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**KeyBank National Association**  
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October 29, 2010

Submitted by e-mail to:  
[rule-comments@sec.gov](mailto:rule-comments@sec.gov)  
Elizabeth Murphy  
Secretary  
Securities and Exchange Commission  
110 F Street, NE  
Washington, DC 20549-1090

Re: File Number S7-15-10  
Proposed Rule on Mutual Fund Distribution  
Fees; Confirmations

Dear Ms. Murphy:

I am submitting this letter on behalf of Victory Capital Management Inc. (“VCM”), a wholly owned subsidiary of KeyBank National Association (“KBNA”). VCM is a registered investment adviser. As of September 30, 2010, VCM had approximately \$41.4 billion in assets under management, including \$12.1 billion held in the Victory Portfolios, a family of registered mutual funds advised by VCM. KBNA is a national banking association with its principal office in Cleveland, Ohio. It is a wholly owned subsidiary of KeyCorp, which has assets of approximately \$94 billion. KBNA provides a wide range of trust, fiduciary and custody services.

We appreciate the opportunity to comment on the SEC’s Release No. 33-9128 proposing the adoption of a new rule that would replace rule 12b-1 under the Investment Company Act (the “Proposal”). We have two (2) specific comments/concerns with respect to the Proposal.

1. Clarification of how a non-rule 12b-1 shareholder servicing plan will be treated under the Proposal

Mutual funds may offer a class of shares that do not have a 12b-1 plan, but rather a non-rule 12b-1 shareholder servicing plan (“Shareholder Servicing Plan”) which may pay up to 25 basis points from fund assets for personal services and/or shareholder account maintenance (the “Services”) <sup>1</sup>.

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<sup>1</sup> Payments made under shareholder servicing plans are for administrative support services to customers. The services may include: (1) aggregating and processing purchase and redemption requests for shares from customers and transmitting net purchase and redemption orders to the distributor or transfer agent; (2) providing customers with a service that invests the assets of their accounts in shares pursuant to specific or pre-authorized instructions; (3) processing dividend and distribution payments on behalf of customers; (4) providing information periodically to customers showing their positions in shares; (5) arranging for bank wires; (6) responding to customer inquiries; (7) providing sub-accounting with respect to shares beneficially owned by customers; (8) if required by law, forwarding shareholder communications (such as proxies, shareholder reports, annual and semi-annual financial statements and

Shareholder Servicing Plans are maintained in reliance on FINRA (NASD) Rule 2830(b)(9) and allow mutual funds to make payments to service providers who purchase shares in a fiduciary capacity and are legally restricted from accepting payments under 12b-1 plans. Both the Comptroller of the Currency (with respect to National Banks) and the Department of Labor (with respect to fiduciaries acting under retirement plans governed by ERISA) have taken the position that a fiduciary that causes assets it manages on a discretionary basis to invest in a mutual fund that pays the fiduciary a 12b-1 fee as a sales commission has committed a breach of its fiduciary duty.<sup>2</sup> However, subject to proper documentation and disclosure, such a fiduciary may receive and retain payments from the mutual fund for the provision of nondiscretionary administrative service (similar to the Services referenced above), which the managed account would otherwise be obligated to pay for.

Under the Proposal, new Rule 12b-2 (“Rule 12b-2”) would allow for payment of a “Marketing and Service Fee”. We appreciate the intention to make Rule 12b-2 flexible in order to cover both marketing and service fees, but we are concerned that the concept of a dual purpose or combined fee could raise regulatory issues for recipients who are acting in a fiduciary capacity, as discussed above. The issues related to a fiduciary receiving sales commissions will become more prominent in light of other proposals by the SEC to treat broker-dealers as fiduciaries and could have a similar effect on all fiduciaries investing discretionary managed accounts in mutual funds.

We believe Rule 12b-2 could retain the desired flexibility and yet operate in a manner precise enough to avoid the fiduciary issue if it were clarified to specifically provide that the 12b-2 fee could be entirely paid for Services, entirely paid for Marketing or paid for any combination of the two, not exceeding a 25 basis point cap. We recommend that final Rule 12b-2 be changed accordingly.

## 2. Conversion of Share Classes with a Shareholder Servicing Plan to conform to Rule 12b-2

Under Rule 12b-2, a fund that decides to convert its 12b-1 share class to conform to 12b-2 does not need approval by shareholder vote if the fund currently has a 12b-1 fee of 25 basis points or less and does not increase that rate.

We believe that the same reasoning that supports allowing conversion of a 12b-1 plan without shareholder approval, as discussed in the Proposal, should also apply to a Shareholder Servicing Plan (i.e., implicit prior shareholder approval and avoiding imposition of unnecessary costs). We recommend that you change final Rule 12b-2 to specifically provide that a Shareholder Servicing Plan can be converted to comply with 12b-2 without the need for shareholder approval if the Shareholder Servicing Plan has a fee of 25 basis points or less and does not increase that rate (that is, on the same basis as the conversion of a 12b-1 plan).

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dividend, distribution and tax notices) to customers; (9) forwarding to customers proxy statements and proxies containing any proposals that require a shareholder vote; and (10) providing such other similar services as may reasonably be requested, to the extent permitted under applicable statutes, rules or regulations.

<sup>2</sup> See, for example, OCC Banking Circular 223 and DOL Opinion Letters 97-15A and 97-16A.

Elizabeth Murphy, SEC  
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Please contact the undersigned at 216-689-3894 if you have any questions or wish to discuss our comments further.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gregory J. Edgehouse". The signature is fluid and cursive, with the first name "Gregory" being particularly prominent.

Gregory J. Edgehouse  
Senior Vice President & Managing Counsel  
KeyBank National Association

GJE/ew