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May 1, 2019

Re: Fund of Funds Arrangements; Release Nos. 33-10590; IC-33329; File No. S7-27-18 (the
"Proposing Release")

VIA E-MAIL: rule-comments@sec.gov

Vanessa Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Dear Ms. Countryman:

We are submitting this comment letter on behalf of Goldman, Sachs & Co. ("**Goldman**") in response to proposed Rule 12d1-4 (the "**Proposed Rule**") under the Investment Company Act of 1940, as amended (the "**Investment Company Act**"). We and Goldman appreciate the opportunity to comment on the Proposed Rule.

I. **Summary**

On February 28, 2017, Goldman received an order (the "**Goldman Order**") from the Securities and Exchange Commission (the "**Commission**") under, as relevant here, Section 12(d)(1)(J) of the Investment Company Act granting an exemption from Section 12(d)(1) of the Investment Company Act with respect to current and future Automatic Common Exchange Security Trusts, and substantially similar trusts, as described in the order ("**ACES Trusts**").¹ We believe that language contained in the Proposing Release could be construed as revoking the Goldman Order's Section 12(d)(1) relief (the "**ACES FoF Relief**") and replacing it with the Section 12(d)(1) relief in the Proposed Rule.² We believe that ACES Trusts are not the type of registered fund

¹ Goldman, Sachs & Co., Investment Company Act Release Nos. 32460 (Jan. 31, 2017) [82 FR 9431 (Feb. 6, 2017)] (notice) and 32514 (Feb. 28, 2017) (order) and related application (812-14702). The Goldman Order also provides certain relief from Section 14(a) of the Investment Company Act and Section 17(a) of the Investment Company Act. That relief is not at issue here.

² The Proposing Release states: "Pursuant to our authority under the [Investment Company] Act to amend or rescind our orders when necessary or appropriate . . . we are proposing to rescind the orders permitting fund of funds arrangements. The orders covered by this rescission include all orders granting relief from sections 12(d)(1)(A), (B), (C), and (G) of the [Investment Company] Act with one limited exception. Specifically, we do not
(continued...)"

intended or necessary to be covered by the Proposed Rule and, for the reasons discussed below, we believe that the ACES FoF Relief should not be revoked.³

II. Background of the Goldman Order and the ACES FoF Relief

a. ACES Trusts

The ACES FoF Relief in the Goldman Order only applies with respect to a highly distinct type of registered fund, i.e., ACES Trusts for which Goldman serves as a principal underwriter. ACES Trusts are limited-life, grantor trusts registered under the Investment Company Act as non-diversified, closed-end management investment companies. Unlike the typical registered fund, ACES Trusts are effectively unmanaged trusts that are not marketed to provide investors with either professional investment asset management or the benefits of investment in a diversified pool of assets. Instead, an ACES Trust is intended to provide a structured exposure, to the equity securities of a single identified issuer, that has unique payment and risk characteristics, including an anticipated higher current yield than the specified equity securities at the time of the issuance of the interests in the ACES Trust (the “**Trust Interests**”).

As described in more detail in the Goldman Order (and the corresponding application and notice), an ACES Trust seeks to achieve this exposure by, at the time it issues its Trust Interests, (i) entering into one or more forward purchase contracts (the “**Contracts**”) with a counterparty to purchase equity securities (the “**Shares**”) of one specified issuer and (ii) in some cases, purchasing certain U.S. Treasury securities (“**Treasuries**”). The investment objective of each ACES Trust is to provide to its investors (i) current cash distributions from the proceeds of any Treasuries and (ii) participation in, or limited exposure to, changes in the market value of the underlying Shares.

The number of Shares, or the value thereof, that will be delivered to an ACES Trust pursuant to the Contracts may be fixed (e.g., one Share per Trust Interest issued) or may be determined pursuant to a formula, the product of which will vary with the price of the Shares during a period proximate to the termination of the Contracts and the ACES Trust. A formula generally will result in each holder of Trust Interests receiving fewer Shares as the market value of the Shares increases, and more Shares as their market value decreases. A formula is likely to limit a holder’s participation in any appreciation of the underlying Shares, and it may, in some cases, limit the holder’s exposure to any depreciation in the underlying Shares. It is anticipated that the holders of Trust Interests will receive a yield greater than the ordinary dividend yield on the Shares at the time of the issuance of the Trust Interests, which is intended to compensate holders for the limit on the holder’s participation in any appreciation of the underlying Shares. At the termination of an ACES Trust, each holder of Trust Interests will receive the number of Shares per Trust Interest, or the value thereof, as determined by the terms of the Contracts, that is equal to such holder’s pro rata interest in the Shares or the amount received by the ACES Trust under the Contracts.

(...continued)

propose to rescind the exemptive orders providing relief from section 12(d)(1)(A) and (B) granted to allow certain interfund lending arrangements.”

³ We note that the comments in this letter are limited to the impact of the Proposed Rule on the ACES FoF Relief.

Each ACES Trust is internally managed by three trustees without a separate investment adviser. The trustees have limited or no power to vary the investments held by the ACES Trust. The day-to-day administration of each ACES Trust is carried out by Goldman or by a bank appointed as administrator. Each ACES Trust's organizational and ongoing expenses are not borne by its investors, but rather, directly or indirectly, by Goldman, the Contract counterparties or another third party.

b. 12(d)(1) Relief Granted for ACES Trust

Pursuant to the ACES FoF Relief in the Goldman Order, Goldman received relief to allow other registered investment companies, and companies excepted from the definition of investment company under Section 3(c)(1) or 3(c)(7) of the Investment Company Act ("**private funds**"), to own a greater percentage of the outstanding Trust Interests of an ACES Trust than would be permitted by Section 12(d)(1) under the Investment Company Act. As a condition to the ACES FoF Relief in the Goldman Order, any registered investment company or private fund holding Trust Interests of an ACES Trust in excess of the 12(d)(1) limits must be required by the ACES Trust's charter documents, or must separately undertake, to vote its Trust Interests in proportion to the vote of all other holders of the Trust Interests.

Goldman sought the ACES FoF Relief because, in order for the Trust Interests in an ACES Trust to be marketed most successfully, and to be traded at a price that most accurately reflects their value, it is necessary for the Trust Interests to be offered to large investment companies and investment company complexes. These investors seek to spread the fixed costs of analyzing specific investment opportunities by making sizable investments in those opportunities. Conversely, it may not be economically rational for the investors, or their advisers, to take the time to review an investment opportunity if the amount that the investors would ultimately be permitted to purchase is immaterial in light of the total assets of the investment company or investment company complex.

III. **The ACES FoF Relief Should Not Be Revoked**

a. Imposition of the Additional Conditions under the Proposed Rule Would Adversely Affect ACES Trusts

While the Proposed Rule would allow registered investment companies to invest in ACES Trusts in excess of the otherwise applicable Section 12(d)(1) limits, the Proposed Rule includes a number of additional conditions that are not contained in the ACES FoF Relief and that would adversely affect the viability of ACES Trusts. For example, the Proposed Rule would effectively prohibit a registered investment company and affiliated funds from owning more than 25% of the Trust Interests of an ACES Trust, whereas the ACES FoF Relief does not contain such a restriction.⁴ Similarly, the Proposed Rule would prohibit private funds from exceeding the 12(d)(1) limits in respect of an ACES Trust, whereas the ACES FoF Relief expressly applies to both registered investment companies and private funds.

Either of these additional limitations would adversely affect the market for Trust Interests because ACES Trusts are generally intended to be marketed to institutional investors, such as registered investment companies and private funds. Limitations on such investors' ability to

⁴ See Proposed Rule 12d1-4(b)(1) and Proposing Release at 31-35.

invest in ACES Trusts would make it difficult to sell sufficient amounts of Trust Interests for an ACES Trust to be economically viable and could also impair the liquidity of Trust Interests on the secondary market.

We believe the additional conditions in the Proposed Rule should not be applied to an ACES Trust, because, as the Commission found in issuing the ACES FoF Relief, ACES Trusts do not raise the concerns Section 12(d)(1) was intended to address and, for that reason, the additional conditions under the Proposed Rule are either unnecessary or inapplicable.

b. ACES Trusts Do Not Raise the Concerns Section 12(d)(1) Was Intended to Address

As described in the Proposing Release, Section 12(d)(1) was intended to address concerns regarding the “pyramiding” of investment companies, where investors in an acquiring fund control the assets of the acquired fund to the detriment of the acquired fund shareholders.⁵ In addition, Section 12(d)(1) was intended to limit the potential for excessive fees, or the formation of overly complicated structures, in fund-of-fund arrangements.⁶

In light of the special characteristics of an ACES Trust, in issuing the Goldman Order, the Commission determined that the application of the Section 12(d)(1) limits was not necessary to address these concerns in the context of an ACES Trust. In particular, with respect to the concerns of pyramiding and the undue influence that an acquiring fund could have on an acquired fund, the holdings of an ACES Trust are unmanaged and the trustees of, and investors in, the ACES Trust may not vary the holdings of the trust or acquire or dispose of the trust’s assets. As such, there is no ability for a large investor in an ACES Trust to use the trust’s portfolio assets or portfolio transactions to the benefit of itself or its affiliates. Further, a large fund investor in an ACES Trust cannot wield undue influence through voting its Trust Interests, because, as a condition to the ACES FoF Relief, the charter documents of an ACES Trust require any investment company or private fund owning Trust Interests in excess of the Section 12(d)(1) limits to vote its Trust Interests in proportion to the votes of the other investors in the trust.⁷ Moreover, the concern regarding undue influence through a threat to redeem an acquired fund’s securities does not arise in the case of an ACES Trust because the Trust Interests are not redeemable.

Similarly, the concerns regarding excessive layering of fees are not present in the case of an ACES Trust, because investors in an ACES Trust do not bear any advisory fees or other organizational or operating costs. Further, because an ACES Trust holds a static portfolio of Contracts and, in some cases, Treasuries, and does not invest in other investment companies, a fund’s investment in an ACES Trust would not create an overly complex structure.

c. The Conditions of the Proposed Rule Are Generally Unnecessary or Inapplicable in the Context of an ACES Trust

⁵ Proposing Release at 9-10.

⁶ *Id.*

⁷ Alternatively, the condition to the ACES FoF Relief contemplates that, in lieu of such a charter provision, such investment company or private fund investor would be required to enter into undertakings to the same effect.

Because an ACES Trust does not, for these reasons, raise the concerns intended to be addressed by Section 12(d)(1), the additional conditions under the Proposed Rule are either unnecessary or inapplicable in the case of an ACES Trust, as discussed in further detail below.

Control. Under the Proposed Rule, an acquiring fund and its “advisory group”⁸ may not control (individually or in the aggregate) an acquired fund. As discussed in the Proposing Release, this effectively means an acquiring fund, together with its affiliates, could not own more than 25% of the Trust Interests of an ACES Trust. In light of the inability, as described above, for a large investor in an ACES Trust to wield an undue influence on an ACES Trust, given its unmanaged structure and voting requirements, it is unnecessary to apply an express ownership limit on Trust Interests.

Voting. Under the Proposed Rule, generally, if an acquiring fund and its “advisory group,” in the aggregate, hold greater than 3% of the outstanding voting securities of an acquired fund, each of those holders would be required “either to seek instructions from its security holders with regard to the voting of all proxies with respect to such security and to vote such proxies only in accordance with such instructions, or to vote the shares held by it in the same proportion as the vote of all other holders of such security.” This condition is unnecessary with respect to the ACES Trusts in light of (i) the general inability of an ACES Trust’s investors or trustees to vary the trust’s holdings and (ii) the requirement under the ACES FoF Relief that any investment company or private fund owning Trust Interests in excess of the Section 12(d)(1) limits vote its Trust Interests in proportion to the votes of the other investors in the trust.

Redemptions. Additionally, under the Proposed Rule, an acquiring fund that holds shares of an acquired fund in excess of the limits of Section 12(d)(1)(A)(i) of the Investment Company Act, could not redeem or submit for redemption, or tender for repurchase, any of those shares in an amount exceeding 3% of the acquired fund’s total outstanding shares during any 30-day period in which the acquiring fund held the acquired fund’s shares in excess of that limit. Such condition is also unnecessary with respect to the ACES Trusts, as the ACES Trusts are closed-end funds and the Trust Interest are not freely redeemable.

Duplicative and Excessive Fees. Further, the Proposed Rule would require an acquiring fund’s investment adviser to evaluate, both prior to investment and periodically thereafter, the complexity of the structure and the aggregate fees associated with the acquiring fund’s investment in the acquired fund, and find that it is in the best interest of the acquiring fund to invest in the acquired fund. This condition is unnecessary with respect to an ACES Trust, because, as described above, investors in an ACES Trust do not bear advisory fees or organizational or operating expenses.

Complex Structures. The Proposed Rule also contains certain limitations on the structuring of fund-of-funds, including a restriction on the ability for an investment company to rely on Section 12(d)(1)(G) or the Proposed Rule to purchase outstanding voting securities, beyond the limits imposed by Section 12(d)(1), of another investment company that discloses in its most recent registration statement that it may be an acquiring fund under Section 12(d)(1). This limitation is

⁸ “Advisory Group” is defined under the Proposed Rule as either: (1) “An acquiring fund’s investment adviser or depositor, and any person controlling, controlled by, or under common control with such investment adviser or depositor”; or (2) “An acquiring fund’s investment sub-adviser and any person controlling, controlled by, or under common control with such investment sub-adviser.”

also unnecessary in the case of ACES Trusts, as the ACES Trusts are unmanaged vehicles that do not invest in other investment companies.⁹

Private Funds. The relief in the Proposed Rule would not extend to private funds, whereas the ACES FoF Relief expressly includes private funds. According to the Proposing Release, the Commission did not include private funds within the scope of the Proposed Rule because private funds are not subject to the same reporting requirements as registered investment companies, and, therefore, the Commission was concerned that it could not sufficiently monitor compliance by private funds with the Proposed Rule. In this case, however, it would not be necessary for the Commission to actively monitor a private fund's investment in an ACES Trust given that, for all the reasons discussed above, an ACES Trust does not present the concerns sought to be addressed by Section 12(d)(1) and, in particular, is not subject to the exertion of undue influence by large investors. Further, private funds have been able to invest in registered investment companies similar to the ACES Trusts since at least 1998, and we are unaware of any reports of abuses that have arisen from such investments.¹⁰ As such, and as the Commission already found in issuing the Goldman Order, we believe that private funds should be permitted to continue to rely on the ACES FoF Relief in investing in ACES Trusts.

For these reasons, we believe the additional conditions in the Proposed Rule would not meaningfully enhance investor protections in the case of ACES Trusts and, thus, we believe the ACES FoF Relief should not be revoked.

IV. **Implementation of Comment**

If the Commission agrees with our comment that the ACES FoF Relief should not be revoked by the Proposed Rule, we believe that no revisions to the Proposed Rule are necessary to address this comment regarding the ACES FoF Relief. Rather, should the Proposed Rule be adopted, it would be sufficient for the Commission to note in the Proposed Rule's adopting release that "The Commission's order, Goldman, Sachs & Co., Investment Company Act Release No. 32514 (Feb. 28, 2017), is not hereby revoked."

V. **Conclusion**

For the reasons discussed above, we believe that the ACES FoF Relief contained in the Goldman Order should not be revoked by the Commission due to the unique structure of the ACES Trusts, which do not present the concerns raised by Section 12(d)(1).

* * *

⁹ Rule 12d1-4(b)(4)(i) also requires an investment company to disclose in its registration statement that it is (or at times may be) an acquiring fund for purposes of Section 12(d)(1). This condition is also unnecessary for the ACES Trusts, since, as noted above, the ACES Trusts will not be "acquiring funds."

¹⁰ See Application of Goldman, Sachs & Co. (File No. 812-14702) at 3-4.

We would be pleased to discuss our comments or any questions the Commission or its Staff may have, which may be directed to Gregory S. Rowland of this firm at [REDACTED].

Very truly yours,


Davis Polk & Wardwell LLP