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Broad Alliance of Financial Services and Public Interest Groups File Petition for Rulemaking Challenging SEC’s Unlawful Regulation by Enforcement

Petition for Rulemaking to end the Commission’s Backdoor Regulations of 12b-1 Fees

Washington, DC (April 29, 2020) – The need for our government to set forth consistent, predictable rules has never been greater, and the Securities and Exchange Commission (SEC) is no exception.

Over the last year, the SEC has used its enforcement authority, rather than its rulemaking authority, to change longstanding, widespread, and previously uncontroversial business practices in the mutual fund space. This is not how the rule of law is supposed to work. So today, a broad alliance of four industry and public interest organizations—the American Securities Association (ASA), the Competitive Enterprise Institute (CEI), the Financial Services Institute (FSI), and the New Civil Liberties Alliance (NCLA)—have teamed up to file a petition for a rulemaking seeking to end the SEC’s penchant for regulation by enforcement. When the stay-at-home orders are finally lifted, American businesses will need to know that the law is what it says, and not what the SEC, years later, decides unilaterally what it should have been.

The petition arises from the SEC’s thirty-year effort to effectively outlaw Rule 12b-1 fees, and the amnesty program which followed. For decades, mutual funds have used 12b-1 fees to compensate financial advisers for ongoing sales and marketing assistance. And (despite the SEC’s efforts to the contrary) no statute or rule changed the manner in which those fees were disclosed. Undeterred by a failed effort to adopt prospective rules in this area in 2010, the SEC has recently turned to “guidance,” coupled with “voluntary” self-reporting programs for those in “violation” of the “guidance,” and punitive enforcement actions for past conduct for those who didn’t turn themselves in. This was undertaken without the notice or public participation that Congress requires for regulatory changes of this type.

“‘If at first you don’t succeed, try, try again’ is a good rule for schoolchildren, but not for federal agencies that are determined to impose their own policy preferences on regulated entities regardless of the requirements of federal law,” said [Helgi Walker](#), a partner at [Gibson Dunn](#) and lead counsel on the petition. “It is time for the SEC to follow the rulemaking procedures that the people’s elected representatives in Congress have prescribed. Investment advisers, like all Americans, have a right to be bound only by duly enacted statutes and the regulations lawfully promulgated under them—and, most importantly, to know what the law is before the SEC brings its enormous enforcement arsenal to bear.”

The stakes of this petition go beyond the securities laws, as evidenced by the broad alliance of groups challenging the SEC’s practice of regulation by enforcement. This is about the rule of law:

- Christopher A. Iacovella, ASA CEO: “The SEC’s foray into regulation by enforcement has established a dangerous precedent which allows the agency to adopt vague disclosure requirements and then decide on the fly what is and is not acceptable. We will comply with clear rules of the road adopted using the formal rulemaking process, anything else flies in the face of how the rule of law in America is supposed to work.”
- John Berlau, CEI Senior Fellow: “Rule 12b-1 commissions, which the SEC is trying to do away with, help funds to grow their asset base, lowering investors’ average costs. The Competitive Enterprise Institute is always concerned with regulations that raise costs and limit choices for investors, consumers, and entrepreneurs. We are especially alarmed when these regulations stem from ‘dark matter,’ such as enforcement actions, that don’t go through the formal notice-and-comment process.”
- Dale Brown, FSI President & CEO: “It is time for the SEC to stop its troubling, ongoing trend of backdoor regulation, or regulation by enforcement. Financial services firms and financial advisors deserve to know the rules of the regulatory road on which they operate and be allowed sufficient time to comply with any changes. It is for this reason that Congress established the requirements of the rulemaking process, and we urge the SEC to address our concerns with regulation by enforcement as called for in the petition.”
- Michael P. DeGrandis, NCLA Senior Litigation Counsel: “Federal agencies may not issue ‘guidance’ to advance new regulatory initiatives. Period. Enforcement of SEC’s ‘Share Class Selection Disclosure Initiative’ is unlawful because it isn’t the product of the rulemaking process Congress mandates. As NCLA has warned SEC before, guidance may not be used to coerce entities outside the agency into taking any action beyond what statutes or regulations already require.”

As detailed in the petition, the SEC should initiate a rulemaking to promulgate regulations to bring its guidance into compliance with applicable law. “Other agencies have already taken similar action,” added Walker. “The SEC should get with the program and end its enforcement abuses once and for all.”

[Click here to read the petition for rulemaking.](#)

About the American Securities Association (ASA): The American Securities Association (ASA) is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA’s mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse

membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.

About the Competitive Enterprise Institute (CEI): The Competitive Enterprise Institute (CEI) is a non-profit research and advocacy organization founded in 1984 that focuses on regulatory policy from a pro-market perspective.

About the Financial Services Institute (FSI): The Financial Services Institute (FSI) is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has successfully promoted a more responsible regulatory environment for nearly 90 independent financial services firm members and their 160,000+ affiliated financial advisors – which comprise over 60% of all producing registered representatives. We effect change through involvement in FINRA governance as well as constructive engagement in the regulatory and legislative processes, working to create a healthier regulatory environment for our members so they can provide affordable, objective advice to hard-working Main Street Americans. For more information, please visit financialservices.org.

About the New Civil Liberties Alliance (NCLA): The New Civil Liberties Alliance (NCLA) is a nonpartisan nonprofit civil rights organization founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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ABOUT NCLA

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For more information visit us online at NCLAlegal.org.

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