

October 28, 2020

Ms. Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

**Re: Rulemaking petition to end the Commission's backdoor regulation of 12b-1 fees  
(File No. 4-761)**

Dear Ms. Countryman:

The American Securities Association (ASA)<sup>1</sup> wishes to provide additional comments related to our April 29, 2020 rulemaking petition regarding the Commission's regulation of 12b-1 fees, filed jointly with the Financial Services Institute, Competitive Enterprise Institute, and the New Civil Liberties Alliance ("12b-1 Petition").

Our comments come in light of the President's recent issuance of Executive Order 13924 ("Executive Order")<sup>2</sup> and a subsequent August 31, 2020 memorandum from the Office of Management and Budget (OMB) to the heads of executive departments and agencies regarding administrative enforcement and adjudication ("OMB Memorandum").<sup>3</sup> The OMB Memorandum directs federal agencies to adopt best practices for their respective regulatory and enforcement programs and is grounded in the principles of due process and fairness that have guided our legal system since our country's founding. While the Executive Order was issued as a response to the ongoing pandemic, the underlying policies it promotes reflect the important principles of transparency and accountability in the administrative process which should be a permanent fixture of any federal regulatory agency.

The Executive Order and OMB Memorandum are especially relevant to the 12b-1 petition, as the Securities and Exchange Commission ("SEC" or "Commission") Division of Enforcement has taken it upon itself to make new law by re-interpreting Rule 12b-1 to justify initiating enforcement actions against private parties. The SEC's behavior has occurred well outside the guardrails established by Congress for administrative rulemaking and procedure.

The Executive Order reiterates that government agencies bear the burden of proving an alleged violation of the law, any penalties imposed by an agency should be done in adherence to consistent standards, and that agencies must ultimately be held accountable for their administrative enforcement decisions.

<sup>1</sup> The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.

<sup>2</sup> Regulatory Relief to Support Economic Recovery. EO 13924 (May 19, 2020).

<sup>3</sup> M-20-31 Memorandum for the Deputy Secretaries of Executive Departments and Agencies (August 31, 2020).



We believe that the SEC should especially take note of the following provisions of the OMB Memorandum, based off the principles laid out by the Executive Order:

- *“Agencies should review their procedures to ensure that members of the regulated public are not required to prove a negative to prevent liability and enforcement consequences in the absence of statutory standards requiring otherwise. This general principle should not be applied to prevent placing the burden of proof on the potential recipients of government benefits...”*
- *“Agencies should consider applying the rule of lenity in administrative investigations, enforcement actions, and adjudication by reading genuine statutory or regulatory ambiguities related to administrative violations and penalties in favor of the targeted party in enforcement.”*
- *“Agencies should make the public aware of the conditions in which investigations and enforcement actions will be brought and provide the public with information on the penalties sought for common infractions.”*
- *“Agencies should establish policies of enforcement discretion that decline enforcement or the imposition of a penalty, as appropriate, in the course of enforcement when the agency determines that the regulated party attempted in good faith to comply with the law.”*

As an independent agency the SEC is technically not bound by the OMB Memorandum, however the Commission has historically committed to abiding by policy directives issued via Executive Orders. For example, the SEC previously committed to following executive orders issued by President Obama related to cost-benefit analysis in financial regulation.<sup>4</sup> The SEC should similarly commit itself to applying the principles laid out in the OMB Memorandum to its own regulatory and oversight efforts, not just related to 12b-1 but in all other areas of SEC jurisdiction.

We appreciate the opportunity to provide further comments on the 12b-1 Petition and look forward to continuing to engage with the Commission on this critical issue.

Sincerely,

*Christopher A. Iacovella*

Christopher A. Iacovella  
Chief Executive Officer  
American Securities Association

---

<sup>4</sup> See e.g. H. Rept. 112-453

