

PUBLIC

1 NOV 1994

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 94-333-CC
Linsco/Private Ledger Corp.
File No. 801-10970

Your letter of June 6, 1994 requests our assurance that we would not recommend enforcement action to the Commission under Section 22(d) of the Investment Company Act of 1940 ("1940 Act") if Linsco/Private Ledger Corp. ("LPL") charges its customers a support services fee for transactions in investment company securities while also receiving Rule 12b-1 fees from those investment companies.

LPL is registered as a broker-dealer under the Securities Exchange Act of 1934 and as an investment adviser under the Investment Advisers Act of 1940. Through its Strategic Asset Management ("SAM") accounts, LPL, acting as agent, makes available to customers over 800 no-load and load-waived investment companies, 1/ as well as other securities. LPL provides SAM account customers with investment advisory, educational, in-house trade processing, and administrative services. Customers receive periodic account statements that reflect account activity and positions, and quarterly performance reports consolidating income, gain, and performance information. LPL uses a third party, Pershing, 2/ to prepare these reports for SAM account customers, as well as to provide clearing, custodial, and customer-level accounting services.

Currently, customers pay LPL an asset-based management fee of up to 2.2 percent, depending on the size of the account, and pay no commissions for the purchase or sale of securities in their SAM accounts. LPL also charges customers a transaction fee for in-house trade processing services. 3/ LPL pays a portion of this fee to Pershing. SAM account customers pay no other fees to LPL.

-
- 1/ Load-waived investment companies are open-end funds that waive their regular sales loads for SAM account customers. Telephone conversation with Alice Pellegrino on September 12, 1994.
- 2/ Pershing is a division of Donaldson, Lufkin & Jenrette Corporation which is not affiliated with LPL. Telephone conversation with Alice Pellegrino on September 12, 1994.
- 3/ The fee is \$20 for each purchase or redemption of no-load or load-waived investment company shares, or for each redemption of load investment company shares that have been transferred by customers from other LPL brokerage accounts into their SAM accounts.

LPL proposes to eliminate the transaction fee for investment company share purchases and redemptions and to enter into Rule 12b-1 agreements with certain investment companies that are available through the SAM accounts. 4/ The Rule 12b-1 fee will compensate LPL for the administrative, in-house trade processing, and educational services provided to its customers. LPL also proposes to charge customers a support services fee with each purchase or redemption of no-load or load-waived investment company shares, and with each redemption of load investment company shares. Pershing will receive this support services fee as compensation for providing clearing, custodial, and customer-level accounting services.

Section 22(d) of the 1940 Act prohibits an investment company from selling its redeemable securities except at "a current public offering price described in the prospectus" to any person other than to or through a principal underwriter for distribution. It further states that "if such class of security is being currently offered to the public by or through an underwriter, no principal underwriter of such security and no dealer shall sell any such security to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus." Section 22(d)'s restrictions do not apply to a broker, as that term is defined in the 1940 Act. 5/ Because LPL purchases and redeems investment company shares as agent for its customers, Section 22(d) does not apply to LPL's involvement in these transactions and, therefore, does not prohibit the support services fee. 6/ This response is based on the representations made to the Division. Any different facts or circumstances might require a different conclusion.

Barbara Chretien-Dar
Barbara Chretien-Dar
Senior Counsel

4/ The Rule 12b-1 fees will be calculated as a percentage of assets held by SAM account customers in each investment company.

5/ United States v. National Ass'n of Sec. Dealers, 422 U.S. 694 (1975). See also Charles Schwab & Co. (pub. avail. Aug. 6, 1992); A. Wayne Harrison (pub. avail. Sept. 20, 1977).

6/ Although LPL may have selling dealer agreements with funds that are available to both its SAM account customers and to its other brokerage customers, you state that LPL acts solely in an agency capacity when it sells these funds to SAM account customers. Telephone conversation with Robert C. Hacker on October 4, 1994.

KIRKPATRICK & LOCKHART

SOUTH LOBBY - 9TH FLOOR
1800 M STREET, N.W.
WASHINGTON, D.C. 20036-5891
TELEPHONE (202) 778-9000
TELEX 440209 KL DC UI
FACSIMILE (202) 778-9100

BOSTON, MA
HARRISBURG, PA
MIAMI, FL
NEW YORK, NY
PITTSBURGH, PA

ROBERT C. HACKER
(202) 778-9016

1940 Act/22(d)

June 6, 1994

Dorothy M. Donohue
Assistant Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

ACT ICA-40
SECTION 22(d)
RULE _____
PUBLIC
AVAILABILITY 11-1-94

Re: Linsco/Private Ledger Corp.

Dear Ms. Donohue:

We are writing to you on behalf of our client, Linsco/Private Ledger Corp. ("LPL"), to request that the staff of the Division of Investment Management of the Securities and Exchange Commission ("Commission") advise LPL that it would not recommend any enforcement action based on Section 22(d) of the Investment Company Act of 1940 ("1940 Act") if LPL charges its customers a per transaction charge to cover clearing, custodial, and customer-level accounting services provided by Pershing, a division of Donaldson, Lufkin & Jenrette Securities Corporation ("Pershing"), in connection with investments in certain mutual funds and receives Rule 12b-1 fees from those mutual funds, all as described below.

STATEMENT OF FACTS

LPL is a broker-dealer registered under the Securities Exchange Act of 1934 and is a member of the National Association of Securities Dealers, Inc. and the Boston Stock Exchange. LPL is also an investment adviser registered under the Investment Advisers Act of 1940. Pershing provides execution, clearance, and back office services for LPL, including services in connection with the purchase and sale of mutual fund shares.

KIRKPATRICK & LOCKHART

SOUTH LOBBY - 9TH FLOOR
1800 M STREET, N.W.
WASHINGTON, D.C. 20036-5891
TELEPHONE (202) 778-9000
TELEX 440209 KL DC UI
FACSIMILE (202) 778-9100

BOSTON, MA
HARRISBURG, PA
MIAMI, FL
NEW YORK, NY
PITTSBURGH, PA

ROBERT C. HACKER
(202) 778-9016

1940 Act/22(d)

June 6, 1994

Dorothy M. Donohue
Assistant Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Linsco/Private Ledger Corp.

Dear Ms. Donohue:

We are writing to you on behalf of our client, Linsco/Private Ledger Corp. ("LPL"), to request that the staff of the Division of Investment Management of the Securities and Exchange Commission ("Commission") advise LPL that it would not recommend any enforcement action based on Section 22(d) of the Investment Company Act of 1940 ("1940 Act") if LPL charges its customers a per transaction charge to cover clearing, custodial, and customer-level accounting services provided by Pershing, a division of Donaldson, Lufkin & Jenrette Securities Corporation ("Pershing"), in connection with investments in certain mutual funds and receives Rule 12b-1 fees from those mutual funds, all as described below.

STATEMENT OF FACTS

LPL is a broker-dealer registered under the Securities Exchange Act of 1934 and is a member of the National Association of Securities Dealers, Inc. and the Boston Stock Exchange. LPL is also an investment adviser registered under the Investment Advisers Act of 1940. Pershing provides execution, clearance, and back office services for LPL, including services in connection with the purchase and sale of mutual fund shares.

KIRKPATRICK & LOCKHART

Dorothy M. Donohue
June 6, 1994
Page 2

The LPL Strategic Asset Management Program

LPL's Strategic Asset Management ("SAM") account is a flexible fee-based asset management account available to investors with a minimum investment of \$25,000. Through the SAM account, investors may invest in no-load and load waived mutual funds, individual stocks and bonds, and options (buying puts and writing covered calls only). Subject to certain restrictions, investors may bring existing mutual fund and individual security holdings into the SAM account to be consolidated with new purchases. In the case of individual security holdings and mutual funds purchased within the previous two years in an LPL brokerage account that are transferred to the SAM account, the customer may be entitled to a credit for a portion of the SAM Account Fee if an LPL investment representative earned commissions on the securities or if the securities might otherwise be liquidated prematurely.

Under the SAM program, LPL acts for its customers as an agent through which they may purchase or sell shares of over eight hundred no-load and load waived mutual funds. LPL provides its customers with investment advisory services, periodic account statements, quarterly performance reports consolidating their income, gain and performance information, recordkeeping, and other services. It also provides in-house trade processing through a trade desk and a centralized computer linkage to its network of investment representatives, who are primarily responsible for accepting and placing their customers' orders. No commissions are paid for the purchase and sale of securities in the SAM accounts. Currently, LPL receives no 12b-1 fees in connection with mutual fund shares purchased in the SAM accounts.

LPL clears SAM account transactions through Pershing. Pershing provides LPL's customers with clearing, custodial, and customer-level accounting services in connection with transactions in their SAM accounts. In addition, during any month that there is activity within their account, investors will receive from Pershing a monthly account statement showing account activity as well as positions held in the account at the month end, and any required confirmations of transactions that occur within the account. Investors with inactive accounts will receive quarterly account statements.

In order to cover the costs of the clearing, custodial, and customer-level accounting services provided by Pershing in connection with investments by SAM account customers, including purchases and sales of mutual fund shares, LPL pays Pershing a

KIRKPATRICK & LOCKHART

Dorothy M. Donohue
June 6, 1994
Page 3

service fee on each transaction executed on behalf of SAM account investors.

Current fee arrangement

LPL currently charges SAM account customers a standard asset-based management fee in return for advisory, research and related analytical services provided to SAM account customers. The amount of this fee varies, up to a maximum of 2.2%, depending on the dollar value of assets under management in each account in accordance with a fee schedule set forth in LPL's Form ADV. LPL pays a substantial portion of this fee to its investment representatives that are responsible for managing the customer accounts affected. LPL also imposes a charge for processing transactions in the SAM accounts. In the case of mutual fund transactions, the charge is \$20 for each purchase or redemption of no-load and load-waived fund shares, and for each redemption of load fund shares transferred by customers into their SAM accounts. LPL pays a portion of this charge to Pershing for each purchase or redemption of no-load and load-waived fund shares, and for each redemption of load fund shares to compensate Pershing for its clearing, custodial, and customer-level accounting services to the SAM accounts. LPL retains the balance of the fee to compensate it for reporting, recordkeeping, and in-house trade processing services in connection with SAM account transactions and its development of promotional and educational materials for use by its investment representatives in connection with the servicing of their customer accounts.

Proposed fee arrangement

LPL proposes to continue its asset-based management fee for the SAM accounts at its current level, but to eliminate the transaction charge for mutual fund transactions. To compensate LPL for its various administrative, in-house trade processing, and promotional and educational services, which previously were covered by a portion of the transaction charge, LPL proposes to enter into agreements with certain mutual funds, shares of which are available through LPL's SAM accounts, pursuant to which LPL will provide such services in return for fees paid by those funds under Rule 12b-1 plans ("12b-1 Fees"). The 12b-1 Fee as to each fund would be calculated as a percentage of assets held by SAM account customers in the fund, and it would be up to the funds to determine whether payments would be made by the fund, its manager, or its distributor.

To compensate Pershing for its clearing, custodial, and customer-level accounting services in connection with the SAM

Dorothy M. Donohue
June 6, 1994
Page 4

accounts, LPL proposes to charge SAM account customers a per transaction services charge ("Support Services Fee") for each purchase or redemption of no-load and load-waived fund shares, and each redemption of load fund shares. LPL intends to negotiate a Support Services Fee with Pershing that will be comparable to rates charged by other providers of similar services. LPL will not receive any portion of the Support Services Fee. The proposed Support Services Fee will be fully disclosed to SAM account customers.

DISCUSSION

LPL believes that its proposal to collect 12b-1 Fees and charge a Support Services Fee on the purchase and redemption of mutual fund shares in the SAM accounts would comply with the terms of Section 22(d) of the Act. LPL also believes that the proposed fee arrangement with respect to the SAM accounts is in accord with the prior no-action letters issued by the Commission staff granting favorable relief to brokers that charge transaction fees in connection with the purchase and sale of no-load and low load mutual fund shares.

Background

Section 22(d) of the 1940 Act generally prohibits mutual funds, underwriters, and dealers from selling fund shares to the public "except at a current public offering price described in the prospectus." For many years, the Commission viewed the imposition of any charge for transactions in shares of no-load funds as a violation of Section 22(d) because of prospectus representations concerning no-load status. In 1974, however, the Commission authorized the Division of Investment Management staff to view favorably interpretative requests with respect to proposals that brokers that act independently of funds and their underwriters be permitted, under certain circumstances, to charge reasonable fees for sales-related services rendered in connection with transactions in shares of no-load funds. The Commission stated that permitting such charges would provide brokers with an incentive to recommend no-load fund shares somewhat comparable to that existing with other securities, and would compensate brokers for services rendered in connection with no-load purchases.^{1/} Because the broker would be compensated for the purchase or sale of shares by their customers, not by the fund or its distributor,

^{1/} See SEC Announces Mutual Fund Distribution Program, Investment Company Act Release No. 8570 (November 4, 1974).

KIRKPATRICK & LOCKHART

Dorothy M. Donohue
June 6, 1994
Page 5

the Commission concluded that they would be acting as brokers, not as dealers in violation of Section 22(d).

Thereafter, the Commission staff advised various brokers that it would not recommend enforcement action if the brokers charged transaction fees for services in connection with the purchase and redemption of no-load fund shares.^{2/} In at least one letter, the staff has taken the position that it would not recommend enforcement action if a broker charged a transaction fee for sales-related services in connection with the purchase and redemption of low-load fund shares where no load reallowance was paid to the broker. See Charles Schwab & Co. (pub. avail. Feb. 2, 1987). Recently, the staff also took the position that it would not recommend enforcement action if a broker-dealer charged certain active traders in investment company shares transaction fees for effecting purchases and redemptions of the shares while also receiving fees pursuant to Rule 12b-1 plans from those investment companies designed to compensate the broker-dealer for non-sales-related services, such as shareholder recordkeeping and transfer agent services. Charles Schwab & Co. (pub. avail. Aug. 6, 1992) ("Schwab IV").

Selling dealers and others in a mutual fund's distribution network would be prohibited under Section 22(d) from charging a sales-related fee that was not disclosed in the fund's prospectus. Thus, in each of these no-action letters, the staff has emphasized that the broker must be independent of the fund's regular distribution network in order to ensure that the sales-related transaction fee imposed by the broker would not be viewed as being related to the distribution of the fund shares. See, e.g., Kidder, Peabody & Co. (pub. avail. Mar. 30, 1987). The staff has also emphasized that an investor should not be charged twice for the same services (i.e., "double dipping"), which could occur if the investor both paid for distribution costs through a sales load or distribution-related 12b-1 fees and paid an additional sales-related transaction fee that covered the same distribution costs. See, e.g., Olde & Co., Inc. (pub. avail. Aug. 31, 1984).

Under LPL's proposal, LPL would enter into agreements with the funds in accordance with Rule 12b-1, pursuant to which LPL would provide in-house trade processing, account recordkeeping,

^{2/} See, e.g., Charles Schwab & Co. (pub. avail. Feb 8, 1982); Fahnstock & Co. (pub. avail. Dec. 22, 1974); Rose & Company Investment Brokers, Inc. (pub. avail. June 23, 1986); First American Investment, Inc. (pub. avail. Dec. 18, 1985).

KIRKPATRICK & LOCKHART

Dorothy M. Donohue
June 6, 1994
Page 6

and administrative services, and promotional and educational information to its investment representatives and their customers. LPL also may have selling dealer agreements with a number of the funds available for purchase through SAM accounts that provide sales load waivers for SAM account purchases, as well as with load funds whose shares have been transferred into SAM accounts by customers. Thus, LPL might be considered a part of the distribution network for at least some of the mutual funds offered through the SAM accounts. LPL's proposal, however, will be consistent with Section 22(d) and the above-mentioned no-action letters because LPL will not charge any additional sales-related transaction fee on purchases and sales of fund shares in the SAM accounts and will not engage in double dipping.

The Support Services Fee charged by LPL will be paid entirely to Pershing for its clearing, custodial, and customer-level accounting services. The amount of the Support Services Fee would remain fixed at the same per transaction rate for all SAM account customers regardless of the size or frequency of a customer's transactions. It is calculated on a per transaction basis because the clearing, custodial, and customer-level accounting services provided by Pershing are generally triggered by activity within an account. Thus, a customer is charged for Pershing's services only to the extent that the customer, through purchase or redemption activity within its account, requires the clearing, custodial, and customer-level accounting services that Pershing provides.

The Support Services Fee in no way resembles a commission or sales charge paid to a broker for sales-related services, since no portion of the fee will cover sales-related activities. Although, in performing its clearing services for the SAM accounts, Pershing receives from LPL's central in-house trade processing facility customer buy and sell orders, transmits them to the funds, and undertakes to ensure that delivery and payment are properly carried out, Pershing does not sell or redeem fund shares on behalf of SAM customers. LPL performs the fundamental sales- and redemption-related services for the SAM accounts. For example, LPL, through its various investment representatives, markets the mutual funds available through the SAM accounts, gathers investment information from the customers, recommends and implements the appropriate mutual fund investments for the customers, takes customer buy and sell orders, and processes all orders through its trade desk and execution system for ultimate clearance through Pershing. LPL will not charge its customers any sales-related transaction fee for these services or retain any portion of the Support Services Fee paid to Pershing.

KIRKPATRICK & LOCKHART

Dorothy M. Donohue
June 6, 1994
Page 7

Furthermore, under the proposal, LPL would not receive compensation that would constitute double payment for the same services. The 12b-1 Fees received by LPL would compensate LPL for performance reporting, in-house trade processing, recordkeeping, and the promotional and educational materials provided to its investment representatives and their customers. The Support Services Fee charged to SAM account investors would be paid entirely to Pershing to cover its clearing, custodial, and customer-level accounting services. Although the Support Services Fee would be calculated on a per transaction basis, it does not cover any services already paid for as part of a fund's sales load or 12b-1 fees. See Schwab IV. Thus, LPL's proposal to charge a Support Services Fee and accept 12b-1 Fees would not result in LPL being compensated twice for the same sales-related services.

In granting no-action relief in Schwab IV, the staff allowed Schwab to charge transaction fees for effecting purchases and redemption of mutual fund transactions on behalf of certain customers, while receiving 12b-1 fees from those funds. The staff did not "view the shareholder subaccounting, and transfer agency services [provided by Schwab in return for 12b-1 fees] as being incompatible with Schwab acting solely as broker." Thus, the staff did not consider such services to be equivalent to the sales-related services offered by dealers. LPL believes that the same analysis permits LPL to both accept 12b-1 Fees to cover its recordkeeping, in-house trade processing, and sales-related promotional and educational services and to charge its customers a per transaction Support Services Fee to cover the non-sales-related clearing, custodial, and customer-level accounting services provided by Pershing.

CONCLUSION

LPL's SAM account program provides LPL's customers with a much more efficient means of buying and selling mutual fund shares than can be obtained by dealing directly with the funds themselves. In addition, it offers investors special services that more easily allow development of personal financial portfolios directed toward fulfilling customers' particular investment needs. The acceptance of 12b-1 Fees from the funds will result in lower transaction costs for the SAM accounts; therefore, under the proposed fee arrangement, LPL will be able to provide SAM account customers, at lower cost, with services equivalent to those they currently enjoy. If LPL is denied reasonable compensation for managing the program and ensuring that investors receive efficient and effective clearing,

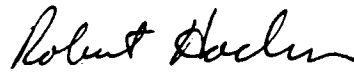
KIRKPATRICK & LOCKHART

Dorothy M. Donohue
June 6, 1994
Page 8

custodial, and customer-level accounting services with respect to mutual fund share transactions, it may be compelled to limit the full range of services it provides to SAM account customers. Such a result would in no way further the cause of investor protection that the 1940 Act, including Section 22(d) thereunder, was designed to promote.

LPL hereby respectfully requests that the staff advise that it would not recommend to the Commission that any action be taken if LPL institutes the fee arrangement described above. If you have any questions, require further clarification, or are disinclined to issue the requested no-action letter, please call the undersigned at (202) 778-9016. Thank you for your attention to this matter.

Sincerely,



Robert C. Hacker