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VIA ELECTRONIC MAIL

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-15-10
Mutual Fund Distribution Fees; Confirmation

Dear Ms. Murphy:

We appreciate the opportunity to comment on *Mutual Fund Distribution Fees; Confirmations* issued by the U.S. Securities and Exchange Commission (the "SEC").[1/] This letter responds to the SEC's request for comment on the proposed new rule and rule amendments that would replace Rule 12b-1 under the Investment Company Act.

I. Introduction

LPL Financial Corporation ("LPL") is one of the nation's leading diversified financial services companies and is registered with the SEC as both an investment adviser and broker-dealer. LPL currently supports the largest independent registered representative base,[2] (referred to herein as "financial advisors") and the fifth largest overall registered representative base in the United States, providing financial professionals with the front, middle, and back-office support they need to serve the large and growing market for brokerage services and independent investment advice, particularly in the market of investors with $100,000 to $1,000,000 in investable assets. As of September 30, 2010, brokerage and advisory assets totaled $293 billion, of which $86 billion was in advisory assets. In 2009, brokerage sales were over $28 billion, including over $10 billion in mutual funds and $14 billion in annuities. Advisory sales were $23 billion, which consisted primarily of mutual funds.

[1/] Investment Company Act Rel. No. 29367, 75 Fed. Reg. 47064 (Aug. 4, 2010) ("Proposing Release").
[2] Investment Advisor's Top 25 Independent Broker/Dealers, *Investment Advisor*, June 2010.

LPL operates as a financial intermediary, providing an integrated technology platform, comprehensive self-clearing services and full open architecture access to leading financial products. LPL does not manufacture any financial products itself, including mutual funds. Rather, LPL's platform provides access to over 8,500 financial products, which are manufactured by over 400 product sponsors. Providing this unique set of services in an environment unencumbered by conflicts from product manufacturing, underwriting or market making means that LPL is well positioned to explain the sentiment of financial advisors, financial intermediaries, and investors with respect to marketing and distribution fees.

With this background, we offer the following comments:

Investors and LPL financial professionals share a common goal: receiving and providing financial advice, products and services at a fair price. A market-clearing equilibrium is achieved as financial professionals provide commission-based brokerage and/or fee-based advisory services to clients with varying levels of assets and investment sophistication. While LPL applauds the SEC's efforts to improve the structure for marketing and distribution fees, LPL believes that 12b-1 fees currently provide a cost-effective and simple way to compensate financial services firms and professionals. This structure provides a mechanism that encourages financial professionals to offer ongoing services that meet the needs of individuals of all income levels – especially the needs of those for whom advisory accounts are too expensive, inappropriate, or unwanted. Perhaps most importantly, 12b-1 fees contribute to investor choices, facilitating a way in which investors can pay for distribution-related costs while purchasing no-load share classes through financial intermediaries. The SEC's current proposal likely will have unintended consequences for investors, including a decline in investment options and a decrease in available investment advice and other services. LPL believes that the proposal fails to appreciate the value of investment advice, discounting the value by limiting 12b-1 fees and allowing negotiated commissions. Those investors who most need the advice and services of financial advisors as they make investment decisions stand to suffer the greatest harm as declining commissions and distribution fees force financial intermediaries to scale back the services they offer. In short, LPL believes that there is no documented need for the degree of reform proposed at this time.

LPL supports the SEC's proposals to improve nomenclature and disclosure regarding marketing and distribution fees and supports the policy behind adopting a straightforward "marketing and service fee" structure in a new Rule 12b-2. However, LPL asks the SEC to clarify the types of services that may be covered by this fee or choose a name that more precisely describes the specific underlying services. In addition, LPL encourages the SEC and the industry to take the following steps before adopting new rule 12b-2 or embarking on an overhaul of the other aspects of distribution financing, such as imposing a cap on ongoing sales charges and allowing negotiable broker-imposed account-level sales charges:

(1) Demonstrate that there is an actual need for regulatory reform of ongoing sales charges;

(2) Ensure that wherever possible, unintended consequences for investors are avoided;

(3) Undertake a thorough analysis of the potential impact ongoing sales charges and broker-imposed account-level sales charges may have on market efficiency, competition, and capital formation; and

(4) Work with Congress to ensure the SEC has adequate statutory authority for each proposed rule and rule amendment that addresses distribution fees.

II. Improved Disclosure of Distribution-Related Fees

There is general consensus among industry and investor representatives that disclosure improvements and increased transparency into the use of 12b-1 fees are warranted.[3/] Improved disclosures and explanations of fees would enhance investor access to information and allow them to interact more knowledgeably with the mutual fund industry. As a result, LPL fully supports the SEC's proposal to abandon the use of the term "12b-1 fees" and require the use of a truly descriptive name to identify these types of charges. LPL also supports the principle of providing detailed information regarding initial and ongoing sales charges to each investor, but recommends that such disclosures not be included on each confirmation for the reasons discussed below. In addition, LPL encourages the SEC to coordinate adoption of any 12b-1 reform measures with other recent regulatory reforms and those currently under consideration.

A. Timing and location for improved disclosures

Rather than placing detailed information regarding initial and ongoing sales charges on each confirmation, LPL encourages the SEC to adopt an access equals delivery model for sales charge disclosures. LPL believes adding the detailed sales charge information to each confirmation may overload this document with information, making it difficult for investors to discern precisely what costs are included. In addition, by providing the details on the confirmation, the information would not reach the investor until a transaction settles – after the investor has made the decision to purchase a particular fund share. Under an access equals delivery approach, financial intermediaries could be required to make detailed information available on a publicly-accessible website and include information about how to access that website on each transaction confirmation and each account statement. This would give investors access to the information in a user-friendly format on an ongoing basis.

[3/] Securities and Exchange Commission Division of Investment Management, 12b-1 Roundtable (Jun. 19, 2007), transcript avail. at: http://www.sec.gov/news/openmeetings/2007/12b1transcript-061907.pdf ("12b-1 Roundtable").

B. Coordination with other recent regulatory changes

LPL also encourages the SEC to take a broad and consolidated view of the new and forthcoming disclosure requirements being imposed across the industry. The SEC recently has adopted and currently is considering numerous regulatory reforms that will form the basis for comprehensive improvements to disclosures and communications with investors. These measures include: adopting a new investment adviser brochure, evaluating the fiduciary standard applicable to financial advisors and related disclosures, extending the interim final temporary rule regarding principal trading, and proposing this extensive overhaul of distribution fees. As the SEC promulgates these new rules, LPL asks the SEC to consider how these various reforms will interact. For example, if the SEC adopts a new fiduciary standard for broker-dealers, will that have an impact on how the distribution fees permissible under the proposed 12b-1 reforms are implemented? LPL is concerned that if the new regulations come into effect in a piecemeal fashion without significant coordination and guidance from the SEC, the regulated entities affected by these changes may face confusion about how the variety of disclosure requirements interact and how to resolve potential conflicts. Similarly, investors may be uncertain about where they can expect to receive information about conflicts, fees, and available services. It would be helpful, for financial intermediaries and investors alike, for the SEC to coordinate the adoption of disclosure-related reforms and provide comprehensive guidance on how these disclosures are to be packaged, coordinated, and delivered to investors.

III. Proposed Rule 12b-2 - the "Marketing and Service Fee"

In principle, LPL supports the proposed new Rule 12b-2, the "Marketing and Service Fee". The proposed Rule 12b-2 would provide a clear mechanism to compensate financial intermediaries for the tasks they regularly perform. These task are easily understood by investors, and include, for example, (i) maintaining and updating book and records; (ii) sending and maintaining client documents; (iii) maintaining a copy of all correspondence; (iv) being available for meetings with clients and auditors; (v) implementing anti-money laundering and other compliance protocols; and (vi) reviewing client accounts.

A. Definition of "services"

In light of the broad spectrum of "services" that a financial intermediary may provide, LPL encourages the SEC to provide greater clarity regarding what costs may be covered by the "services" component of the proposed 12b-2 fee. The SEC could simply use a more descriptive name such as "Marketing and Distribution Fee" to educate retail investors about the types of services likely to be covered. Alternatively, the SEC could detail in its adopting release the specific types of services Rule 12b-2 is designed to cover. If the SEC decides to keep the current proposed name, LPL recommends that the fund boards that currently have oversight responsibilities for 12b-1 payments be authorized or directed to make a determination regarding what costs are covered by this fee and describe this determination in each fund's prospectus.

B. Setting the cap at 50 basis points

Given the breadth of services that may be covered by this fee, and the costs of providing such services, LPL encourages the SEC to pursue the option raised in the Proposing Release of increasing the cap on 12b-2 fees to 50 basis points.[4/] A 25 basis point cap may eliminate the creative mechanism currently available to funds and financial intermediaries to combine services and meet investor needs. For example, the ability to bundle administrative services enables funds to offer R shares to retirement plans. A slightly higher cap would provide the flexibility essential to ensure the fee accurately reflects the specific services rendered by each financial intermediary. For example, a 50 basis point cap would give mutual fund boards additional flexibility to provide appropriate compensation to financial intermediaries willing to take on additional distribution and marketing related responsibilities. It also would let competition on price and services drive the costs for investors and increase the likelihood that a variety of service levels would be available to investors. Moreover, LPL believes that a 50 basis point cap more accurately reflects the actual cost of marketing and other services provided by financial intermediaries (some of which is subsidized currently through revenue sharing and other arrangements with mutual fund investment advisers); and would reflect the potential shift of additional distribution responsibilities to financial intermediaries as a result of other aspects of the proposed reform of distribution fees.

If the SEC determines that the cap should be set at 25 basis points, LPL encourages the SEC to consider an exception or alternative level for money market funds and retirement plan accounts. Since money market funds are used extensively by commercial sweep accounts, which rely on the funds for overnight cash management purposes, the administrative costs associated with the distribution of these fund shares are often higher than 25 basis points. A 25 basis point cap would require financial intermediaries to establish new mechanisms to track ongoing fund shares, which would provide minimal benefit for shares held only overnight. Similarly, the 25 basis point cap poses particular difficulties for the administration of retirement plan accounts. Many financial intermediaries currently receive greater than 25 basis points for the cost of providing bundled services to retirement accounts, particularly for small plans. A cap of 25 basis points combined with the increased costs financial intermediaries may incur to establish tracking systems for individual shareholders within a plan may cause some financial intermediaries to stop offering services to small retirement plans. As a result, LPL recommends that the SEC take into consideration the unique nature of money market distribution and retirement account administration and adjust the 12b-2 proposal accordingly.

IV. Proposed Rule 6c-10(b) – "Fund-Level Sales Charges"

Before adopting the proposed amendment to Rule 6c-10 that places a cap on ongoing fund-level sales charges, LPL encourages the SEC and the industry to determine if there is a demonstrated need for regulatory changes at this time and address the possible unintended consequences of the rule amendment.

[4/] LPL believes that mutual fund boards, including the independent members, should retain the ability to evaluate, negotiate, and approve the fee levels that are appropriate for each fund.

A. There is no documented need for regulatory changes at this time

LPL encourages the SEC to follow the approach used in the 1970s and 1980s when it first evaluated and eventually adopted regulations regarding marketing and distribution fees. This would include undertaking a substantial analysis of investor needs, current regulations, market conditions, and industry capabilities before embarking on a significant overhaul of mutual fund distribution fee regulations.

The analysis undertaken to date stands in stark contrast to the analysis the SEC conducted in the past when first considering the impact of substantial changes to marketing and distribution fees. In 1974, when abolition of 22(d) was last considered, the SEC determined that a comprehensive study was essential before moving forward with such radical regulation changes. And yet the securities markets were significantly smaller, less complex, and more stable than they are today. In the late 1970s and 1980, the SEC undertook extensive steps to analyze the developing market, investor needs, and industry capabilities, and provided ample opportunities for investor and industry input. Specifically, the SEC commissioned a comprehensive study of mutual fund distribution by Division of Investment Management in 1974,[5/] held four days of hearings in 1976,[6/] issued an interpretive release in 1977,[7/] provided advanced notice of rulemaking in 1978,[8/] followed eventually by a rule proposal in 1979[9/] and the eventual rule adoption in 1980.[10/]

Today, there has been no analysis that demonstrates a need to change the structure of marketing and distribution fees. The SEC may be trying to fix a situation that isn't really broken. Panelists at the SEC's 12b-1 roundtable articulated the merits of the current 12b-1 structure and did not come to consensus or raise alarms on the need for structural changes to the rate regulation.[11/] Furthermore, there is no industry or investor consensus regarding what statutory or regulatory changes would best address these as yet unidentified needs. Panelists at the SEC's 12b-1 roundtable did not reach consensus on the types of regulatory changes that would be most beneficial. They discussed possibilities such as internalizing versus externalizing payment of fees, and strengthening the role of fund boards in fee oversight, but did not reach consensus on what might be needed or effective.[12/] Finally, there has been no comprehensive analysis of how the recent historic economic downturn and turmoil in the markets has effected the distribution of mutual fund shares. Given the fragile state of our economic recovery and the

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[5/] Securities and Exchange Commission Division of Investment Management, Mutual Fund Distribution and Section 22(d) of the Investment Company Act of 1940, Rep. to the Sen. Comm. on Banking, Housing and Urban Affairs (Nov. 4, 1974) ("1974 Mutual Fund Report").

[6/] Announcement of Public Hearings, Investment Company Act Release No. 9470, 1976 SEC LEXIS 691, at *1 (Oct. 4, 1976),

[7/] Bearing of Distribution Expenses by Mutual Funds, Investment Company Act Release No. 9915 (Aug. 31, 1977),

[8/] Bearing of Distribution Expenses by Mutual Funds, Investment Company Act Release No. 10252 (May 23, 1978),

[9/] Bearing of Distribution Expenses by Mutual Funds, Investment Company Act Release No. 10862, 1979 LEXIS 735, at *5-*6 (Sept. 7, 1979),

[10/] Bearing of Distribution Expenses by Mutual Funds, Investment Company Act Release No. 11414, 1980 LEXIS 444, at *26 n.49 (Oct. 28, 1980).

[11/] 12b-1 Roundtable, *supra* note 3; and Proposing Release, *supra* note 1.

[12/] 12b-1 Roundtable, *supra* note 3.

important role mutual funds play in our capital markets, LPL believes the SEC should proceed more deliberately before taking any steps that could disrupt mutual fund distribution.

B. Rule 6c-10(b) may have unintended consequences for investors

The proposed changes to Rule 6c-10 that would impose a cap on ongoing fund-level sales charges may have a number of unintended consequences for investors. First, the proposal may effectively eliminate investment options for investors. For example, A shares will become presumptively unsuitable in light of the cap on ongoing sales charges applicable to C shares[13/] – preventing diligent broker-dealers from recommending these securities to potential investors, and potentially causing funds to stop offering this option. Similarly, the economics of R shares will change, and they will become more complicated to implement.[14/] As a result, funds may stop offering R-shares.

Second, investors may no longer be able to obtain quantity discounts or scheduled variations on front-end sales loads. The proposed new rule, which would permit, but not require, mutual funds to apply scheduled variations and discounts when determining the reference load for an ongoing sales charge, may cause the fund to stop offering these options to investors when it is placed in an untenable position. The flexibility surrounding the reference load forces a fund to choose between (i) using a uniform reference load that will cause some investors to pay higher sales charges; and (ii) undertaking a costly and complex system of variable reference loads to ensure investors have access to all scheduled variations for which they are eligible. A fund that chooses not to apply the discounts for purposes of determining the reference load is knowingly choosing a sales option that is more costly for investors and in conflict with the stated purpose of the cap on ongoing sales charges. As a result, funds' efforts to avoid encountering this conflict may cause them to cease offering quantity discounts and scheduled variations on front-end loads to investors - the path the SEC is specifically trying to avoid.

Even if breakpoints and other discounts continue to be available, the proposed flexibility may make it more difficult for investors to understand the possible costs associated with various share classes. Similarly, financial intermediaries will face greater challenges in explaining to investors how to determine the full spectrum of available discounts, as the calculations will vary from fund to fund and follow no singular principle. These circumstances may serve to cloud the disclosure atmosphere surrounding fees at a time when the SEC is attempting to provide greater clarity.

[13/] When the sales load on C shares cannot exceed that of A shares, a C share provides the possibility of a lower sales charge (if the investor sells the shares within a certain timeframe), without the threat of ever incurring higher charges than an A share. As a result, the A share no longer provides a benefit to investors and is presumptively unsuitable.

[14/] R-shares currently provide a fee structure that covers the recordkeeping, plan administration, and employee communication expenses for the bundled providers, placing outside firms on a par with the bundled provider's proprietary funds. The proposed rule will require separate and potential increases in other fee categories.

Third, the proposal to assess ongoing sales charges at the account level rather than the fund level may have negative tax consequences for investors. Fees based on a fund's net asset value result in a reduction in taxable fund distributions and in the shareholder's reported taxable earnings, and thus, lower tax payments. In comparison, when the advisory fee is paid on an account-by-account basis with out-of-pocket, pre-tax dollars, the taxable earnings are no longer reduced by the assessed fees and the tax benefits generally are available only when the investor is able to report such expenses under "miscellaneous itemized deductions" subject to the 2% of AGI limitations. Less than 5% of households are able to deduct such expenses.

Fourth, it remains to be seen how the industry will handle tracking sales charges on an account-by-account basis (whether it will be handled by the funds themselves or, more likely, become the responsibility of the financial intermediaries). How this is resolved will have a significant effect on the costs transferred to investors and other aspects of investors' experience with mutual fund investing. LPL maintains that account-by-account tracking should be a fund responsibility. Funds have the power to set the parameters of sale charge options and ultimately will benefit from the sales charges imposed. In addition, funds have direct access to or control over shareholder purchase and sale information[15/] and have the authority to obtain information underlying omnibus accounts from DST. Furthermore, funds have the advantage of economy of scale to implement the tracking – charges differ by fund, so a fund's tracking need only accommodate the differences of that fund family, while a financial intermediary's tracking system would need to accommodate the different charges imposed by a wide spectrum of fund families. Despite these factors, there is a risk that responsibility for account-by-account tracking and conversion will be shifted to the financial intermediaries.

Finally, the proposal to cap ongoing sales charges may have a number of other unintended consequences. Account level fee restrictions may have an impact on investors' ability to move between financial intermediaries if the financial intermediary has record-keeping responsibilities. The proposal may disrupt the direct business option, limiting investors' ability to transact directly with funds. In addition, it may bring asset-based fees back into brokerage – after having just eliminated it. And as with the challenging logistics of cost-basis tracking, a cap on ongoing sales charges may make it difficult for individual financial advisors to move from one broker-dealer to another.

V. Proposed Rule 6c-10(c) – the "Account-Level Sales Charge"

LPL's greatest concerns arising from the Proposing Release center on the possibility that broker-dealers may be authorized to impose a negotiated account-level sales charge. LPL is significantly concerned that this proposal will have the opposite of the SEC's intended effect on investors. Before adopting the proposed amendment to Rule 6c-10 authorizing broker-imposed account-level sales charges, LPL encourages the SEC to demonstrate the need for the proposal and address the possible unintended consequences of the proposed rule.

[15/] This information is available to funds through the fund-advisory contract and as a result of the near-universal affiliation between a fund adviser and distributor.

A. There is no demonstrated need for a broker-imposed account-level sales charge

LPL encourages the SEC to undertake a substantial analysis of investor needs, current regulations, market conditions, and industry capabilities to determine whether there is truly a demonstrated need for the SEC to authorize a broker-imposed account-level sales charge. The existing regulatory structure provides opportunities for funds and financial intermediaries to provide investors with a wide spectrum of investment options and related services. Investors can take advantage of the highly competitive marketplace fostered by the current regulatory framework, where investors, with the help of their financial advisors, may select from an alphabet soup of share class options, each of which carries its own unique sales charges. In addition, the current regulatory framework enables shareholders to take advantage of volume discounts for which they qualify, purchase shares on a no-load basis, purchase similarly situated exchange-traded funds, or purchase a no-load option.

It is not clear precisely what problem the proposed broker-imposed account-level sales charge is attempting to address. The evidence indicates that there already exists ample competition with investment choice as a principal component of the industry. In fact, investors and their financial advisors may not be faced with the problem of too little choice, but instead face the dilemma of navigating through numerous available options when deciding which investment best suits the investor's needs. To add another level of intricacy to this already complex decision-making process may prove to be counterproductive.

B. Rule 6c-10(c) may have unintended consequences for investors

When assessing the prospect of distribution fees in 1974, the SEC recognized the importance of fee oversight by independent members of fund boards.[16/] The same issues remain true today. For example, the diversity of potential fees requires a higher level of sophistication and additional research and understanding on the part of investors. As the SEC Chairman stated in 1974: "it would be unrealistic to suppose that a sudden end to retail price maintenance would be accompanied by the level of investor sophistication and sensitivity to sales loads that would be needed to make a price competitive distribution system work."[17/] Retail investors may not be sufficiently sophisticated or have access to the tools necessary to fully evaluate the scope of services provided and their relative value. Furthermore, investors are not well positioned to negotiate fees with financial intermediaries – individuals inherently operate at a disadvantage with respect to large corporations or even well-organized smaller financial intermediaries.

In addition, the proposal may have the effect of decreasing competition as large players in the market are able to monopolize pricing and small firms are disadvantaged or even pushed out of the market. The proposed structure effectively would substitute a cost comparison for the current service-based competition. This could make price the paramount factor, cause a decline in services available to investors; or signal a devaluation by the SEC of the advice and other services a financial advisor can provide to investors. Moreover, the proposed structure may

[16/] 1974 Mutual Fund Report, *supra* note 5.
[17/] Letter from Chairman Ray Garrett, Jr., to the Chairman of the U.S. Senate Committee on Banking, Housing and Urban Affairs (Nov. 4, 1974), 1974 Mutual Fund Report, *supra* note 5.

make an already complicated decision more complicated as other fees are increased to cover lost revenue and disclosures at the point of sale necessarily cover a wider variety of fees.

VI. Cost-Benefit Analysis

A. Statutory requirements

Cost-benefit analysis is of utmost importance for SEC regulations given the direct impact such regulations have on the productivity and stability of the economy. This is particularly true in the area of mutual fund regulation, in light of its size and the great variety of participating investors (from retail to sophisticated institutional investors). Section 2(c) of the Investment Company Act requires the SEC to include a cost-benefit analysis in the course of certain rulemakings.[18/] The language of Section 6(c), providing that the SEC may by rule establish exemptions from any provision of the ICA "if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title",[19/] triggers the cost-benefit analysis requirements of Section 2(c).

In recent years, an incomplete cost-benefit analysis has jeopardized SEC rulemaking. For example, in *Chamber of Commerce of the United States v. SEC*,[20/] the court struck down the mutual fund governance rule because the SEC failed to fulfill "its statutory obligation to determine as best it can the economic implications of the rule it has proposed." In *American Equity Investment Life Insurance Company v. SEC*,[21/] the court vacated the indexed annuities rule because the SEC failed to provide "a reasoned basis for its conclusion that Rule 151A would increase competition[,] …failed to consider the extent of the existing competition in its analysis," and its capital formation analysis was based on the "flawed presumption that the enhanced investor protections under Rule 151A would increase market efficiency."[22/]

B. Current cost-benefit analysis

Here, the proposed amendments to Rule 6c-10 are vulnerable to judicial challenges because the SEC may not have adequately analyzed the potential impact the proposed rule may have on efficiency, competition, and capital formation. The cost-benefit analysis focuses on costs that may result for funds and "other marketplace participants", which the SEC identifies as investment advisers to the funds.[23/] The cost-benefit analysis does not adequately address the potential impact on financial intermediaries. As noted above, the responsibility for tracking ongoing sales charges on an account-by-account basis and converting share classes required by the proposed amendments to Rule 6c-10 may not be borne by the funds or fund advisers themselves. Instead, these responsibilities may be passed on to the financial intermediaries.

[18/] Specifically, Section 2(c) provides: "Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is consistent with the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 80a-2(c).
[19/] 15 U.S.C. § 80a-12(b)
[20/] 412 F.3d 133, 142 (D.C. Cir. 2005),
[21/] No. 09-1021 (D.C. Cir. July 12, 2010),
[22/] *Id.*
[23/] Proposing Release, *supra* note 1, at fn 441.

The Proposing Release does recognize that financial intermediaries may experience a reduction in compensation as a result of the cap on ongoing sales charges and lists required actions that may increase costs for these financial intermediaries to the tune of $50,000 and 100 hours of internal personnel time.[24/] However, the Proposing Release does not acknowledge the full scope of additional responsibilities and associated costs that may be shifted to financial intermediaries related to account-level tracking, and dramatically underestimates the potential costs that likely will result if the rule changes are adopted as proposed. The cost-benefit analysis assumes that only record-keepers for certain retirement plans[25/] and omnibus accounts will bear account-level tracking and share class conversion responsibilities.[26/] As a result, the SEC's analysis fails to consider the true cost implications for financial intermediaries, who are essential market participants directly impacted by these proposed rules.

The SEC's analysis may similarly underestimate the cost implications of the proposed amendment to Rule 6c-10(c) authorizing a broker-imposed account-level sales charge. The SEC estimates that the cost of implementing this rule will be limited to a one-time cost of $400 for a fund to include a disclosure regarding the potential sales charge in its registration statement. The SEC further indicates that there are no ongoing costs for funds and any costs imposed on financial intermediaries would be fully offset by the potential benefits. While the SEC indicates that the elective nature of the 6c-10(c) proposal will mean that only those financial intermediaries who choose to utilize the new commission option will incur any costs, LPL believes the nature of competition makes this choice illusory. As soon as a major market participant utilizes proposed Rule 6c-10(c) to offer a lower commission, competitive pressures will obligate all financial intermediaries to follow suit. As discussed in greater detail below, the SEC's current analysis does not take into account the full impact on financial intermediaries of implementing the account-level sales charges, making the rule vulnerable to judicial challenges.

C. Additional costs considerations

As noted above, LPL is a self-clearing broker that does not process brokerage transactions in mutual fund accounts on an omnibus basis. LPL estimates the true cost for financial intermediaries, such as LPL, likely will reach $3 to $4 million in the twelve to eighteen months needed to establish the disclosures, technology, processes and support systems necessary to implement the regulatory reforms outlined in the Proposing Release. The on-going

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[24/] The SEC indicated that financial intermediaries may need to: (a) Enter into new or amended distribution agreements with funds the sell; (b) enhance their recordkeeping systems, update sales literature; and (c) provide additional training to their sales representatives regarding the new regulatory framework for mutual fund asset-based distribution fees and the suitability of different share classes for their clients. Proposing Release, *supra* note 1.

[25/] "Only record-keepers that provide services to retirement plans that offer fund share classes with 12b-1 fees in excess of 25 basis points would be affected by our proposal." Proposing Release, *supra* note 1, at 204.

[26/] The SEC expects record-keepers' compensation for these accounts to remain the same and estimates that it would cost a record-keeper approximately $1,000,000 in one-time costs and $1,500,000 annually to manage ongoing sales charges Proposing release at 205. The Proposing Release does not calculate an estimate of the anticipated costs for record-keepers of other omnibus accounts.
"These expenses would include, but not be limited to, expenses related to enhancing computer software to begin tracking and aging share histories and multiple share classes, additional computer hardware and storage costs for the increased volume of information related to participant positions, larger participant statements (and higher mailing costs), increased time spent providing service to participants, and costs related to managing the operational complexities." Proposing Release, *supra* note 1, at 205.

annual costs required to enact the reforms are projected to be between $250,000 and $500,000 annually—resulting from the need to bring on additional staff.

With respect to the above estimates, the SEC's analysis does not account for a number of tasks that will be required of financial intermediaries to implement the proposed rule changes. These tasks include:

Disclosure Improvements:

- Revising disclosures on applications, prospectus receipt forms, statements, confirmations and any related technology and trading platforms.
- In the case of Proposed Rule 6c-10(b), providing clarification and custom notifications to clients that transfer positions from another institution offering different sale charges for similar or the same positions.
- Working with technology service vendors and partners to update and program the interoperability (i.e., communications and linkages) between our systems and theirs for reporting purposes.

Rule 12b-2, Rule 6c-10(b), and Rule 6c-10(c):

- Enhancing educational material for advisors and clients regarding sales charge options and operations;
- Establishing the technology and processes to monitor, supervise and track individual sales to ensure any maximum sales charge is not exceeded, that the standard charge is uniformly adhered to, that no client is overcharged, and that each sales charge is "fair and reasonable" with respect to each client and transaction;
- Developing technology and processes to capture fees paid for shares purchased at another firm or grandfathered into the rule, and adjust share price and on-going sales charges accordingly;
- Creating the methodology to efficiently identify the price structure of a fund as a factor in determining suitability, especially in switches between share classes;
- Revising compliance exception reports and enhancing trade blotters to include monitoring for switches not only from one fund to another but also between share classes within single funds;
- Implementing a policy around switches between families of funds and developing technology to capture that data, issue reports and forms;

- Integrating surveillance of money market funds into processes for on-going sales charge monitoring;

- Enhancing technological capability and supervisory staffing to address the potential increase in related non-compliance "red flags;"

- Changing online tools and processes (e.g., Breakpoint Calculators and Fund Look-up databases) to accommodate new fee caps and fund-level sales charges;

- Updating trade, commission and payment infrastructures to accommodate fee caps and fund-level sales charges;

- Incurring the cost of changes made by our technology partners (e.g., BETA or DST—data providers and record-keepers), which are likely to end up being pass-through cost increases for LPL; and

- Acquiring third-party audits to ensure compliance with the Proposing Release.

The SEC's cost-benefit analysis does not account for any of the above anticipated costs or otherwise address the potential impact on financial intermediaries, which are essential marketplace participants. LPL believes that many of the above tasks could more efficiently be taken care of by fund companies, thus easing some of the burden placed on intermediaries.

VII. Statutory Authority

LPL is concerned that the SEC may not have sufficient statutory authority to adopt the new proposed rules regarding distribution fees, including Rules 12b-2, 6c-10(b), and 6c-10(c). The expense and disruption resulting from invalidation of the fee-based brokerage rule taught the brokerage industry a painful lesson about the costs of relying on a rule adopted without adequate statutory authority. As a result, LPL encourages the SEC to work with Congress to resolve these concerns before proceeding with the rulemaking process.

A. Proposed Rule 12b-2 – Marketing and Service Fee

The industry has raised concerns in the past that Section 12(b) authorizes SEC rulemaking only for transactions not sold through underwriters, which would preclude the SEC from adopting Rule 12b-2 as proposed.[27/] In response to these concerns, the SEC has indicated that:

> the "phrase 'except through an underwriter' does not deprive the Commission of authority over the distribution financing activities of funds which have underwriters. If a fund finances distribution, it becomes so

[27/] The grant of rulemaking authority in Section 12 of the Investment Company Act provides: "It shall be unlawful for any registered open-end company … to act as a distributor of securities of which it is the issuer, except through an underwriter, in the contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 12(b) (emphasis added). If "Congress has directly spoken to the precise question at issue . . . [then] that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[27] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

> actively and intimately involved in the distribution process that, even if it contracts with an underwriter, it cannot fairly be said to be distributing through that underwriter. Such a fund should more properly be viewed as acting as a distributor along with the underwriter.[28/]

LPL is concerned that the SEC's interpretation may be challenged as unreasonable. Even if a fund is "actively and intimately involved" in distribution activities to such an extent that it is acting as a distributor along with the underwriter, these actions may not eliminate the effect of the exclusion Congress explicitly included in the statute.[29] Practically speaking, when a fund has engaged an underwriter, fund shares are not available to investors other than when purchased from that underwriter or its agent.[30]

Critics of the SEC's proposal may argue that Congress anticipated that an underwriter does not act alone in distributing investment company securities and actually requires funds to be intimately involved in the distribution process when using an underwriter.[31/] This exception appears to refer to transactions involving the securities of investment companies that have engaged an underwriter pursuant to Section 15 of the Investment Company Act, which necessarily involves the active participation of the investment company itself. Once an underwriter has been engaged in accordance with Section 15, each sale of a fund's securities is "through an underwriter" even though the fund is also involved in the distribution. As a result, the SEC may not have the authority to impose the cap on marketing and service fees as proposed in Rule 12b-2.

B. Proposed Amendment to Rule 6c-10(b) – Ongoing Sales Charge

LPL also is concerned that the SEC may not have sufficient statutory authority to adopt Rule 6c-10(b) as proposed. While the SEC has indicated that it is authorized to regulate excessive distribution expenses, Congress has articulated its intent to delegate this authority exclusively to FINRA. [32/] Other provisions of the ICA, primarily Section 22(b), delegate responsibility for regulation of excessive distribution expenses, including transactions through an underwriter, to FINRA (or another national securities association registered pursuant to Section

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[28/] Release No. IC-11414, *supra* note 10 (1979-80 rulemaking procedures for Rule 12b-1, where the SEC disagreed with these concerns, referencing the SEC spokesman's comments to Congress).

[29] It is not clear from the SEC spokesman's testimony how adding a sales charge makes the fund more intimately involved in distribution than it is with a no-load fund.

[30] e.g., If the investor calls the fund directly to purchase shares, they will be directed to the fund's underwriter to complete the transaction.

[31/] The definition of underwriter in Section 2(a)(40) likely captures those situations when other parties, such as the investment company itself, are also involved in the transaction. *See also*, Section 15 of the Investment Company Act (requiring initial approval by the fund's independent directors and annual approval by the fund's independent directors or a majority of the fund's outstanding voting securities)*; and* Lee Gremillion, Mutual Fund Industry Handbook: A Comprehensive Guide for Investment Professionals, 167 (2005) (describing the standard provisions of an underwriting agreement, including the agreement for the underwriter to be the fund's exclusive selling agent).

[32/] In Section 22(c) Congress grants the SEC the power to join FINRA in adopting the rules authorized in Section 22(a) regarding the time of redemption and means of calculating the net asset value for investment company securities, but does not authorize the SEC to join FINRA in regulating excessive distribution expenses in transactions executed through an underwriter found in Section 22(b). 15 U.S.C. § 80a-22(c).

15 of the ICA).[33/] If Congress intended to authorize SEC regulation of distribution expenses in transactions involving underwriters, Congress could have provided this authority in the course of the recent financial regulatory overhaul. LPL is concerned that Congress' inaction on this point may undermine the SEC's position. It may be beyond the scope of the SEC's authority to engage in *de facto* rate setting for ongoing distribution expenses when that responsibility has been reserved exclusively to self-regulatory organizations.

C. Proposed Rule 6c-10(c) – Account-Level Sales Charge

The proposed amendment to Rule 6c-10 authorizing account-level sales charges also may be vulnerable to judicial challenges as outside the scope of the SEC's statutory authority. It is well settled that there are limits to the extent to which Congress can delegate legislative power (through rulemaking) to federal agencies.[34/] To pass constitutional muster, there must be an intelligible legislative policy determination articulated by Congress sufficient so that the agency is acting to implement that policy, and not make the determination itself.[35/] While courts have recognized delegated authority to fill in the details regarding policy implementation and deal with circumstances which were unforeseen at the time the legislation was enacted, the courts have not endorsed an agency's ability to enact rules that contradict or exceed the bounds of existing statute.[36] The SEC itself also has recognized the inherent limitations to Section 6(c), indicating that the power to exempt should only be exercised with the "greatest circumspection"[37/], in "those special situations that might have been overlooked or that could not be foreseen at the time the legislation was drafted."[38/] Applying those standards, the SEC staff expressly considered allowing for increased mutual fund price competition and concluded that it lacked the requisite authority to permit price competition without Congressional action.[39/]

Here, the proposed rule does not involve a situation that was unforeseen (or unforeseeable) by Congress. The proposed rule would operate, not as an exemption for specific transactions, persons, or securities, as Section 6(c) has been used in the past, but as a wholesale rescission of Section 22(d) – the exact provision the SEC concluded 18 years ago it did not have

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[33/] The SEC acknowledged this delegation of responsibilities (via the 1970 Amendments to the ICA) in the Proposing Release and in the Congressional committee hearings regarding the 1970 amendments. *See,* Proposing Release, *supra* note 1 at 9, (*citing* Hearings on S. 34 and S. 296 Before a Subcomm. of the Senate Comm. on Banking and Currency, 91st Cong., 1st Sess. 6-8 (1968) (statement of Hugh Owens, SEC Commissioner)).

[34/] Field v. Clark, 143 U.S. 649, 692 (1892), A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-25 (1935); and NASD v. SEC, 420 F.2d 83, 92 (D.C. Cir. 1969), rev'd on other grounds.

[35/] Whitman v. American Trucking, 531 U.S. 457, 473 (2001).

[36/] NASD v. SEC, 420 F.2d 83, 92 (D.C. Cir. 1969), rev'd on other grounds.

[37/] In Re American Participations, Inc., 10 S.E.C. 430, 437 (1941); *see also* In the Matter of the National Association of Small Business Investment Companies, Inv. Co. Rel. No. 6523 (May 14, 1971) (noting "that the power under Section 6(c) to free any person from any section of the Act is one which must be exercised with circumspection"),

[38/] In re Atlantic Coast Line Company, 11 S.E.C. 661, 667 (1942). *See also,* In the Matter of First National City Bank, Inv. Co. Act Rel. No. 4538 (Mar. 9, 1966) (indicating that Section 6(c) is intended "to take care of special situations that might have been overlooked or that could not be foreseen at the time the legislation was drafted"); *and* In the Matter of the Great American Life Underwriters, Inc., Inv. Co. Act Rel. No. 3070 (Jul. 15, 1960) (noting that Section 6(c) is designed to "enable the Commission to deal equitably with situations which could not be foreseen at the time the legislation was enacted").

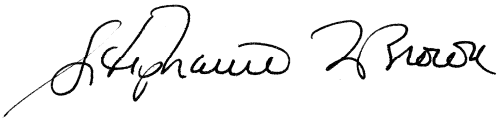
[39/] *See,* SEC Division of Investment Management, *Protecting Investors: A Half Century of Investment Company Regulation*, 314 (May 1992) (acknowledging that Section 6(c) did not grant the SEC the authority to authorize general retail price competition in light of the explicit prohibition in Section 22(d), while recommending that the SEC seek additional statutory authority to do so).

plenary authority to rescind under Section 6(c).[40] Before asking investors to understand a new fee structure and causing the financial services industry to incur the expense and burden of adapting to a new regulatory regime for mutual fund distribution, LPL encourages the SEC to follow the path originally recommended by its staff and seek the repeal of Section 22(d) through Congressional action rather than *ultra vires* rulemaking by the SEC.

VIII. Conclusion

Thank you for the opportunity to comment on the rule proposals. Please note that our comment letter has been signed by nearly 1,200 individual financial advisors licensed with LPL who have read and agree with the comments LPL has provided. If you have any questions regarding this letter, please do not hesitate to contact me at (617) 897-4340. LPL is ready and willing to meet with the SEC or its staff at any time to discuss this matter further.

Sincerely,



Stephanie L. Brown

cc: The Honorable Mary L. Schapiro
The Honorable Kathleen L. Casey
The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
The Honorable Troy A. Paredes

Robert E. Plaze, Associate Director
Division of Investment Management

[40] The only limitations envisioned by the SEC are the requirement that funds inform investors an account-level sales charge may be imposed and restrain from also imposing an ongoing sales charge at the fund level.

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