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November 4, 2010

Ms. Elizabeth M. Murphy,
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Mutual Fund Distribution Fees; Confirmations
(Release Nos. 33-9128; 34-62544; IC-29367; File No. 57-15-10)

Dear Ms. Murphy:

We are pleased to submit this letter commenting on limited aspects of the Commission's comprehensive proposal for mutual fund distribution fees reform. Our firm advises open- and closed-end management investment companies and independent trustees and directors of such companies.

We, and those of our client independent trustees and directors to whom we have spoken about these proposed reforms, are gratified that the Commission recognizes that distribution practices for mutual fund shares and the business challenges faced by funds and their principal underwriters and selling dealers in the 1970s and early 1980s differ substantially from such practices and challenges today, and that the Commission's 1980 guidance to independent trustees and directors has limited continuing utility.

Importantly, the Commission has also recognized that payments made under Rule 12b-1 plans have been a critical factor in the significant expansion of assets under management in mutual funds and the enhancement of the quality and quantity of services available to fund shareholders from the funds in which they invest and from the managers and service providers to those funds.

Underlying the proposed reform are three basic principles:

(1) The shift from limiting the amount distribution participants may receive to limiting the amounts individual shareholders should pay is consistent with the protection of investors and the best interests of funds and their shareholders.

(2) Payments by mutual funds of up to 25 basis points for non-management and advisory services are acceptable even if they are made in whole or in part for marketing and distribution activity.

(3) Ongoing sales charges paid by funds on behalf of shareholders over time are equivalent to front-end and contingent deferred back-end sales charges when limited to the approximate percentage equivalent of the initial purchase price.

As proposed, as has been widely publicized, the Commission seeks to change, and limit, the nature of the trustees' and directors' participation in establishing and approving marketing and distribution fees permitted by proposed Rule 12b-2 and ongoing sales charges permitted by proposed Rule 6c-10. Nevertheless, for the reasons discussed below, we believe that the proposed reform presents the Commission with the opportunity to better refine the role of fund trustees and directors and to mitigate or eliminate the possibility that, as has been the case over much of the last 30 years, that role and the factors relevant to board approvals become increasingly uncertain with the passage of time.

First, based on the substantive equivalency of front-end, back-end and ongoing sales charges and the fact that prospective investors will be able to make fully informed choices concerning the amounts of and methods by which they pay sales charges, there is no continuing need, in contrast to the process contemplated by Rule 12b-1, to distinguish the directors' duties with respect to ongoing sales charges from those pertaining to front-end or back-end sales charges, or to require that trustees and directors make determinations about ongoing sales charges that they do not make, and are not required to make, in respect of front-end or back-end sales charges.

We note, for example, the significant difference in the statutory scheme applicable to advisory contracts under Sections 15(a) and 15(c) of the Investment Company Act (requiring that compensation be precisely described and requiring reciprocal obligations of directors and advisers to request and provide relevant information) from that applicable to underwriting contracts under Sections 15(b) and 15(c) (no such requirement or reciprocal obligation). Instead, sales charges have for generations been limited under the rules of fair practice of FINRA and its predecessors, rules that have been approved by the Commission. The effect of proposed Rule 6c-10 is equivalent – the maximum sales charge (of any nature) is set by FINRA and approved by the Commission.

Accordingly, it is not appropriate or necessary that determinations be made of the "fairness and reasonableness" of ongoing sales charges or that there be an evaluation of the nature or quality of services provided in return, but only that the distribution agreements (including sales charges) are commercially reasonable arrangements. To reflect the foregoing discussion, there is attached a revised proposed Guidance in substitution of that proposed at pages 64-65 of the Release.

Second, we think the discussion in Section III.C. is well-intended but confusing. The Release correctly notes that fund expenditures under current 12b-1 plans "often pay for a mixture of distributions and administrative services". We suggest that the discussion be recast to make clear that, in order that payments (for example, to fund supermarkets) in excess of 25 basis points not be treated as ongoing sales charges subject to Rule 6c-10, boards must determine that they are not "primarily intended for distribution". Whether some portion of the 25 basis points is also not primarily intended for distribution should ordinarily not be a matter of particular concern if payments in fact are limited to 25 basis points or all payments in excess are not primarily so intended.

Third, we believe that it is unnecessary and inappropriate for trustees and directors to be assigned, indirectly through proposed Rule 12b-2 or Rule 6c-10, the task of overseeing how much or for what services management companies pay out of their own resources. Such expenses should explicitly not be captured by either Rule. To that end, the Commission should reemphasize that payments made by management companies and their affiliates to support marketing and distribution may come from any source within the management company or an affiliate, provided that the advisory agreements have been approved under Sections 15(a) and 15(c), and that, when reforms are adopted, the Commission should expressly state that any such payments, including those heretofore made under "defensive 12b-1 plans", are not subject to the limitations under Rule 12b-2, or to the confusing calculations (if they could even be made) contemplated by footnote 155.

We appreciate the opportunity to comment on the Commission's fund distribution initiative and are available to meet with or speak to the staff or the Commission at their convenience as the rule-making process unfolds. Please contact John Baumgardner ((212)558-3866) or Don Crawshaw ((212)558-4016) at your convenience if this would be helpful.

Very truly yours,

Sullivan & Cromwell LLP

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(Attachment)

<u>Proposed Guidance – Revised</u>

We believe that directors can and should view ongoing sales charges as integral parts of the fund's sales load structure in considering the initial or annual approval of the fund's underwriting contract under sections 15(b) and 15(c) of the Act. In light of the fact that prospective investors will be able to make informed choices as to the amounts of and methods by which they elect to pay sales loads of approximately equivalent amounts pursuant to the limitations of Rule 6c-10, fund directors may assume the equivalent nature of such sales charges whether paid by the investor, the shareholder or the fund on the shareholder's behalf. In determining whether to approve (or re-approve) the underwriting contract, the directors must exercise their reasonable business judgment to decide, among other things, whether the terms of the contract benefit the fund (or its relevant class) and its shareholders, and whether the underwriter's compensation is within the limitations applicable to the fund under Rule 6c-10 and commercially reasonable taking into account the sales loads (including the ongoing sales charge) charged by other principal underwriters and selling dealers of mutual shares and then current economic and industry trends.