

VIA ELECTRONIC MAIL

July 2nd, 2020

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: **File No. 4-761**

Dear Ms. Countryman:

On April 29, 2020, a Petition for Rulemaking to End the Commission’s Backdoor Regulation of 12b-1 Fees (the “Petition”) was filed with the Securities and Exchange Commission (“SEC”).¹ I am writing to express support for the Petition and concern that the SEC is regulating by enforcement.

The SEC’s recent Share Class Selection Disclosure Initiative (“SCSDI”) collected over \$139 million from at least 96 firms. The enforcement staff, however, could not cite a clear rule or regulation that had been violated and instead relied on previous settlements and retroactively applied published guidance as the basis to extract settlements from firms.

- 12b-1 fees are a legitimate and important part of my firm’s business [insert reasons, e.g., help provide services to clients, expands client choice] and ultimately help grow asset size for mutual funds to *reduce* costs to investors
- When asked by the SEC to participate in a “voluntary disclosure” initiative, heavy-handed and one-size-fits-all enforcement action against participants should not follow.
- Firms want to comply with SEC rules and dedicate significant efforts and resources to do so.
- Firms disclosed 12b-1 fees, but the SEC’s dissection and *post-hoc* focus on and interpretation of a couple of words (“may” versus “will”) was an improper and unfair basis for enforcement action.
- The SEC should not side-step the appropriate notice and comment process if it seeks to eliminate 12b-1 fees or change the rules surrounding their use. As an industry participant, our firm would like the opportunity to review a proposed rule and comment, which ultimately leads to better SEC rules.

More generally, regulation by enforcement harms independent financial services firms and main-street investors. Specifically, independent financial firms and advisors have a reasonable

¹ File No. 4-761, Rulemaking Petition to End the Commission’s Backdoor Regulation of 12b-1 Fees (April 29, 2020) available at: <https://www.sec.gov/rules/petitions/2020/petn4-761.pdf>

expectation the SEC will clearly disclose the rules of the road before engaging in enforcement. Regulation by enforcement strips firms of the requisite notice and ability to comment, leads to inconsistencies in interpretation and enforcement, and, ultimately, increases cost for investors and decreases investor choice.

The SEC has extended the same enforcement practices employed against 12b-1 fees – the dissection of firm disclosures made in good-faith based on published rules and well-known industry norms – to now confront a wide-variety of fees and firm revenue generating areas including bank sweep accounts,² transaction cost markups, and execution costs in connection with retail wrap fee programs.³ Firms seeking to make adjustments to business practices and firm disclosures to address new regulatory expectations are forced to do so in a regulatory environment that lacks clarity and has demonstrated a proclivity to use enforcement action as a matter of first resort. Regulatory certainty is more important now than ever given the challenging economic conditions caused by Covid-19. President Trump, on May 19, 2020, signed an executive order entitled “Regulatory Relief to Support Economic Recovery” that instructs agencies to provide those that they regulate “[c]ompliance assistance” and “. . . decline enforcement against persons and entities that have attempted in reasonable good faith to comply with applicable statutory and regulatory standards.”⁴ Regulation by enforcement creates uncertainty of later being unfairly deemed to be out of bounds and provides operational uncertainty for firms making real-time, good-faith business judgments. The President’s Order instructs agencies to “revise their procedures and practices” to reflect certain “principles of fairness in administrative enforcement” including that “[l]iability should be imposed only for violations of statutes or duly issued regulations, after notice and an opportunity to respond,” and “[a]dministrative enforcement should be free of unfair surprise.”⁵

As outlined in the Petition, the SEC’s actions on 12b-1 fees are contrary to Supreme Court rulings, U.S. law (Administrative Procedure Act), and even statements by its own Chairman recognizing that previous staff settlements and even published guidance do not hold the weight of law.⁶ I believe that the SEC should reconsider its approach in light of this Petition, fundamental concepts of fairness, and, most certainly, based on the President’s executive order.

Thank you for the opportunity to comment in support of this Petition.

Sincerely, Tasha Johns

² Stephanie Avakian, Keynote Remarks at the 2019 SEC Regulation Outside the United States Conference (November 5, 2019) *available at*: <https://www.sec.gov/news/speech/speech-avakian-2019-11-05>

³ SEC Charges Smith Morgan Stanley Smith Barney With Providing Misleading Information to Retail Clients <https://www.sec.gov/news/press-release/2020-109>

⁴ Donald J. Trump, Executive Order on Regulatory Relief to Support Economic Recovery, at § 5 (May 19, 2020) *available at*: <https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery/>

⁵ *Id.* at § 6

⁶ Jay Clayton, Chairman, U.S. SEC, Statement Regarding SEC Staff Views (Sept. 13, 2018), <https://www.sec.gov/news/public-statement/statement-clayton-091318>

cc: (via email)

Securities and Exchange Commission

Honorable Jay Clayton, Chairman (chairmanoffice@sec.gov)

Honorable Allison Herren Lee, Commissioner (CommissionerLee@sec.gov)

Honorable Hester M. Peirce, Commissioner (CommissionerPeirce@sec.gov)

Honorable Elad L. Roisman, Commissioner (CommissionerRoisman@sec.gov)