund industry to offer investors a product that charges distribution costs over a period of several years instead of imposing a front-end sales load."[45] Additionally, the 2003 GAO Report describes Rule 12b-1 as providing investors with "an alternative way of paying for investment advice and purchases of fund shares."[46]

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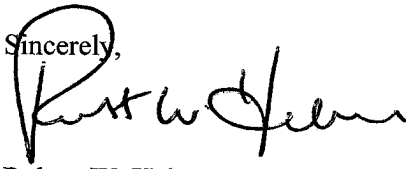
We applaud the Commission for convening a roundtable to discuss Rule 12b-1 and the impact it has had on the mutual fund industry. We believe that consideration of the origins of Rule 12b-1 and its impact on the evolution of the distribution of fund shares and servicing of fund shareholders should constitute a cornerstone of any consideration of possible amendments to Rule 12b-1 or other related regulatory initiatives.

Sincerely,



Robert W. Helm

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44 1986 Dingell Letter, *supra* note 10, at *10.

45 1988 Proposing Release, *supra* note 29, at 20.

46 2003 GAO REPORT, *supra* note 5, at 32.