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May 2, 2019

Vanessa Countryman
Acting Director, Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Investment Company Act Release No. 33329 (File No. S7-27-18) Fund of Funds Arrangements

Dear Ms. Countryman:

Teachers Insurance and Annuity Association of America ("TIAA"), through Nuveen, LLC ("Nuveen"), its investment management arm,[1] appreciates the opportunity to comment on the proposed rescission of Securities and Exchange Commission ("SEC" or the "Commission") Rule 12d1-2 and adoption of Rule 12d1-4 (the "Proposal") under the Investment Company Act of 1940, as amended (the "1940 Act"), which seeks to streamline and enhance the regulatory framework applicable to fund of funds arrangements.[2] At the outset, we echo sentiments expressed in the comment letters submitted by the Investment Company Institute ("ICI") and Securities Industry and Financial Markets Authority – Asset Management Group ("SIFMA AMG"), organizations of which Nuveen is a member. We are writing separately to respectfully request that the SEC reconsider certain aspects of the Proposal and to respond to the Commission's questions regarding the disclosure of acquired fund fees and expenses.

I. Executive Summary

a. Affiliated fund of funds arrangements should not be subject to the enhanced regulations contemplated by Rule 12d1-4.

We do not believe that the Proposal's potential disruptive impacts on Affiliated Fund of Funds Arrangements[3] are justified in light of the Proposal's stated policy objectives to streamline and enhance the

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1 Nuveen is a wholly-owned subsidiary of TIAA. Nuveen's investment advisory subsidiaries collectively manage over $950 billion in assets, which include assets in the Nuveen and TIAA-CREF registered fund complexes.

2 *Fund of Funds Arrangements*, SEC Release No. IC-33329, 84 Fed. Reg. 1286 (Feb. 1, 2019), available at https://www.federalregister.gov/documents/2019/02/01/2018-27924/fund-of-funds-arrangements (the "Proposing Release").

3 For purposes of this comment letter, the phrase "Affiliated Fund of Funds Arrangements" refers only to arrangements where an acquiring fund (*i.e.*, a registered open-end fund) invests (i) substantially all of its assets in one or more acquired funds within the same "group of investment companies" (as defined in Section 12(d)(1)(G)(ii) of the 1940 Act) but also invests (ii) a comparatively small percentage of its assets (*i.e.*, approximately 10% or less) in investments other than such acquired funds.

For the avoidance of doubt, the use of the term "Affiliated Fund of Funds Arrangements" should not be viewed as a concession or admission by Nuveen, Advisors, the Lifecycle Funds, or the Underlying Funds

regulatory framework applicable to fund of funds arrangements generally. We believe that the potential costs of disruption to Affiliated Fund of Funds Arrangements far outweigh the benefits of simplifying the regulatory framework, and we are aware of no evidence to suggest that the current regulatory framework applicable to Affiliated Fund of Funds Arrangements requires any enhancement to ensure investor protection. In the absence of evidence suggesting that Affiliated Fund of Funds Arrangements raise concrete policy concerns, we urge the Commission to either retain Rule 12d1-2 or exempt investments in acquired funds within the same group of investment companies from the redemption limits contained in Rule 12d1-4(b)(2).

b. The Commission should take action to limit the ability of activist firms to exercise undue influence over exchange-listed closed-end funds.

Nuveen respectfully requests that the Commission take certain actions to minimize the risk that any final rulemaking increases the ability of activist firms to exercise undue influence over exchange-listed closed-end funds. First, we encourage the Commission to work with Congress to introduce legislation that would better address the goals of Section 12(d)(1) of the 1940 Act. As discussed in further detail in ICI's comment letter on the Proposal (the "ICI Letter"), activist firms are using multiple private funds to invest in a single closed-end fund, permitting them to stay below the 3% limit in Section 12(d)(1)(A)(i) but to hold substantially more than the 10% permitted by Section 12(d)(1)(C), as private funds are not currently subject to that provision. We urge the Commission to recommend legislation amending Sections 3(c)(1) and 3(c)(7) of the 1940 Act to deem any private fund investing in a registered fund and any other private funds controlled by the private fund's manager to be an "investment company" for purposes of Section 12(d)(1)(C).

Second, we recommend that the percentage ownership by an acquiring fund and its advisory group at which "mirror" or "pass-through" voting would be triggered under Rule 12d1-4(b)(1)(ii) be increased from 3% to 10%. As noted above, activist firms are utilizing multiple private funds to hold significant positions in closed-end funds, but private funds would not be subject to Rule 12d1-4. On the other hand, registered funds investing in closed-end funds would be subject to this voting condition. Because "pass-through" voting for such registered funds would likely be impractical, they would likely "mirror" vote shares held in any closed-end fund subject to the voting condition, which would effectively increase the voting power of activist firms.

c. The Commission should exclude business development companies from the definition of "acquired fund" for purposes of "acquired fund fees and expenses" disclosed in registered investment company fee and expense tables.

Under Item 3 of Forms N-1A, N-2 and N-3, a registered investment company investing in another investment company is required to include in its prospectus fee table a line item labelled "Acquired Fund Fees and Expenses" ("AFFE"). We urge the Commission to consider, as part of any final rulemaking, excluding business development companies ("BDCs") from the definition of "acquired fund" for purposes of AFFE disclosure in such fee tables. As discussed in further detail below, the inclusion of BDC expenses in AFFE disclosure has ultimately led to a reduction of the funding available to BDCs to achieve their goal of small business capital formation, unnecessarily frustrating the original legislative intent motivating their creation.

II. Affiliated Fund of Funds Arrangements should not be subject to the enhanced regulations contemplated by Rule 12d1-4.

We agree with the Commission's assessment that Affiliated Fund of Funds Arrangements play a vital role in the retirement and retail investing marketplace. Specifically, Affiliated Fund of Funds Arrangements allow investors to: (i) access professional asset management capabilities, (ii) invest in a diversified portfolio (including

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that investment companies with a common investment adviser are, necessarily, affiliated persons of one another.

with respect to industry and sector) without requiring substantial investible assets, (iii) obtain such diversification without incurring substantial transaction costs associated with building a diversified portfolio, and (iv) invest in a wider array of funds than might otherwise be possible if the investor were not able to meet the individual investment minimum for each individual acquired fund.

However, as discussed in further detail below, we believe the Proposal presents significant challenges to Affiliated Fund of Funds Arrangements, including the TIAA-CREF Lifecycle Funds, a family of retirement target date mutual funds sponsored by a Nuveen subsidiary that relies on the existing regulatory framework applicable to such Arrangements. Given the importance of Affiliated Fund of Funds Arrangements to retirement investors, we do not believe that the Proposal's potential disruptive impacts on such Arrangements are justified in light of its stated policy objectives to streamline and enhance the regulatory framework applicable to fund of funds arrangements generally. We believe that the potential costs of disruption to Affiliated Fund of Funds Arrangements far outweigh the benefits of simplifying the regulatory framework, and we are aware of no evidence to suggest the current regulatory framework applicable to such Arrangements requires any enhancement to ensure investor protection. In the absence of evidence suggesting that investments in acquired funds within the same group of investment companies raise concrete policy concerns, we urge the Commission to either retain Rule 12d1-2 or exempt such investments from the redemption limits contained in Rule 12d1-4(b)(2).

a. Overview of the TIAA-CREF Lifecycle Funds.

TIAA-CREF Funds (the "Trust") is a 1940 Act registered open-end investment company organized into a number of different series, including the TIAA-CREF Lifecycle Funds (the "Lifecycle Funds"). The Trust currently consists of 69 separate series, with approximately $363.8 billion of assets under management ("AUM") as of February 28, 2019. Each series of the Trust is advised by Teachers Advisors, LLC ("Advisors"), a subsidiary of Nuveen.[4]

The Lifecycle Funds are a family of retirement target date "funds of funds" that employs a glide path asset allocation strategy implemented by Advisors. The Lifecycle Funds currently consist of twelve separate funds, with approximately $32.1 billion of AUM as of February 28, 2019. Each Lifecycle Fund invests (i) approximately 95% of its assets in other series of the Trust advised by Advisors or other open-end investment companies that are part of the same "group of investment companies" for purposes of Section 12(d)(1)(G) of the 1940 Act (collectively, "Underlying Funds") and (ii) approximately 5% of its assets in the TIAA-CREF Real Property Fund LP ("RPF"), a private fund managed by Advisors that is designed to provide Lifecycle Fund investors with exposure to direct real estate.[5] Nuveen and Advisors believe that providing the Lifecycle Funds with exposure to direct real estate through investment in RPF is an important element of diversified investing for retirement or other long-term purposes.

RPF is organized as a limited partnership relying on an exception from the definition of the term "investment company" under the 1940 Act. RPF invests a substantial portion of its assets in TIAA-CREF Real Property REIT LLC ("TC REIT"),[6] a real estate investment trust which is also managed by Advisors. Direct real

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[4] Although this letter emphasizes the Proposal's impact on the Lifecycle Funds, the Proposal would have similar negative impacts on other Affiliated Fund of Funds Arrangements within the Trust, including the TIAA-CREF Lifecycle Index Funds and the TIAA-CREF Lifestyle Funds.

[5] As discussed further below, each Lifecycle Fund may also invest a portion of its assets in one or more exchange-traded funds ("ETFs") not part of the same group of investment companies for cash management purposes.

[6] RPF is the sole investor in the TC REIT, other than the ninety-nine or more additional investors necessary or appropriate to allow the TC REIT to qualify as a REIT under Section 856(a)(5) of the Internal Revenue Code of 1986. If deemed appropriate by Advisors, RPF may also invest a portion of its assets in liquid investments for purposes of maintaining liquidity.

estate exposure offers investors a low performance correlation to traditional asset classes and a high performance correlation to measures of inflation. Although we believe exposure to direct real estate is an important element of a diversified portfolio, such exposure is not generally accessible to persons investing for retirement except through publicly traded real estate investment trusts ("REITs") (or mutual funds that invest in publicly traded REITs). However, we believe that publicly traded REITs provide less effective asset class diversification than investments in direct real estate because their performance is more highly correlated to the performance of the equity markets. As a practical matter, we have found that publicly traded REITs tend to perform like small company stocks and produce less income than investments in direct real estate.

b. The Proposal presents significant challenges to the continued viability of the Lifecycle Funds as currently structured.

Each Lifecycle Fund's investment in RPF is effectuated in reliance on Section 12(d)(1)(G) of the 1940 Act and exemptive relief[7] which permits, among other things, the Lifecycle Funds to purchase limited partnership interests in RPF and RPF to sell limited partnership interests to the Lifecycle Funds. Absent the RPF Exemptive Relief, the Lifecycle Funds' investment in RPF may be prohibited by Section 17(a) and Section 17(d) of the 1940 Act, as RPF and the Lifecycle Funds may be deemed to be affiliated persons, or affiliated persons of affiliated persons. Therefore, assuming that the Lifecycle Funds' investment in RPF is deemed to be made in reliance on Rule 12d1-2, we believe that the proposed rescission of Rule 12d1-2 and the proposed adoption of Rule 12d1-4, as set forth in the Proposal, presents significant challenges to the continued viability of the Lifecycle Funds as currently structured. Adopting the Proposal as proposed presents Advisors with two options:

(i) relying on Section 12(d)(1)(G) without the benefit of Rule 12d1-2, which may require eliminating the RPF allocation for each Lifecycle Fund,[8] or

(ii) relying on Rule 12d1-4, which would permit investment in RPF but also potentially subject each Lifecycle Fund's allocation to Underlying Funds to the rule's redemption limits.

As discussed in further detail below, each of these options would subject the Lifecycle Funds and their shareholders to potentially significant negative consequences.

i. *Reliance on Section 12(d)(1)(G)*

If the Lifecycle Funds were to rely solely on Section 12(d)(1)(G), they would be permitted to invest only in Underlying Funds, government securities and short-term paper. However, many Affiliated Fund of Funds Arrangements have relied upon the flexibility provided by Rule 12d1-2 and SEC staff no-action relief to structure their underlying portfolios. Rule 12d1-2 expanded the scope of investments permitted to be held by an acquiring fund relying on Section 12(d)(1)(G) to include, among other things, securities issued by unaffiliated investment

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7 *In the Matter of TIAA-CREF Funds, et al.*, Amendment No. 6 to and Restatement of an Application for an Order Pursuant to Sections 6(c) and 17(b) of the Investment Company Act of 1940, as amended (the "Act"), for an Exemption from Section 17(a) Thereof, and Pursuant to Section 17(d) of the Act and Rule 17d-1 Thereunder, Permitting the Proposed Transactions, File No. 812-13995 (Sept. 4, 2015) (the "Application"); Inv. Co. Act. Rel. No. 31807 (Sept. 8, 2015) (the "Notice"); Inv. Co. Act Rel. No. 31861 (Oct. 6, 2015) (the "RPF Exemptive Relief").

8 From time to time, each Lifecycle Fund may invest a portion of its assets (not in excess of the limits imposed by Section 12(d)(1)(A) of the 1940 Act) for cash management purposes in one or more ETFs that are not part of the same group of investment companies. Any such investment would generally be made in reliance on Rule 12d1-2 under the 1940 Act. Therefore, if the Proposal is adopted as proposed and the Lifecycle Funds are restructured to rely on Section 12(d)(1)(G), the Lifecycle Funds would also be unable to continue to invest in such ETFs for cash management purposes.

companies (within the limits permitted by Sections 12(d)(1)(A) or (F)) as well as non-investment company securities. In addition, the SEC staff has granted no-action relief permitting an acquiring fund relying on Section 12(d)(1)(G) to invest a portion of its assets in investments that may not be securities (*e.g.*, derivative instruments).[9]

Thus, if Rule 12d1-2 and associated no-action relief were to be rescinded, reliance by the Lifecycle Funds on Section 12(d)(1)(G) would significantly constrain the portfolio managers' flexibility in structuring the Lifecycle Funds' underlying portfolios. The Lifecycle Funds would no longer be able to invest in unaffiliated ETFs or to utilize futures to equitize cash for short-term portfolio management purposes, potentially negatively impacting the Lifecycle Funds' performance. More importantly, assuming the Lifecycle Funds rely on Rule 12d1-2 to invest in RPF, the Lifecycle Funds would not be able to utilize RPF to provide retirement investors the benefits of direct real estate investment, absent reliance on Rule 12d1-4.

ii. *Reliance on Rule 12d1-4*

Alternatively, the Lifecycle Funds could rely on Rule 12d1-4 and maintain their exposure to RPF. However, reliance on Rule 12d1-4 poses its own set of portfolio construction challenges. Under the Proposal, an acquiring fund holding shares of an acquired fund in excess of the Section 12(d)(1)(A) limits would generally be prohibited from redeeming or submitting for redemption (or tendering for repurchase) greater than 3% of the acquired fund's total outstanding shares during any 30-day period in which the acquiring fund holds the acquired fund's shares in excess of that limit (the "3% Limit").[10] As reflected in the following table, the majority of Lifecycle Funds hold shares of Underlying Funds in excess of the limits imposed by Section 12(d)(1)(A)(i) (such Underlying Funds referred to herein as "3% Limit Underlying Funds") and, therefore, such Lifecycle Funds would be subject to the 3% Limit with respect to such investments. Indeed, the table shows that a significant portion of most of the Lifecycle Funds' AUM is held in 3% Limit Underlying Funds.

Lifecycle Fund	**Number of 3% Limit Underlying Funds Held**	**Percentage of Shares of 3% Limit Underlying Funds Held**	**Percentage of Lifecycle Fund AUM Invested in 3% Limit Underlying Funds**	**Percentage of Lifecycle Fund AUM Invested in 3% Limit Underlying Funds in Excess of the 3% Limit**
Lifecycle 2010 Fund	6	3.68%-6.53%	56.33%	16.94%
Lifecycle 2015 Fund	12	3.00%-9.77%	69.71%	27.35%
Lifecycle 2020 Fund	16	3.84%-18.74%	88.94%	52.23%
Lifecycle 2025 Fund	17	3.89%-19.20%	92.00%	58.19%
Lifecycle 2030 Fund	17	3.32%-16.12%	93.05%	58.77%
Lifecycle 2035 Fund	16	3.82%-14.78%	94.76%	62.35%
Lifecycle 2040 Fund	16	4.90%-19.89%	95.20%	68.28%
Lifecycle 2045 Fund	12	3.09%-11.94%	90.49%	52.93%
Lifecycle 2050 Fund	10	3.86%-8.02%	82.24%	37.09%
Lifecycle 2055 Fund	0	N/A	N/A	N/A
Lifecycle 2060 Fund	0	N/A	N/A	N/A

[9] See Northern Lights Fund Trust, SEC Staff No-Action Letter (pub. avail. Jun. 29, 2015).

[10] As discussed in the Proposing Release, the 3% Limit would not apply to sales of an acquired fund's shares in a secondary market transaction. *See Proposing Release* at p. 1299.

Lifecycle Retirement Income Fund	0	N/A	N/A	N/A

Data as of February 28, 2019.

Given the magnitude of investments by the Lifecycle Funds in 3% Limit Underlying Funds, we are concerned that the current portfolio allocations of most of the Lifecycle Funds may not be viable under the Trust's Rule 22e-4 liquidity risk management program (the "Program"). Specifically, per the terms of the RPF Exemptive Relief, each Lifecycle Fund is currently required to treat its entire allocation to the RPF (approximately 5% of each Lifecycle Fund's AUM) as illiquid. Further, under the Program, the Lifecycle Funds would be required to assess whether a portion of their investments in 3% Limit Underlying Funds should be classified as illiquid, as holdings in excess of the 3% Limit could not be sold within 30 days. As reflected in the table above, a substantial portion of many Lifecycle Funds' AUM is invested in 3% Limit Underlying Fund's in excess of the 3% Limit. To the extent that the Program administrator deemed such investments to be illiquid under the Program (which we believe is a possible outcome), these Lifecycle Funds would hold in excess of 15% of their assets in illiquid investments and would thus be prohibited under Rule 22e-4 from acquiring additional shares of any 3% Limit Underlying Fund or additional limited partnership interests of RPF.[11] In that event, the Lifecycle Funds would be forced to allocate assets to other Underlying Funds, requiring the Funds' portfolio managers to deviate substantially from their desired portfolio allocations, to the potential detriment of investors.

Leaving aside our Rule 22e-4 concerns, the Lifecycle Funds' concentration of investments in 3% Limit Underlying Funds is likely to make re-allocations along the Lifecycle Funds' respective glide paths much more difficult. Indeed, past redemptions by certain Lifecycle Funds have exceeded the 3% Limit over 30-day periods in certain circumstances.[12] We believe that Lifecycle Funds with larger positions in a 3% Limit Underlying Fund would

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[11] The Proposal would also impose substantial monitoring requirements on the Program administrator to monitor, on a rolling 30-day basis, whether each Lifecycle Fund's cumulative sales of shares of the Underlying Funds reach a point such that another sale would trigger the Rule 22e-4 prohibition on acquisitions of illiquid investments.

[12] The Proposal appears to be relatively silent on how the 3% Limit is to be operationalized in practice. For purposes of our calculations, we assumed that the maximum number of shares that can be redeemed from a 3% Limit Underlying Fund is established on the first day of each rolling 30-day period (*i.e.*, 3% of the shares held by the acquiring fund on that day) and is not affected by subsequent flows into or out of the 3% Limit Underlying Fund.

We also note an apparent ambiguity in the text of Rule 12d1-4(b)(2). The Proposal states:

> Specifically, proposed rule 12d1–4(b)(2) would prohibit an acquiring fund that acquires more than 3% of an acquired fund's outstanding shares (*i.e.*, the statutory limit) from redeeming or submitting for redemption, or tendering for repurchase, more than 3% of an acquired fund's total outstanding shares in any 30-day period. (Proposal at 1298)

However, the text of the proposed rule would apply the 3% Limit "during any thirty-day period *in which the acquiring fund holds the acquired fund's shares in excess of that limit*" (emphasis added). The italicized language could be read to suggest that an acquiring fund would be subject to the 3% Limit only if it *continuously holds during the 30-day period* in excess of 3% of the acquired fund's shares, *i.e.*, the 3% Limit would no longer be operative if at any point during the 30-day period the acquiring fund holds less than 3% of the acquired fund, whether that is due to redemptions by the acquiring fund itself or purchases by unaffiliated investors (or some combination thereof). This interpretation would effectively mean that an acquiring fund could hold more than 3% of an acquired fund without implicating the 3% Limit, assuming unaffiliated purchase and redemption activity is held constant.

In the event that the final rule retains a redemption limit, we encourage the Commission to more clearly address these methodological and interpretive questions.

have particular difficulty with portfolio re-allocations. For example, as of February 28, 2019, Lifecycle 2040 Fund held 19.89% of the outstanding shares of the TIAA-CREF Quant Large-Cap Fund which, were it subject to the 3% Limit, would require at least 7 months to liquidate the entire position. Such a redemption timeline could have significant, negative impacts on the portfolio managers' ability to implement their desired asset allocation and, ultimately, the Lifecycle 2040 Fund's performance. The impact of this restriction would likely be most acutely felt during periods of significant market stress or dislocation – precisely the times when portfolio managers require the most flexibility to safeguard the interests of retirement and other long-term investors.

We also note that the Lifecycle Funds' investor base is concentrated in large retirement plans, which we believe to be common among Affiliated Fund of Funds Arrangements. For example, investments from 15 retirement plans accounted for 22% of the Lifecycle Funds' AUM as of February 28, 2019. The retirement plan market is highly competitive, with plans regularly changing their available investment options. To the extent a plan with significant assets invested in a Lifecycle Fund were to cease offering the Fund, required redemptions from the Underlying Funds could in certain circumstances exceed the 3% Limit; this could force the Lifecycle Fund's portfolio managers to redeem more from Underlying Funds that are not subject to the 3% Limit, potentially disrupting the Fund's target asset allocation, to the detriment of the remaining investors.

c. *The potential costs of disruption to Affiliated Fund of Funds Arrangements like the Lifecycle Funds far outweigh the benefits of simplifying the regulatory framework, and we are aware of no evidence to suggest the current regulatory framework applicable to Affiliated Fund of Funds Arrangements requires any enhancement to ensure investor protection.*

The Proposing Release indicates that the Proposal is intended, among other things, "to create a more consistent and efficient regulatory framework for fund of funds arrangements."[13] While we appreciate the Commission's desire to simplify its oversight of fund of funds arrangements, we believe the Proposal will be highly disruptive to existing Affiliated Fund of Funds Arrangements like the Lifecycle Funds which operate in reliance on Section 12(d)(1)(G), and, if necessary, Rule 12d1-2. This regulatory regime has been in place since 1996 and 2006, respectively, creating a level playing field among Affiliated Fund of Funds Arrangements. As discussed above, forcing the Lifecycle Funds to rely on Section 12(d)(1)(G) or Rule 12d1-4 would likely require restructuring the Funds' portfolios, changing the retirement portfolios of hundreds of thousands of investors. This change would be made in order to bring Affiliated Fund of Fund Arrangements under the same rule as (i) closed-end funds and business developments companies (among other fund of fund structures), which, according to the Commission's own analysis, represent only a small percentage of the acquiring funds currently in existence,[14] and (ii) unaffiliated fund of funds, despite Affiliated Fund of Funds Arrangements having operated without incident under the existing regulatory regime for two decades. We do not believe that the benefits to the Commission of simplifying the regulatory framework outweigh the costs that disrupting existing Affiliated Fund of Funds Arrangements will ultimately impose on investors.

Nor is it clear how the Proposal, with respect to Affiliated Fund of Funds Arrangements, would advance the Commission's stated goal of enhancing investor protection. The Proposing Release indicates that the 3% Limit is intended to (i) address the concern that "an acquiring fund could threaten large-scale redemptions as a means of exercising undue influence over an acquired fund" and (ii) "provide a check against the influence that an

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13 *See* Proposing Release at p. 1288.

14 *See* Table 1 on page 1313 of the Proposing Release (there are 5,154 open-end acquiring funds representing approximately $5.1 trillion in AUM; 424 ETFs representing approximately $522 billion in AUM; 969 UITs representing $5 billion of AUM; 108 closed-end funds representing approximately $80 billion of AUM; and 0 BDCs representing $0 of AUM).

acquiring fund can have on an acquired fund when it owns a significant percentage of the acquired fund."[15] Historically, the concern regarding an acquiring fund exerting undue influence over an acquired fund was based on a scenario where an individual, using a relatively small amount of money, acquired control of a fund and used the fund's assets to acquire control of the assets of another fund, which, in turn, could use its assets to control a third fund. As a result, a few individuals effectively could control millions of dollars in shareholder assets invested in various acquired funds. These "pyramiding" schemes were used to enrich these few individuals at the expense of fund shareholders.[16] In addition, the complex structures that resulted from pyramiding created other issues for shareholders – acquiring funds circumvented investment restrictions and limitations and made it impossible for shareholders to understand who really controlled the fund or the true value or nature and risk of their investments.[17]

However, concerns about undue influence, pyramiding and complex structures are entirely misplaced in the context of Affiliated Fund of Funds Arrangements, a fact that both Congress and the Commission have previously recognized. In 1996 Congress enacted (i) Section 12(d)(1)(G) to permit acquiring funds to invest in acquired funds within the same group of investment companies in excess of the limits in Section 12(d)(1)(A) and (ii) Section 12(d)(1)(J) to permit the Commission to provide exemptive relief under Section 12(d)(1) of the 1940 Act when consistent with the public interest and protection of investors. Drawing on Congress' mandate to "to adopt rules and process exemptive applications in the fund of funds area *in a progressive way as the fund of funds concept continues to evolve over time,*"[18] the Commission has since continued to expand the scope of permissible fund of funds arrangements (including Affiliated Fund of Funds Arrangements) through, among other things, the adoption of Rule Rule 12d1-2 in 2003.

Indeed, in the Proposing Release itself, the Commission acknowledges the reasons why Affiliated Fund of Funds Arrangements do not raise the policy concerns underlying Section 12(d)(1). The Proposing Release notes that, when acquiring and acquired funds share a common investment adviser, the adviser's fiduciary duty to both the acquiring and acquired funds mitigates the risk that the acquiring fund would attempt to exercise control over the acquired fund.[19] In fact, the Commission has gone a step further, acknowledging that, even in circumstances where the advisers to the acquired and acquiring funds are merely control affiliates, there is a limited risk that the acquiring fund's adviser would seek to control the acquired fund.[20] While the Proposing Release cites these facts

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15 *See* Proposing Release at 1298.

16 For example, in some cases, controlling individuals caused the acquired funds to purchase securities in companies in which the individuals had an interest. In other cases, these individuals caused funds to direct underwriting and brokerage business to broker-dealers they controlled-often on terms favorable to the broker-dealer. Controlling persons also profited when fund shareholders paid excessive charges due to duplicative fees at the acquiring and acquired fund levels. *Fund of Funds Investments*, Inv. Co. Rel. No. 26198 (the "2003 Proposing Release").

17 *Id.*

18 *See* House Report No. 104-622 to Accompany H.R. 3005, the Securities Amendments of 1996, 104th Congress, June 17, 1996 at 43-44 (emphasis added). In particular, it was noted that the Commission should use the exemptive authority granted to it in Section 12(d)(1)(J) so that "the benefits of [funds of] funds … are available to investors through a variety of different types and sizes of investment company complexes." *Id.* at 43-45.

19 *See* Proposing Release at 1297 ("In circumstances where the acquiring fund and the acquired fund share the same adviser, the adviser would owe a fiduciary duty to both funds, serving to protect the best interests of both funds.").

20 *See id.* ("In addition, in cases where the arrangement involves funds that are advised by advisers that are control affiliates, we do not believe that the acquiring fund adviser generally would seek to benefit the

in exempting Affiliated Fund of Funds Arrangements from the Proposal's control and voting conditions,[21] it inexplicably fails to extend this same logic to the Proposal's redemption limits.

As the sponsor of the Lifecycle Funds and other Affiliated Fund of Funds Arrangements, Nuveen appreciates the Commission's willingness to apply the requirements applicable to fund of funds arrangements in a progressive way. In this regard, Nuveen is not aware of any evidence suggesting that this progressive approach has been leveraged by fund sponsors to develop Affiliated Fund of Funds Arrangements that implicate the policy concerns underlying Section 12(d)(1). In the absence of such evidence, we urge the Commission not to subject Affiliated Fund of Funds Arrangements to the heightened regulation contemplated by the Proposal.

d. Potential alternatives to the Proposal

In lieu of the Proposal, we urge the Commission to consider adopting one of the following alternatives:

- Retain Rule 12d1-2 and permit it to operate contemporaneously with proposed Rule 12d1-4.
- If Rule 12d1-2 is rescinded, exclude investments by acquiring funds in acquired funds within the same group of investment companies from the 3% Limit.

III. The Commission should take action to limit the ability of activist firms to exercise undue influence over listed closed-end funds.

As the leading sponsor of closed-end funds,[22] Nuveen is increasingly concerned about the ability of activist firms to exercise undue influence over listed closed-end funds, to the detriment of the interests of the funds' long-term shareholders. Activist firms have taken advantage of an inadequate statutory framework to hold shares of closed-end funds well in excess of the limits in Sections 12(d)(1)(A)(i) and 12(d)(1)(C), and we urge the Commission to work with Congress to address this issue. Furthermore, we believe that the Proposal's voting condition may have the unintended effect of increasing the influence of activist firms over closed-end funds, and we ask the Commission to consider changes to the Proposal to mitigate this concern.

Under the current regulatory regime, activist firms seeking to control shares of a closed-end fund in excess of the Section 12(d)(1)(A)(i) limit typically do so by forming multiple Section 3(c)(1) or 3(c)(7) funds. Because the Section 12(d)(1)(A)(i) limit is applied at the fund level (*i.e.*, ownership among entities under common control is not aggregated for purposes of the limit), this has the practical effect of allowing activist firms to hold voting power over greater than 3% of a closed-end fund. Moreover, because Section 12(d)(1)(C) is not applicable to private funds, activist firms are able to use this structuring technique to control in excess of 10% of a closed-end fund's voting shares. We encourage the Commission to work with Congress to introduce legislation that would close this structural loophole and better address the goals of Section 12(d)(1). As discussed in further detail in the ICI Letter, the Commission could recommend legislation amending Sections 3(c)(1) and 3(c)(7) to deem any private fund investing in a registered fund and any other private funds controlled by the private fund's manager to be an "investment company" for purposes of Section 12(d)(1)(C).

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acquiring fund at the expense of the acquired fund (nor do we believe that the acquiring fund would seek to influence the acquired fund through its ownership interest in the acquired fund")).

21 *See* Proposing Release at 1296 ("[b]ased on our experience overseeing fund of funds arrangements, we believe the proposed exceptions are appropriately tailored to except only those fund of funds arrangements that do not raise the concerns of undue influence that underlie section 12(d)(1) from the control and voting conditions.").

22 As of March 31, 2019, Nuveen sponsored 74 closed-end funds with aggregate managed assets of $61.7 billion.

In addition, in the event that private funds are permitted to rely on Rule 12d1-4, we encourage the Commission to condition this reliance on compliance with the requirements of Section 12(d)(1)(C), also as discussed in the ICI Letter. Under these circumstances, a private fund relying on Rule 12d1-4 to acquire shares of a closed-end fund in excess of the Section 12(d)(1)(A)(i) limits could not own, in combination with other investment companies and private funds sharing the same investment adviser, more than 10% of the outstanding voting securities of the acquired closed-end fund. We believe this would limit the ability of activist firms to utilize Rule 12d1-4 to exercise undue influence over closed-end funds.

We are also concerned that the Proposal's voting condition may have the unintended effect of increasing the influence of activist firms over closed-end funds. Rule 12d1-4(b)(1)(ii) would require that an acquiring fund and its advisory group that collectively hold more than 3% of an acquired fund utilize "mirror" or "pass-through" voting. As noted above, activist firms are utilizing multiple private funds to hold significant positions in closed-end funds, but private funds would not be subject to Rule 12d1-4.[23] On the other hand, registered funds investing in closed-end funds would be subject to this voting condition. Because "pass-through" voting for such registered funds would be impractical, they would likely "mirror" vote shares held in any closed-end fund subject to the voting condition. This would have the effect of increasing the voting power of activist firms.

We believe the Commission could mitigate this concern by increasing the percentage beyond which an acquiring fund and its advisory group are required to "mirror" or "pass-through" vote. The current 3% threshold is exceedingly low – it is difficult to understand how an acquiring fund and its advisory group could exercise outsized influence when holding such a small percentage of an acquired fund's shares. We recommend that the voting condition's threshold be increased to at least 10%, which we believe is a level at which it is more reasonable for the Commission to be concerned about undue influence. Moreover, increasing the threshold would allow acquiring funds to hold larger positions in closed-end funds without forfeiting the right to exercise their independent judgment regarding shareholder proposals.

IV. The Commission should exclude BDCs from the definition of "acquired fund" for purposes of "acquired fund fees and expenses" disclosed in registered investment company fee and expense tables.

Under Item 3 of Forms N-1A, N-2 and N-3, a registered investment company investing in another investment company is required to include in its prospectus fee table a line item labelled "Acquired Fund Fees and Expenses," which discloses the fees and expenses associated with investments in acquired funds, including BDCs. We urge the Commission, as part of any final rulemaking, to exclude BDCs from the definition of "acquired fund" for purposes of AFFE disclosure in such fee tables. The inclusion of BDC expenses in AFFE disclosure has had a number of negative consequences. In early 2014, certain index providers removed BDCs from their indices in response to concerns expressed by registered funds tracking such indices that BDC investments were increasing their total operating expenses due to AFFE. This has led to a reduction in institutional ownership of BDCs and, by extension, the funding available to BDCs to achieve their goal of small business capital formation, unnecessarily frustrating the original legislative intent motivating their creation.

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[23] Even if Rule 12d1-4 is made available to private funds, activist firms could nonetheless choose to structure around it.

Nuveen appreciates the opportunity to comment on the Proposal. Any inquiries regarding this letter may be directed to me ([redacted] or [redacted]) or Rachael Zufall, Managing Director and Associate General Counsel ([redacted] or [redacted]).

Sincerely,

/s/ Christopher M. Rohrbacher

Christopher M. Rohrbacher
Managing Director and Associate General Counsel
Nuveen, LLC

cc: The Honorable Jay Clayton
The Honorable Robert J. Jackson Jr. The
Honorable Hester M. Peirce
The Honorable Elad L. Roisman

Dalia Blass
Director, Division of Investment Management