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Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Proposed Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies (File No. S7-28-07)

Dear Ms. Morris:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law (the "Committee") in response to a request for comment by the Securities and Exchange Commission ("Commission") on the proposed enhanced disclosure and new prospectus delivery option for registered open-end management investment companies (the "Proposal").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the American Bar Association's (the "ABA") House of Delegates or Board of Governors and therefore do not represent the official position of the ABA Section of Business Law, nor do they necessarily reflect the views of all members of the Committee.

We appreciate the opportunity to submit comments with respect to the Commission's Release No. IC-28064 (November 21, 2007) (the "Release") proposing amendments that would permit open-end management investment companies ("mutual funds") to sell their shares by means of an easy to read, plain English "summary prospectus," and to satisfy their prospectus delivery obligations under Section 5(b)(2) of the Securities Act of 1933 (the "Securities Act") by sending or giving the summary prospectus and providing the "statutory prospectus" on an Internet website. The Proposal would also amend Form N-1A to require that the summary prospectus disclosure – which will include key information in a standardized order – appear at the front of the mutual fund statutory prospectus.

The Committee strongly supports the Commission's objective, as stated in the Release, of providing investors with better information and an enhanced means of gaining access to that information. The Committee believes that the Proposal furthers these objectives and improves upon the fund "profile" currently permitted under Rule 498.

Specifically, the Committee supports the Commission's decision to resolve the principal liability concerns that have contributed to preventing wider use of the fund profile since its adoption in 1998. These concerns have arisen because, under the profile rule, delivery of a profile does not satisfy a mutual fund's prospectus delivery obligation under Section 5(b)(2) of the Securities Act, and the profile does not permit incorporation by reference of the statutory prospectus and statement of additional information ("SAI"). The Proposal decisively addresses these concerns by expressly negating these two aspects of the profile rule. Unlike the profile rule, the Proposal provides the means for the summary prospectus to satisfy prospectus delivery requirements, and also for the summary prospectus to incorporate by reference the statutory prospectus, the SAI and the most recent shareholder report. Moreover, the Proposal goes further by adding a specific rule designed to confirm that delivery of information incorporated by reference would be deemed delivered to an investor upon delivery of the summary prospectus. The Commission has thus designed the rule so as not to increase the potential liability of funds that elect to use the summary prospectus. The Committee believes that by addressing these liability concerns in its proposal, the Commission encourages wider adoption of the summary prospectus.

Because the elimination of legitimate liability concerns is critical to achieving the Commission's goals, we suggest the following clarifications.

Incorporation by Reference

Proposed Rule 498(b)(3)(iii) provides, in effect, that for purposes of 1933 Act Rule 159, information properly incorporated by reference into the summary prospectus will be conveyed to an investor at the time he or she has received the summary prospectus. This is consistent with the way the fund industry has long understood the concept of incorporation by reference as it applies to fund prospectuses, that is, that the investor has information incorporated by reference into the prospectus when the investor has the prospectus. This understanding is based on the Commission's explanation of incorporation by reference in the release adopting Form N-1A, an explanation provided in order to assuage liability concerns raised in connection with the then ground breaking "two part" registration statement designed to enhance investor communications: "if a mutual fund incorporates the Statement of Additional Information by reference, the Statement would be part of the prospectus as a matter of law." Re. No. IC-13436 (Aug. 12, 1983).

The "as a matter of law" statement, which has stood for over 20 years and has been accepted as the cornerstone of incorporation by reference in the fund prospectus context, has also been relied on by a federal district court in granting summary judgment in favor of fund

defendants accused under 1934 Act rule 10b-5 of improperly putting certain information in the SAI rather than the prospectus. *White v. Melton*, 757 F. Supp. 267, 271-272 (S.D.N.Y. 1991)(cited in the Release at note 135). It is commonly paraphrased in fund prospectuses to provide a plain English explanation of the term "incorporation by reference" (e.g. the SAI is "legally a part of this prospectus"). The release proposing the summary prospectus does not restate the "as a matter of law" statement. In light of the importance of this concept, we ask the Commission to include this statement in the adopting release.

We also ask the Commission to remove the reference in proposed Rule 498(b)(3)(iii) to "for purposes of rule 159," which could be viewed as inconsistent with the "as a matter of law" statement, or to replace it with the broader language "for purposes of the liability provisions of the federal securities laws." It is our understanding that under proposed Rule 498, investors will indeed have received the information incorporated by reference for all liability purposes when they receive the summary prospectus. While we understand the reason the Commission proposed including the reference to Rule 159, we are concerned that this reference will confuse readers and raise unintended ambiguities as to the meaning of incorporation by reference.[1]

Proposed Rule 498 furthermore requires funds to "clearly identify" documents that the summary prospectus incorporates by reference. We suggest that the Commission either define the term "clearly identify" in Rule 498 or delete the word "clearly" so as to remove any ambiguity.

Greater Prominence Requirement

The Committee requests that the Commission provide guidance in the adopting release on how a fund that delivers multiple summary prospectuses in connection with an annual mailing to shareholders or in other circumstances, could satisfy the requirement to give the summary prospectus "greater prominence" than any accompanying material. As noted in the Release, many funds seek to satisfy the prospectus delivery obligations for those existing shareholders who purchase additional shares throughout the year by mailing a statutory prospectus to those shareholders annually in addition to mailing a statutory prospectus in connection with the purchase of fund shares. These annual mailings often include combined prospectuses for some or all of the funds offered by the mutual fund family.

As an alternative to requiring that a summary prospectus be given greater prominence than any accompanying material, the Commission could require a boldfaced legend at the top of the summary prospectus that would call attention to the document. This approach

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[1] By contrast, the Release states unequivocally that information incorporated by reference into the summary prospectus is provided to the investor "at the same time" as or "simultaneous[ly]" with the summary prospectus, and that proposed rule 498 is "designed" to result in effective conveyance of information properly incorporated by reference, without limiting this result to purposes of Rule 159.

would be analogous to the approach that requires funds to include a legend on the cover of each prospectus indicating that the Commission has not approved the offered securities and anyone who tells you otherwise may be committing a crime.

PDF Format

Proposed Rule 498 requires funds to provide website access to certain documents in formats that are "convenient" for both reading on line and printing. The Committee suggests that the Commission specify in the adopting release that a PDF format would constitute a "convenient" format for purposes of Rule 498.

Conditions to Compliance

We suggest that the Commission consider characterizing the failure to comply with the foregoing requirements and other requirements of the Rule as a violation of Rule 498 but not as a failure to satisfy its conditions. As currently drafted, the failure to comply with the conditions of the Rule results in an inability to rely on the Rule to satisfy Section 5(b)(2) of the Securities Act, with certain limited exceptions. One such exception is that failure to deliver a statutory prospectus or SAI to a person requesting a copy would be a violation of the Rule but not a condition to satisfying a fund's delivery obligations under Section 5(b)(2) of the Securities Act. The Committee believes that characterizing all of the requirements of the Rule in this manner would encourage reliance on the Rule. The Committee further believes that characterization of the requirements of the Rule in this manner would not diminish protection of investors, as the Commission would continue to have authority to exercise its examination and enforcement powers to ensure compliance.

Quarterly Update Requirements

We are aware that some in the industry believe that the quarterly requirements to update the performance returns and the top ten portfolio holdings each quarter are unnecessary or inappropriate, or would discourage funds from using the summary prospectus. We also are aware that many are concerned that requiring each fund in a multiple-fund statutory prospectus to include a separate summary will result in repetitive disclosures that will be costly to implement. We leave those industry participants to comment on those provisions.

We hope these comments are helpful to the Commission and the Staff. Members of the Committee are available to discuss these comments. If you believe that such discussions would be helpful, please contact the undersigned.

Respectfully Submitted,

/s/ Keith F. Higgins

Keith F. Higgins, Chair, Committee on Federal Regulation of Securities

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