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[redacted]

May 2, 2019

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

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

Dear Ms. Countryman,

Massachusetts Mutual Life Insurance Company ("MassMutual") appreciates the opportunity to comment on the Commission's proposed new rule 12d1-4 ("Proposed Rule") under the Investment Company Act of 1940, as amended (the "1940 Act"). MassMutual agrees with the Commission's goal of a streamlined and enhanced regulatory framework surrounding fund of funds arrangements and is broadly supportive of the manner in which the Proposed Rule enables market participants to utilize fund of funds structures without first obtaining exemptive relief. We write solely to comment on one aspect of the Proposed Rule.

MassMutual is a provider of a wide variety of financial services and products, serving the interests of investors through a range of insurance, investment, and retirement planning solutions. Accordingly, we regularly consider the potential application of novel structures to serve investor needs, which may include multi-tiered fund of funds arrangements involving private funds relying on Sections 3(c)(1) and 3(c)(7) of the 1940 Act ("3(c)(1)/(7) Issuers").

The Proposed Rule would restrict the ability of underlying funds in a fund of funds arrangement ("acquired funds") to invest in 3(c)(1)/(7) Issuers. Because Section 12(d)(1) does not by its terms limit acquired fund investment in 3(c)(1)/(7) Issuers, the Proposed Rule would, in this respect, be more restrictive than the statute. As discussed below, we do not believe that the proposed restriction on the ability of acquired funds to invest in 3(c)(1)/(7) Issuers is necessary in order to achieve the intended purposes of Section 12(d)(1) and would unduly restrict the development of novel and innovative products.

i) <u>The Proposed Rule's Restrictions on Acquired Funds' Acquisition of Securities of 3(c)(1)/(7) Issuers is Inconsistent With Section 12(d)(1) Framework</u>

Section 12(d) limits the extent to which one investment company may invest in another investment company.[1] Section 12(d) is designed to address concerns posed by fund of funds arrangements relating to excessive layering of fees, abuse of control by the acquiring fund and the formation of overly complex

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1 Section 12(d)(1)(A) prohibits an investment company from (i) acquiring more than 3% of another investment company's outstanding voting securities, (ii) investing more than 5% of its total assets in any one investment company or (iii) investing more than 10% of its total assets in investment companies generally.

structures that could be confusing to investors.[2] As noted above, Section 12(d)(1) does not by its terms limit investment by an acquired fund in 3(c)(1)/(7) Issuers. Rather the only limitations pertaining to 3(c)(1)/(7) Issuers relate to investments **by** 3(c)(1)/(7) Issuers **in** registered investment companies.[3] The absence of limitations on investment by acquired funds in 3(c)(1)/(7) Issuers suggests that Congress did not believe that acquired fund investments in 3(c)(1)/(7) Issuers implicate the concerns designed to be addressed by Section 12(d)(1). In view of the foregoing, the extension of 12(d)(1)(a) limitations to acquired fund investments in 3(c)(1)/(7) Issuers seems to be inconsistent with Congressional intent.[4]

ii) Policy Concerns Regarding Overly Complex Fund Structures Can Be Addressed Without Limiting Acquired Fund Investments in Issuers Relying on Sections 3(c)(1) and 3(c)(7)

By restricting acquired fund investments in 3(c)(1)/(7) Issuers, the Proposed Rule would preclude application of fund of funds structures to a wide range of potentially beneficial contexts. We believe that any Commission concerns respecting acquired fund investment in 3(c)(1)/(7) Issuers may be addressed through a more flexible approach that would not require the broad restriction proposed. Such an approach could involve some combination of enhanced disclosures, fee waivers and other fund policies to resolve the Commission's concerns in a more targeted manner.

We believe an enhanced disclosure framework can effectively mitigate any concerns arising from the increased complexity of a multi-tiered fund of funds arrangement involving a 3(c)(1)/(7) Issuer. The Proposed Rule requires that a fund that is or may be an acquiring fund disclose so in its registration statement so as to put other funds on notice. Such a disclosure requirement could be plausibly expanded to also require that a fund fully disclose in its registration statement whether it will invest in any 3(c)(1)/(7) Issuers, as well as any risks and costs associated with such an investment. For example, acquiring funds

2 *See Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth*, H.Rep. No. 2337, 89th Cong., 2d Sess. (1966) ("PPI Report") at 321 ("If funds on funds are permitted to proliferate, how would an investor decide among the many such companies seeking his investment dollar? Would he not need a fund on funds on funds to make this decision?"); *see also* House Report No. 104-622 to Accompany H.R. 3005, the Securities Amendments of 1996, 104th Congress, June 17, 1996 at 43 (noting that Section 12(d)(1)(G)(i)(IV) "is intended to avoid overly complex inter-corporate structures that may present issues that have not been presented in the types of fund of funds arrangements previously considered by the Commission."). *See also* PPI Report at 316 (noting that the "potential for control, basic to the fund holding company structure, carries with it obvious dangers to investors in registered investment companies."); see also *id.* at 318 ("[A]ny effects of redemptions which may occur would be multiplied as fund holding company operations grow and their structures become more complex" and "[i]nherent in the fund holding company structure is a layering of costs.").

3 By its own terms, Section 12(d)(1)(A) confines itself only to investment companies and does not reach any further. By contrast, Sections 3(c)(1) and 3(c)(7) each provide an exclusion from the statutory definition of an "investment company." A company excluded from investment company status would ordinarily not be subject to the limitations set forth in 12(d)(1). However, both Sections 3(c)(1) and 3(c)(7) provide that companies relying on these exclusions are to be considered "investment companies" for purposes of the limitations set forth in Sections 12(d)(1)(A)(i) and (B)(i), but **only** in terms of their own acquisition of shares in registered investment companies. There is no corresponding statutory restriction on a registered investment company's investment in the securities of a 3(c)(1)/(7) Issuer.

4 *See* Senate Report No. 104-293 to Accompany S. 1815, the Securities Investment Promotion Act of 1996, 104th Congress, June 26, 1996 at 23 ("New section 3(c)(7)(D) imposes the investment restrictions of section 12(d)(1)(A)(i) and (B)(i) of the Investment Company Act on all section 3(c)(1) and section 3(c)(7) issuers, *but only in connection with the transactions involving securities issued by registered investment companies.")* (emphasis added).

could continue to be required to disclose the amounts and details of underlying fees and expenses attributable to investments in underlying 3(c)(1)/(7) Issuers - building upon the existing disclosure framework for Acquired Fund Fees and Expenses ("AFFE").[5] Similarly, acquiring funds could be required to include specific prospectus disclosure relating to an investment strategy of investing in 3(c)(1)/(7) Issuers, as well as risk disclosure relating to the risks of investing in 3(c)(1)/(7) Issuers (which in each case would include disclosure relating to the complexity of the structure). We also believe that fee waivers could be similarly utilized in a manner that addresses concerns associated with layered fees and expenses. This would allow for fund of funds structures targeting certain market segments or asset classes made available through 3(c)(1)/(7) Issuers, while guarding against the threat that the fund of funds structure would be abused to assess duplicative fees.

We note that in cases where acquired funds in a fund-of-funds structure invest in 3(c)(1)/(7) Issuers, the policy concerns regarding pyramiding of control and the exercise of undue influence would, in these circumstances, only apply to the investors in the 3(c)(1)/(7) Issuers which are exempt from most provisions of the 1940 Act, rather than investors in the registered funds that are subject to the 1940 Act. We believe the Proposed Rule need not attempt to protect 3(c)(1)/(7) Issuers and their investors from these concerns, since private fund investors are sophisticated individuals and institutions who perform their due diligence and can understand the complex structure of the private fund and its fees.

iii) <u>The Commission Should Continue to Consider Novel Individual Applications for Exemptive Relief</u>

To the extent that this flexibility is not included in any final rule, we ask that the Commission remain open to consideration of individual novel requests for exemptive relief for fund of funds structures in the future, including those which would involve acquired funds investing in 3(c)(1)/(7) Issuers. The Proposed Rule aims to establish a "comprehensive, streamlined framework" that standardizes the conditions under which fund of funds arrangements operate. It should not, however, foreclose the possibility of continued dialogue between the Commission and market participants on the potentially beneficial applications of fund of funds arrangements that may nonetheless require exemptive relief from the bright lines any final rule draws, including ones which might utilize the flexibility sought in this letter.

The Commission is empowered under Section 12(d)(1)(J) to provide exemptive relief under Section 12(d)(1) when "consistent with the public interest and the protection of investors." The congressional record further suggests legislative intent that this exemptive authority be used by the Commission "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.*"[6] Attitudes towards fund of funds structures have indeed evolved over time, and the Commission's progressive exercise of its exemptive authority has played a role in driving these developments. It has done so by allowing for a dialogue in which new and potentially beneficial use cases prove themselves capable of addressing historical concerns and demonstrating that they are consistent with the public interest and the protection of investors.[7] Such a dialogue enables novel relief to possibly

5 *See* Form N-1A; Form N-2; Form N-3. We note that in the Proposing Release, the Commission requested comment on whether these disclosure requirements should be amended or removed. We agree with various other commenters that the AFFE disclosure requirements should be revised so as to no longer require such expenses to be included in the fee table, but instead disclosed separately in a different location in the registration statement. See, *e.g.*, Comment Letter of Dechert LLP (May 2, 2019), Comment Letter of Asset Management Group, Securities Industry and Financial Markets Association (May 2, 2019).

6 *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).

7 We note, for example, that the limited exceptions the Proposed Rule provides allowing acquired funds to invest in other investment companies or private funds in excess of the Section 12(d)(1)(A) limits in certain

become routine relief, which may, in turn, shape the contours of some future formal rulemaking. We believe that such a dialogue should continue and not be foreclosed by the adoption of a final rule.

iv) Conclusion

We commend the Commission's efforts towards establishing a fund of funds regulatory framework under which substantially similar fund of funds arrangements are not subject to different conditions. We likewise applaud the Commission for simplifying the process by which a registered investment company can access the benefits that fund of funds structures make possible. We hope, however, that the Commission reconsider its position with respect to 3(c)(1)/(7) Issuers and the role they may play within this new framework.

We thank you for the opportunity to comment on the Proposed Rule. Please feel free to contact me at [redacted], or our outside counsel at Dechert LLP, Jeremy I. Senderowicz at [redacted], with any questions about this submission.

Sincerely,

Helder P. Pereira
Lead Counsel, Corporate Law

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

circumstances reflect prior exemptive orders. *See, e.g.*, Highland Capital Management, L.P., *et al.*, Investment Company Act Release Nos. 29890 (Dec. 19, 2011) [76 FR 80424 (Dec. 23, 2011)] (notice) and 29918 (Jan. 17, 2012) (order) and related application; *see also* Brinker Capital Destinations Trust, *et al.*, Investment Company Act Release Nos. 32478 (Feb. 14, 2017) [82 FR 11277 (Feb. 21, 2017)] (notice) and 32534 (Mar. 16, 2017) (order) and related application.