

Shipley, Akerman & Pickett
Washington, D.C.

April 1, 1968

Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

Re: Release No. 8239, 1934 Act, January 26, 1968

Sirs:

We respectfully oppose the Commission's proposed Rule 10b-10 on the following grounds:

We believe the proposed rule is in reality and substance a legislative action as distinguished from a rule, and is unconstitutional. Under the Federal Constitution (Article I, Sec. 1), Congress alone is empowered to legislate, i.e., to pass laws establishing fundamental national policy. In Section 17 (e) of the 1940 Act, Congress has provided that a 1% commission is equitable. The SEC has no power to control disposition of an earned commission which is otherwise lawful.

The proposed rule is not limited to implementing or filling in the details of any policy committed to the SEC by Congress in the Investment Company Act of 1940, the Investment Advisers Act of 1940 or the Securities Exchange Act of 1934. Instead, it makes previously lawful activity unlawful.

Section 38 of the Investment Company Act of 1940 authorizes the SEC only to make rules "appropriate to the exercise of powers conferred upon the Commission".

Section 23 of the 1934 Act gives the SEC power only to make rules "necessary for the execution of the functions vested" in it. Nothing in either Act gives the SEC authority to control a broker's disposition of an earned commission.

The SEC says proposed Rule 10b-10 is "bottomed on the premise that a "fiduciary uses commissions to obtain benefits for himself". This assumes that any "give-up" is automatically an excess commission. Actually, "give-ups" involve various services relating to investor protection, such as distribution of mutual fund shares, which gives shareholders an offsetting protection against redemptions which can narrow diversification, reduce management flexibility, and reduce volume trading advantages; or providing research on investment

opportunities often worth far more to shareholders than the savings per share in commissions that might result from a prohibition of "give-ups"; and best executions in terms of price, speed and block transactions.

Investment companies are unique in that they carry on a continuous public offering and redemption of shares. In order for a mutual fund to reach optimum efficiency for its investors, it must have adequate size to insure flexibility, diversification, liquidity, depth, and continuity. Sales of new shares must more than offset redemptions so performance of the fund can be beneficial to its shareholders. The present distribution and research structure involving "give-ups" is vital to these goals. Elimination of give-ups would undermine investor protection, and risk throwing some mutual funds into net redemptions and ultimate disaster. In short, the SEC's proposed Rule 10b-10 is a case of dangerous "overkill".

If the SEC's rule is adopted, it will have a shattering impact on many independent broker-dealers who play an important role in the mutual fund distribution system. Many will suffer serious financial losses, and will have to eliminate skilled securities personnel. On its face, the SEC's proposed rule seems eminently reasonable. The SEC emphasizes a savings to shareholders on brokerage commissions, but does not fairly reveal that this amounts to only a few cents a share. And the SEC makes no mention of the jobs to be lost, the shrinkage of the distribution apparatus, the loss of special research investment opportunities, the risk of net redemptions, fund shrinkage, and ultimate paralysis of the highly successful mutual fund industry as it now exists. In short, the SEC has told only half the story. It makes its appeal to the natural instinct of everyone to get something at "wholesale", without revealing that such short-sighted savings turn out in the end to be expensive mistakes.

For the above reasons, we respectfully oppose the SEC's proposed Rule 10b-10, and recommend that instead, the suggestions of the New York Stock Exchange be considered as an alternative.

Respectfully submitted,

SHIPLEY, AKERMAN & PICKETT