STATEMENT OF MATTHEW P. FINK, SEC RULE 12b-1 ROUNDTABLE
Tuesday, June 19, 2007

I am an independent director of the Oppenheimer Funds and a member of the NASD Investment Companies Committee. From 1971 to 2003 I was employed by the Investment Company Institute and served as its President from 1991 to 2003. The views I express today are my own and are confined to the subject of the first panel, the history of Rule 12b-1.

I am writing a history of the fund industry to be published by Oxford University Press. My research for this book indicates that there are a number of common misperceptions regarding the history of Rule 12b-1:

> The first misconception is that the Commission intended 12b-1 payments to be used solely for advertising, and not to pay dealers.
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> The second misconception is that the Commission intended 12b-1 plans to be temporary to address the specific problem of net redemptions.
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> The third misconception is that the Commission has required fund directors to make virtually impossible findings in order to approve and continue 12b-1 plans.
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> The fourth misconception is that in the 27 years since 1980 the Commission has never revisited Rule 12b-1.

I would like to briefly discuss each misconception

*First, the Commission contemplated the use of 12b-1 fees to compensate dealers.* In 1975 Anne Jones, the Associate Director of the Division of Investment Management, stated that the Commission was considering whether it would be appropriate for funds "to use some small portion of their assets to help their sales program—pay salesmen directly, for example." In 1976, in a development that helped touch off the 12b-1 debate, the staff took a qualified no-action position with respect to an arrangement whereby 50% of a fund's management fee would be reallocated to dealers who sold fund shares. In 1978, the Commission requested comments regarding different types of distribution expenses funds might incur including "cash payments to dealers in fund shares." Finally, Rule 12b-1 expressly speaks of "compensation of underwriters, dealers, and sales personnel."

Why has a misconception developed that the Commission did not contemplate use of 12b-1 fees to compensate dealers? I believe the reason is that while in 1980 observers knew that 12b-1 fees might be used to pay dealers, they did not foresee the development of spread-load plans where payments are so large as to fully substitute for traditional 5-6% front-end sales loads. Yet this development was made possible by Commission orders, beginning just fourteen months after the adoption of Rule 12b-1, permitting contingent deferred sales loads.

*Second, the Commission did not assume that all 12b-1 payments would be temporary to meet the specific problem of net redemptions.* Two SEC actions provided models for Rule 12b-1. First, in 1976 the staff granted the no-action letter discussed above permitting reallocation of 50% of a fund's management fee to dealers. Second, in 1978 the SEC granted an exemptive order permitting the Vanguard funds to bear distribution expenses. Neither the Mutual Liquid Assets no-action letter nor the Vanguard order required that payments be temporary to meet the problem of net redemptions. Similarly at the 1976 public hearings and in subsequent comment letters a number of industry representatives urged Commission action permitting the use of fund assets for distribution, but did not propose such limitations.

It is true that the Commission considered and adopted Rule 12b-1 at a time when the industry was in a period of sustained net redemptions. This change in the economic environment may have contributed to the Commission's willingness to reconsider its historic position that funds can never bear distribution expenses. But there is no evidence that the Commission believed that a fund must cease 12b-1 payments when net redemptions end. (By analogy, Congress enacted the federal securities laws during the Great Depression, but did not intend the laws to expire when the Depression ended).

The only possible argument for the temporary nature of 12b-1 payments is based on the wording of possible factors for directorial consideration enumerated in the Commission's adopting release. For example, the second factor refers to "the nature of the problems or circumstances", perhaps implying the existence of a temporary situation. However, the release states explicitly that while these factors would normally be relevant, "the Commission has decided not to require directors to consider any particular factors".

*Third, the Commission has not required fund directors to make virtually impossible findings.* Some fund directors and their counsel have expressed concern that in the case of some 12b-1 plans directors cannot make findings based on the factors enumerated in the release. However, as discussed above, the Commission has made it clear that consideration of any particular factors is not required. The rule itself only requires directors to make the general finding that "there is a reasonable likelihood that the plan will benefit the company and its shareholders".

*Fourth, the Commission has revisited Rule 12b-1 on a number of occasions.* For example: In 1988 the Commission proposed amending the rule to eliminate spread-load plans. In 1992 the Division of Investment Management recommended that, in light of the NASD's proposal to amend its sales charge rule to include 12b-1 fees, only limited changes be made to Rule 12b-1. In 2004 the Commission amended the rule to prohibit funds from paying for distribution of their shares with brokerage commissions.

The Commission is to be commended for initiating a comprehensive review of Rule 12b-1. This is an area of utmost importance to tens of millions of investors. It is essential that this review and any Commission action be based on the facts. I hope that the results of my research regarding the history of Rule 12b-1 are helpful to the Commission.