NEW YORK
CITY BAR

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February 25, 2008

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

Re: Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Release No. 33-8861, File No. S7-28-07 (the "Release")

Dear Ms. Morris:

The Committee on Investment Management Regulation of the New York City Bar (the "Committee") appreciates the recent invitation to comment on the Release issued by the Securities and Exchange Commission (the "Commission" or "SEC") regarding proposed amendments to Rule 498 (the "Rule") and proposed amendments to Form N-1A (together, the "Proposed Amendments") under the Securities Act of 1933, as amended ("Securities Act").[1] Among other things, the Proposed Amendments seek to enhance the disclosure provided to

[1] The Release also proposes amendments to Rules 159A, 482, 485 and 497 under the Securities Act, Rules 304 and 401 of Regulation S-T, and Form N-4 and Form N-14 under the Securities Act.

investors in registered open-end management investment companies ("Funds") and permit Funds to satisfy their prospectus delivery requirements by delivering to investors a summary prospectus ("Summary Prospectus") and posting a full statutory prospectus meeting the requirements of Section 10(a)(2) of the Securities Act[2] ("Statutory Prospectus") to an Internet Web site. The Committee is composed of lawyers with diverse perspectives on investment management issues, including members of law firms, and counsel to financial services firms, investment company complexes and investment advisers. A list of our current members is attached as Annex A.

The Committee applauds this effort by the Commission to encourage Funds to employ technology in delivering information to investors more efficiently and to assist those investors in using information more effectively. Like the Commission, the Committee believes that the Proposed Amendments will enhance the disclosure available to Fund investors by providing meaningful information to investors in a useful manner. This letter provides the Committee's comments with regard to the Proposed Amendments.

* * *

Concerns Regarding Proposed Rule 498

The Committee recognizes and fully supports the Commission's goal of crafting amendments to the current disclosure requirements and prospectus delivery requirements that are "intended to create a disclosure regime that is tailored to the unique needs of mutual fund investors in a manner that provides ready access to the information that investors need, want, and choose to review in connection with a mutual fund purchase decision."[3] The Committee

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2 15 U.S.C. § 77j(a).

3 Release at page 42.

believes, however, that certain provisions of the proposed Rule may have the potential to discourage Funds from using the Summary Prospectus.

Proposed Rule 498(d)(1) provides that, if any other materials accompany the Summary Prospectus, the Summary Prospectus must be given "greater prominence" than those materials (and not be bound together with any of those materials). The proposed Rule further provides (in connection with making available the Fund's Statutory Prospectus and other materials on the Internet) that the materials must be "convenient" for both reading online and printing on paper (proposed Rule 498(f)(2)(i)), and include tables of contents that "prominently display" relevant sections of the Statutory Prospectus and Statement of Additional Information (the "SAI") (proposed Rule 498(f)(2)(iii)(B)). The proposed Rule also provides (in connection with the legend on incorporation by reference into the Summary Prospectus) that the legend "clearly identify" the document from which information is incorporated (proposed Rule 498(b)(1)(B)).

These terms -- "greater prominence," "convenient" for reading and printing, "prominently display" and "clearly identify" -- are not defined in the proposed Rule. In the opinion of the Committee, these terms do not provide sufficient clarity of direction to Funds as to the manner of compliance with the proposed Rule's requirements for prospectus delivery and incorporation by reference. The Committee believes that a Fund that relies on the proposed Rule must be certain that it is making proper delivery of its Summary Prospectus, and that it is incorporating by reference to other documents properly, without having to make judgments as to what constitutes "greater prominence," a "prominent display," "convenience" or "clear identification." The Committee believes that in the absence of such certainty, Funds may be discouraged from using the Summary Prospectus.

In addition, such uncertainty could have the consequence of increasing Funds' risk in private securities litigation.[4] The Committee infers from the Commission's description of the proposed disclosure regime that neither the use of the Summary Prospectus to satisfy prospectus delivery requirements, nor the permitted incorporation by reference of, among other documents, the Fund's Statutory Prospectus and SAI, is intended to have that result.

A Fund that fails to satisfy its prospectus delivery obligations under Section 5(b)(2)[5] of the Securities Act may be subject to a private right of action under Section 12(a)(1).[6] Thus, any Fund that chooses to satisfy its Section 5(b)(2) obligation by providing investors with a Summary Prospectus under the proposed Rule could potentially be at risk for Section 12(a)(1) liability if it fails to comply with all of the relevant conditions specified in the proposed Rule. The same risk exists with respect to Section 12(a)(2), which provides a private right of action for certain material misstatements or omissions.[7] Specifically, any Fund that chooses to provide investors with a Summary Prospectus that incorporates by reference its Statutory Prospectus (or other permitted documents) could potentially be at risk for Section 12(a)(2) liability if it fails to

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4 The Committee notes that concerns as to potential liability in private securities litigation have frustrated prior efforts by the Commission and Funds to shorten and simplify Fund disclosure. For example, the "profile" prospectus was not broadly adopted due to concerns about potential liability and the inability to incorporate by reference the information in the Statutory Prospectus. In addition, we have been told that brokers selling exchange-traded funds rarely use the "Product Description" that those funds provide as a sales document in lieu of a Statutory Prospectus due to liability concerns.

5 15 U.S.C. § 77e(b)(2). Section 5(b)(2) provides that "it shall be unlawful for any person, directly or indirectly, to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10."

6 15 U.S.C. § 77*l*(a)(1). Section 12(a)(1) provides that liability may arise in connection with any person who "offers or sells a security in violation of section 5."

7 15 U.S.C. § 77*l*(a)(2).

comply with the relevant conditions for incorporation by reference specified in the proposed Rule.

The Committee notes that the conditions of proposed Rule 498 discussed above could form the basis of allegations in Section 12(a) litigation, and that some individual courts may be reluctant to resolve issues of compliance with such conditions on motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)").[8] The terms employed in the proposed Rule may be viewed by some courts as presenting fact-based inquiries. In this regard, the Committee notes that courts are generally unwilling to dismiss claims where the motion to dismiss raises factual issues.[9] If a Section 12(a) lawsuit survived a motion to dismiss due to questions of fact relating to compliance with the conditions of proposed Rule 498, and the lawsuit moved forward into the discovery state of litigation, the impact would be significant. In this regard, the Committee notes that claims surviving Rule 12(b)(6) motions to dismiss, even if ultimately without merit, can typically be expected to generate substantial Fund expense in the form of additional defense costs (largely through the additional costs associated with discovery),[10] and to represent significant distractions to the business of a Fund, its Board of Directors or Trustees, and its management.[11] Thus, to the extent that conditions in proposed

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[8] Rule 12(b) states in relevant part: "(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted . . . "

[9] See, e.g., In re Scottish Re Grp. Sec. Litig., -- F. Supp. 2d --, 2007 WL 3256660, at *19 (S.D.N.Y. Nov. 2, 2007) (denying motion to dismiss Section 12 claim where motion to dismiss raised factual issues); In re Portal Software, Inc. Sec. Litig., 2006 WL 2385250, at *4 (N.D. Cal. Aug. 17, 2006) (same); In re Electronic Data Sys. Corp. "ERISA" Litig., 305 F. Supp. 2d 658, 681 (E.D. Tex. 2004) (same).

[10] Litigation defense costs incurred by a Fund defendant are a Fund expense whether paid directly or indirectly in the form of Fund insurance premiums.

[11] See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2504 (U.S. 2007) ("Private securities fraud actions, . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law."); SG Cowen Securities Corp. v.

Rule 498 may generate new issues in Section 12(a) civil litigation that may not be susceptible to disposition by means of a motion to dismiss, Funds will have to consider the associated risks and costs in evaluating whether to employ the Summary Prospectus.[12]

One possible solution to the concerns outlined above is to amend proposed Rule 498(c)(1) and (d)(1) to eliminate the requirement that the Summary Prospectus be given "greater prominence" than any other materials with which it is sent. In addition, proposed Rule 498(f)(2) could be amended to change the requirement that the materials on the Fund's Web site be in a format or formats that "are convenient for both reading online and printing on paper" to a more specific requirement that they be in a format or formats that "permit the materials to be read online and to be printed on paper," and proposed Rule 498(f)(2)(iii)(B) could be amended to delete the word "prominently." Finally, proposed Rule 498(b)(1)(B) could be amended to delete

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U.S. Dist. Court for Northern Dist. of CA, 189 F.3d 909, 911 (9th Cir. 1999) (quoting legislative history of Private Securities Litigation Reform Act's provision staying discovery while motion to dismiss is pending because the "cost of discovery often forces innocent parties to settle frivolous securities class actions. According to the general counsel of an investment bank, 'discovery costs account for roughly 80% of total litigation costs in securities fraud cases.' In addition, the threat that the time of key employees will be spent responding to discovery requests, including providing deposition testimony, often forces coercive settlements.") (quoting H.R. Rep. No. 104-369 (1995) (Conf. Rep.)).

[12] The Release references Section 19(a) of the Securities Act (15 U.S.C. § 77s(a)), which protects acts "done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason." It is not clear whether the Release means to suggest that Section 19(a) would potentially be available where a defendant is alleged to have failed to comply with the proposed Rule. In this regard, the Committee notes that compliance with the Rule itself would appear to be a necessary prerequisite to protection, and the concept of "good faith" would appear to relate only to a defendant's *reliance* on the Rule's validity (not to a defendant's *compliance* with the Rule itself), see Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 428 (1990) (citing Section 19(a) as one example of "legislative relief" that has been created by Congress for instances of "significant detrimental reliance on the erroneous advice of Government agents"); Spicer v. Chi. Bd. Options Exch., Inc., (No. 88 C 2139, 1992 U.S. Dist. LEXIS 18796 at *11 (N.D. Ill. Dec. 10, 1992) ("If [the defendant acted] . . . in good faith reliance on the SEC rule, then no liability follows."). Moreover, the Committee notes that even if a court were to view Section 19(a) as potentially applicable where a defendant is alleged to have failed to comply with the Rule, questions of a defendant's "good faith" may not be amenable to resolution on a motion to dismiss, see, e.g., Smith v. Andersen L.L.P., 175 F. Supp. 2d 1180, 1204 (D. Ariz. 2001) ("The essential determination of whether the Individual Defendants acted in 'good faith', is a question of fact that cannot be decided in the context of a motion to dismiss."), aff'd, 421 F.3d 989 (9th Cir. 2005).

the word "clearly" from the requirements for incorporation by reference into the Summary Prospectus.

Prohibition of Information not Required by the Rule

The Committee generally supports the Commission's proposal to prohibit Funds from including any information in the Summary Prospectus other than that required or permitted by the Proposed Amendments (specifically, the information required by Items 2 to 9 of amended Form N-1A). This prohibition should help to keep the Summary Prospectus concise and readable. The standardized format should also facilitate comparisons between similar types of Funds. The prohibition on including additional information in the Summary Prospectus offers the ancillary benefit of providing a Fund with a defense to any claim that material information about the Fund was omitted from the Summary Prospectus.

The Committee, however, notes an exception to its general support for limiting the disclosures to those specified in the form requirements for the Summary Prospectus. Specifically, as currently drafted, the items in the form are directed at traditional Funds, and not exchange-traded funds ("ETFs") or other types of Funds with less traditional or non-retail structures, such as Funds-of-Funds, master-feeder Funds, Funds that serve as the funding vehicle for insurance products or Funds that are offered to retirement plan participants. The Committee urges the Commission to adopt requirements for such Funds that would accommodate their special characteristics by, for example, permitting them to describe their structures and omitting disclosure that is not applicable to them.

Top 10 Portfolio Holdings

The Committee believes that the Commission's proposed requirement that a list of a Fund's top 10 portfolio holdings be included in the Statutory Prospectus, and to update that list quarterly in the Summary Prospectus, does not necessarily provide "key information that is important to an investment decision."[13] Moreover, the Committee believes that for certain types of Funds, such as money market Funds, fixed income Funds generally and index Funds, this information may be at best unhelpful and at worst misleading. In addition, the list of top 10 holdings does not advance the Commission's goal of facilitating investor comparisons among Funds.[14]

Money market Funds invest in a broad range of short-term money market instruments pursuant to the diversification, quality and maturity requirements of Rule 2a-7 under the Investment Company Act of 1940, as amended (the "1940 Act"). Depending on the type of money market Fund, the list of top 10 holdings may be composed, for example, solely of U.S. Treasury bills with varying maturities, short-term corporate obligations and commercial paper, or short-term municipal obligations. A list of top 10 holdings with this type of disclosure is not likely to provide investors with meaningful information about the types of investments made by their Funds. Furthermore, given the broad diversification requirements of Rule 2a-7, a money market Fund's top 10 holdings might comprise less than 1% of such a Fund's assets. Also, given the short-term nature of such a Fund's investments, the information will quickly become stale. Indeed, it is quite possible that a substantial percentage of the holdings being reported may not even be in the Fund's portfolio by the time the list is published.

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[13] Release at page 26.

[14] Release at page 15.

Similarly, for fixed income Funds, a list of top 10 holdings could be composed of different tranches of private mortgage-backed securities, obligations of corporate issuers, or government or municipal obligations. Without more context, this list is not going to provide much meaningful information to an investor about the Fund. Even a relatively small fixed income Fund is likely to invest in a relatively large number of different issuers and, as a result, its top 10 holdings could amount to a very small percentage of its assets.

There are other examples where a list of top 10 issuers is of limited utility. Index Funds will likely show the top 10 issuers in the index. Feeder Funds in master-feeder structures will show only their interests in the master Fund.[15] Funds that obtain exposure to issuers or asset classes through derivatives such as swaps will show only the counterparty to the derivative and not the underlying exposure, thereby potentially providing a misleading impression of the Fund's portfolio exposure. A Fund that has experienced significant cash inflows may show a significant investment in an ETF that it is using to gain exposure to the relevant market while it looks for underlying investments that meet its investment policies.

These examples highlight an important issue with the top 10 holdings requirement generally: it is a "snapshot" of the portfolio on a particular day, and may not be representative of the portfolio's composition over longer periods of time. Moreover, given the limitations of such a snapshot -- it may change frequently, it may represent only a small percentage of a Fund's assets, and it will not reflect the exposure obtained through a Fund's investments in derivatives or other similar instruments -- the requirement will not advance the Commission's goal of facilitating investor comparisons among Funds.

[15] If the feeder Fund has invested in an unaffiliated master Fund, it would not necessarily have access to the information about the underlying master Fund's top 10 holdings in time to meet the requirement of the proposed Rule.

For the reasons outlined above, the Committee does not believe that top 10 portfolio holdings should be elevated by the Commission to the status of a key piece of information for an investment decision. The Committee does not believe that the Commission can remedy the issues identified above with respect to a top 10 holdings list by simply adding required disclosure about the limitations of such a list, or an explanation of the holdings on the list, as such additional disclosure would be contrary to the Commission's goals of shorter and more readable disclosure. Rather, the Committee recommends that the requirement be deleted from the Statutory Prospectus and Summary Prospectus altogether.

The Committee understands that some investors and financial intermediaries have expressed their belief that this is important information that should be included in the Statutory Prospectus and the Summary Prospectus. However, as the Commission noted in the Release[16], lists of portfolio holdings are often included in sales literature and Fund Web sites, so the information is readily available to investors and financial intermediaries who want it. Moreover, as currently used by Funds, this information may be updated more frequently than is contemplated by the Proposed Amendments. The Committee believes that the Statutory Prospectus and Summary Prospectus should focus investors' attention on the basic structure of the Fund and the type of investments it may make under its investment objective and policies, and not on a one-day snapshot of portfolio holdings that, for any number of reasons, may not be entirely representative of the Fund's investments over time.

Quarterly Updating Requirements

In addition to the recommendation that the top 10 holdings requirement be deleted altogether from the Statutory Prospectus and the Summary Prospectus, the Committee strongly

[16] Release at page 26.

recommends that the Commission delete the requirements that portfolio holdings information and performance information in the Summary Prospectus be updated on a calendar quarter basis. The Committee believes that these requirements might lead to inadvertent errors by Funds and their distributors or dealers with resultant liability under the Securities Act for the failure to deliver a prospectus as required by Section 5(b)(2). The quarterly update requirements also create burdens on Funds that, in the Committee's opinion, may dissuade Funds from using the Summary Prospectus.

Funds currently are required to report portfolio holdings information on a quarterly basis based on their fiscal year ends.[17] Under the Proposed Amendments, Funds using the Summary Prospectus would be required to update their top 10 portfolio holdings information on a *calendar* quarter basis. As a result, Funds using the Summary Prospectus would be required to report portfolio holdings information eight times a year. Funds wishing to avoid such duplicate reporting efforts may opt not to use the Summary Prospectus. In addition, under the Proposed Amendments, the delivery by a financial intermediary of a Summary Prospectus without the required quarterly update would constitute a violation of Section 5(b)(2) of the Securities Act over which the Fund would have no control.[18]

The Commission has also asked for comments about concerns relating to investor confusion or potential liability if quarterly updating is required for the Summary Prospectus but

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17 Funds report their schedules of investments after the end of the second and fourth quarters of their fiscal years as part of their reports to shareholders filed on Form N-CSR under the Securities Exchange Act of 1934 (the "1934 Act") and the 1940 Act . They report the same information after the end of the first and third quarters of their fiscal years on Form N-Q under the 1934 Act and the 1940 Act.

18 As discussed above, a Fund may have liability under Section 12(a)(1) of the Securities Act if it were unable to prove that its delivery of the Summary Prospectus satisfied the conditions of the proposed Rule and thereby met the requirements of Section 5(b)(2) of the Securities Act (assuming the Fund did not have a separate basis for demonstrating compliance with the delivery requirements of Section 5(b)(2)).

not for the Statutory Prospectus. The Committee recognizes the efforts made by the Commission to forestall such liability, by providing in proposed Rule 498(e)(2) that the failure to include in the Statutory Prospectus the updated return and portfolio holdings information required to be included in the Summary Prospectus will not, *solely* by virtue of inclusion of the information in the Summary Prospectus, be considered an omission of material information required to be included in the Statutory Prospectus. Nevertheless, the Committee is concerned that the proposed rule may not be sufficient to protect Funds from potential liability to the extent that the Summary Prospectus is updated with this information but the Statutory Prospectus is not.

Proposed Changes to Fee Table Disclosure

The Committee appreciates the Commission's concerns with respect to investors' comprehension of the impact of Fund operating expenses. The Proposed Amendments address these concerns generally by making the fee table currently found in the Statutory Prospectus a required part of the Summary Prospectus and, in particular, by changing the disclosure in one of the headings of the required fee table with respect to operating expenses of the Fund.[19]

While the Committee acknowledges that investors might benefit from clearer disclosure regarding the effects of ongoing Fund expenses on individual investors, the Committee believes that the proposed change to the parenthetical in the fee table is incorrect and misleading, since it implies that investors pay the Fund's operating expenses. Proposed Item 3 changes the parenthetical explaining "Annual Fund Operating Expenses" from "expenses that are deducted from Fund assets" to "ongoing expenses that *you* pay each year as a percentage of the value of your investment" (emphasis added). The fact remains that it is the Fund that pays its expenses. The Committee believes that the fee table should continue to state that Fund fees and expenses

[19] Proposed Item 3 of Form N-1A.

are deducted from Fund assets, as distinguished from fees that investors pay (such as sales loads and transaction fees).

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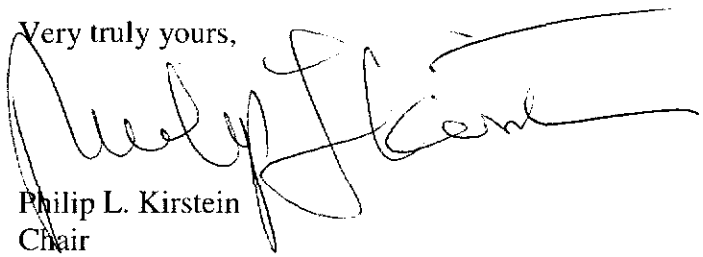
The Committee appreciates the opportunity to comment on the Proposed Amendments and would be happy to discuss our concerns in more detail. Should you have any questions about our comments, please feel free to contact the undersigned by telephone at (212) 969-2108 or by e-mail at phil.kirstein@alliancebernstein.com.

Very truly yours,



Philip L. Kirstein
Chair

Attachment

cc: Hon. Christopher Cox
Hon. Paul S. Atkins
Hon. Kathleen L. Casey

Andrew J. Donohue, Director, Division of Investment Management
Susan Nash, Associate Director, Division of Investment Management

Nancy M. Morris, Secretary
Securities and Exchange Commission
February 25, 2008

Annex A

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