

May 2, 2019

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

RE: Fund of Funds Arrangements, File No. S7-27-18

Dear Ms. Countryman:

Calamos Investments LLC (“Calamos”) is pleased to have the opportunity to comment on the Securities and Exchange Commission’s (the “Commission”) proposed Rule 12d1-4 regarding Fund of Funds Arrangements (the “Proposed Rule”). Calamos generally supports the Investment Company Institute’s (the “ICI”) comments on the Proposed Rule. However, we offer our additional comments on an issue related to the investment by certain unregistered investment pools in registered closed-end funds.

We believe that Calamos can provide useful insight into this issue. Serving the needs of institutional and individual investors since 1977 through its operating subsidiaries, Calamos is a global investment firm committed to excellence in investment management and client services. With over \$23 billion in assets under management, Calamos has particular experience with closed-end funds. Calamos’ subsidiary Calamos Advisors, LLC is the investment adviser to six closed-end funds with over \$6.95 billion of assets under management.

Through our involvement in the closed-end fund industry, we have become aware of a very distressing trend of private fund managers running separate pooled investment vehicles in parallel in order to skirt the limitations imposed by Section 12(d)(1)(A)(i) of the Investment Company Act of 1940, as amended (the “1940 Act”).¹ This structure permits these unregistered pools to collectively obtain voting securities of closed-end funds in excess of the three percent limit found in Section 12(d)(1)(A)(i) of the 1940 Act while individually remaining within facial compliance of the limitation.² The pools then use their collective voting power in order to exert influence over closed-end funds to the detriment of their long-term shareholders. These activities can include pushing for tender offers at, or close to, net asset value. Such actions benefit the short-term focus of the well-heeled investors in these hedge funds but can act to the detriment of long-term shareholders in a closed-end fund. Tenders designed solely to monetize a discount to net asset value can cause a fund to prematurely exit investments, disrupt its investment strategy, and deplete its assets; assets that are necessary to fully implement the closed-end fund’s

¹ See, e.g., Rose DiMartino, Protecting Closed-End Fund Investors: A Call to Amend 1940 Act Section 12(d)(1)(A), 26 *The Investment Lawyer* 1 (January 2019) (detailing how private funds can circumvent the 3 percent limit).

² Section 12(d)(1)(A)(i) of the 1940 Act, as pertinent to this issue, prohibits certain private investment pools that rely on the exception from the definition of investment company in Sections 3(c)(1) and 3(c)(7) from purchasing or acquiring the voting stock of a registered closed-end fund if the acquiring fund (or any fund controlled by the acquiring fund) would own in the aggregate more than three percent of the closed-end fund’s total outstanding voting stock as a result of the purchase or acquisition.

investment strategy over time.³ All of these results have the potential to affect long-term returns and increase the expense ratio borne by the fund and indirectly by its retail shareholders.

In essence, this practice effectively allows the controlling person or persons of a consortium of hedge funds to use the group's voting power to push for change that may not be to the benefit of all fund shareholders. This type of action by an affiliated person⁴ to achieve their own narrow goals at the expense of an investment company and its long-term shareholders is the precise type of over-reaching that the 1940 Act was intended to limit.⁵ And yet this undue influence is allowed to occur due to a claimed "wrinkle" in the law.

We understand that hedge funds argue in support of this practice by applying a nuanced and technical reading of Section 12(d)(1). The argument is based on the fact that Section 12(d)(1)(C) of the 1940 Act – which is not applicable to private pools relying on the 3(c)(1) or 3(c)(7) exceptions from the definition of investment company – expressly prohibits acquisitions by "an acquiring company" and "other investment companies having the same investment adviser" from acquiring more than 10% of the outstanding voting stock" of a registered closed-end fund. In contrast, Section 12(d)(1)(A)(i) – which is applicable to these pools – only references an acquiring fund and any company or companies controlled by the acquiring fund. Read together, the argument goes, Congress knew how to legislate to prohibit investment companies operating in parallel and chose not to do so in the case of companies relying on the 3(c)(1) or 3(c)(7) exceptions.⁶

We applaud the ICI's strong recommendation that the Commission work with Congress to introduce legislation that would better address the goals of Section 12(d)(1) by amending the 1940 Act to make Section 12(d)(1)(C) applicable to private pools investing in closed-end funds. We believe this approach is laudable. But we believe that the Commission has the power to address the issue now, as part of this rulemaking, without a need for Congressional action.

Congress drafted the 1940 Act broadly to ensure that its remedial purposes were achieved. A group of hedge funds operating in parallel to achieve particular investment results may be fairly deemed to be "an organized group of persons" under Section 2(a)(8) of the 1940 Act, and thus a "company" for purposes of

³ A failure to engage in such a tender in the face of an activist shareholder expending its full power to force change could be even more damaging to the fund and its shareholders.

⁴ The person controlling the consortium will typically be an affiliated person of the acquired closed-end fund. Under Section 2(a)(3) of the 1940 Act, an affiliated person includes "any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person." Because these consortiums of private funds typically control over 5% of the acquired closed-end fund's shares, the controlling person of the consortium would be an affiliated person of the acquired fund.

⁵ See Section 1(b) of the 1940 Act, noting investors are adversely affected when investment companies are operated in the interest of affiliated persons or in the interest of other investment companies or persons engaged in other lines of business rather than in the interest of all classes of such companies' security holders.

⁶ The counter argument, of course, is that Congress also knew how to legislate to prevent clever persons from creatively using multiple companies from skirting the statutory limitations that otherwise applied to them. See Section 48(a) of the 1940 Act making it "unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under" the 1940 Act or its rules.

the 1940 Act.⁷ Given that such a company would be owned by individuals through securities ownership, a “company” comprised of an “organized group of persons” would thus be a “person” under Section 2(a)(22) and an “issuer” under Section 2(a)(28) and would potentially be either an investment company under Section 3(a), or excluded from the definition of investment company pursuant to Sections 3(c)(1) or 3(c)(7). In either case, by treating such an organized group of persons as a single entity, that group’s investments in a closed-end fund would be subject to the limits imposed by Section 12(d)(1)(A)(i).

In addition to working towards a legislative solution to this issue in accordance with the ICI’s recommendation, we urge the Commission to consider adopting an interpretive rule pursuant to its authority under Section 38 of the 1940 Act⁸ that would clarify that a group of hedge funds operating in parallel to invest in a closed-end fund for purposes of exerting influence over that fund is an organized group of persons within the meaning of Section 2(a)(8). We believe that this interim step would make clear that such groups of hedge funds are subject to Section 12(d)(1)(A)(i) despite their structuring to avoid regulation.

We note that this approach does not stop investors from voicing their support for change. Even if the Commission were to take this approach, the hedge fund investors would still be welcome to convince other shareholders of the rightness of their position;⁹ they would just have to work for such change in a manner that is consistent with the law.

Calamos Investments LLC appreciates the opportunity to comment on this rulemaking and would welcome the opportunity to further discuss our views with you. Please feel free to contact the undersigned at [REDACTED] or [REDACTED] if you prefer to do so.

Very truly yours,


J. Christopher Jackson
Senior Vice President & General Counsel

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

⁷ See Bancroft Convertible Fund v. Zico Inv. Holdings Inc., 825 F. 2d 731, (1987) (noting that a number of investors in a hedge fund could themselves be deemed to be a single “company” for purposes of the 1940 Act due to their status as “an organized group of persons” under Section 2(a)(8)).

⁸ Section 38 of the 1940 Act gives the Commission the “authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the powers conferred upon the Commission elsewhere in this subchapter, including rules and regulations defining accounting, technical, and trade terms” used in the 1940 Act.

⁹ See Rule 14a-8 under the Securities Exchange Act of 1934, which allows shareholders who hold as little as \$2,000 in market value of a fund for a least one year to submit shareholder proposals in the fund’s proxy statement.