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May 2, 2019

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Vanessa Countryman
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Via Electronic Filing

Re: Fund of Funds Arrangements; Rel. No. IC-33329; File No. S7-27-18

Dear Ms. Countryman:

Ropes & Gray LLP appreciates the opportunity to provide these comments to the United States Securities and Exchange Commission (the “**Commission**”) on the Commission’s proposed new Rule 12d1-4 (the “**Proposed Rule**”) under the Investment Company Act of 1940, as amended (the “**1940 Act**”), and the Commission’s related proposals to amend Rule 12d1-1 under the 1940 Act and to rescind Rule 12d1-2 under the 1940 Act and certain exemptive orders that have been granted to funds of funds and their sponsors (together with the Proposed Rule, the “**Proposal**”).

Our firm represents many registered funds that operate as funds of funds, independent directors to funds of funds, and asset management firms registered with the Commission as investment advisers that sponsor funds of funds. Collectively, these funds of funds employ a broad array of structures and invest in reliance on a variety of authorities, often in combination. Because the Proposal would directly apply to our clients, we are writing to provide our views on select aspects of the Proposal.

Fund of funds arrangements play a critically important and highly beneficial role for investors. As noted by the Commission in the proposing release relating to the Proposal, funds of funds provide an efficient, cost-effective means for funds and their advisers to provide investors with exposure to a particular market or asset class.¹ Many investors use fund of funds arrangements as a convenient way to allocate and diversify their investments in a single portfolio, or to gain exposure to an asset class or fund not otherwise available to that investor.² As a result, nearly one half of all registered funds

¹ Fund of Funds Arrangements, Rel. No. IC-33329 (Dec. 19, 2018) (the “**Proposing Release**”), at 7.

² *Id.* at 7-8.

invest in other funds.³ We applaud the Commission’s objective of creating “a consistent and efficient rules-based regime for the formation and oversight of funds of funds.”⁴ Particularly in view of the highly beneficial role played by funds of funds, we believe that any new rulemaking in this area should seek to support and foster the use of funds of funds in a manner that is consistent with the protection of investors and avoid unduly burdensome conditions with the potential to dramatically curtail their use or effectiveness.

This comment letter focuses on three specific aspects of the Proposal:

- (i) The provision of the Proposed Rule prohibiting an acquiring fund that holds more than 3% of an acquired fund’s outstanding voting shares in reliance on the Proposed Rule from redeeming more than 3% of the acquired fund’s shares during any thirty-day period in which the acquiring fund holds the acquired fund’s shares in excess of the 3% limit (the “**Redemption Cap**”)⁵;
- (ii) The provisions of the Proposed Rule generally prohibiting complex fund of funds arrangements, including by restricting a fund that is an acquired fund under the Proposed Rule from investing in another fund, subject to certain enumerated exceptions (the “**Multiple-Tier Restriction**”)⁶; and
- (iii) The Proposal’s request for comment on a number of questions relating to the status of investment vehicles domiciled outside the United States (“**Foreign Funds**”) under the Proposed Rule and Section 12(d)(1) of the 1940 Act more generally, where Foreign Funds are acquired funds in fund of funds arrangements.

The comments expressed herein reflect the views of the undersigned, as practitioners with many years of experience in providing legal counsel to registered investment companies, independent directors to registered investment companies, and asset management firms. They are not intended to represent the views of our clients.

I. The Redemption Cap

A. *Impact of the Redemption Cap*

The Commission proposed the Redemption Cap as a means “to address concerns that an acquiring fund could threaten large-scale redemptions as a means of exercising undue influence over an

³ *Id.* at 7.

⁴ *Id.* at 6.

⁵ See Rule 12d1-4(b)(2) of the Proposed Rule.

⁶ See Rules 12d1-4(b)(4)(i)-(iii) of the Proposed Rule.

acquired fund.”⁷ While we appreciate the Commission’s objective of preventing an acquiring fund’s threat of large-scale redemptions as a means of exercising undue influence over acquired funds, we are concerned that the Redemption Cap—which goes beyond any conditions to reliance on Section 12(d)(1)(G), current Rule 12d1-2 or existing exemptive orders—is an unnecessary measure that would require many existing funds of funds to restructure and could curtail the use and effectiveness of fund of funds structures.

The Commission’s analysis regarding the potential impact of the Redemption Cap (and its stated basis for believing that the Redemption Cap would not have a large effect on funds of funds) emphasizes the relatively low percentage of recent historical monthly redemptions by unlisted acquired funds that exceed the proposed 3% redemption limit.⁸ We believe that any analysis of the likely impact of the Redemption Cap or any similar limit on redemptions should focus primarily on the number of funds that *own* more than 3% of another fund’s shares rather than the number of funds that *actually redeem* more than 3% of another fund’s shares in any thirty-day period or the frequency with which funds make such redemptions. As a practical matter, we expect that capping redemptions at 3% of an acquired fund’s shares in any thirty-day period would likely cause many, if not most, funds of funds to decide not to own more than 3% of any acquired fund’s shares in reliance on the Proposed Rule. Even where an acquiring fund has no intention of making such a large redemption, we expect the loss of *flexibility* to do so would be unacceptable to many portfolio managers. As a result, we are concerned that the Redemption Cap would have a far more significant impact on existing fund of funds arrangements than the Commission anticipates.

We are also concerned that implementation of the Redemption Cap could involve a number of additional unintended, undesirable consequences, including those identified below.

Reduced use of funds of funds. In light of the obligation of a fund of funds to stand ready to honor redemptions, the loss of flexibility to redeem acquired fund shares in excess of 3% within a thirty-day period would make many otherwise attractive investments in acquired funds impracticable.

Increased transaction costs for current fund of funds investors. As noted above, we expect that the Redemption Cap could cause many (if not most) funds of funds to restructure their investments. For example, funds of funds that currently rely on Rule 12d1-2 to invest in a mix of affiliated funds and other securities may opt to divest any investments not permitted by Section 12(d)(1)(G) so as to rely on Section 12(d)(1)(G) and avoid application of the Redemption Cap. Similarly, funds of funds required to rely on the Proposed Rule (and thus subject to the Redemption Cap) and that currently hold more than 3% of one or more acquired fund’s shares may opt to reduce these positions to less than 3% to avoid the loss of flexibility to redeem these positions due to the Redemption Cap. In each case, the portfolio restructuring may result in significant transaction costs and disruption for investors

⁷ Proposing Release, *supra* n.1, at 47.

⁸ *Id.* at 50, n.125.

in funds of funds and, where funds of funds redeem acquired fund shares to bring ownership levels to less than 3%, acquired funds.

Increased compliance burdens and risks for funds of funds. A fund of funds relying on the Proposed Rule would be required to monitor the percentage of each acquired fund's shares held in its portfolio, both to ensure compliance with the Proposed Rule and to appropriately assess the liquidity of those holdings in connection with the fund's liquidity risk management program pursuant to Rule 22e-4 under the 1940 Act.⁹ In addition to the increased costs associated with this new compliance burden, we note that there are some practical challenges to monitoring compliance with the Redemption Cap in the case of unaffiliated acquired funds, as a fund of funds may not know how many acquired fund shares are outstanding on a given day (as that number would fluctuate with purchases and redemptions by the acquired fund's other shareholders). This lack of transparency poses additional compliance risks for the funds of funds.

Reduced effectiveness of funds of funds. In our experience, the flexibility provided by Rule 12d1-2 for funds relying on Section 12(d)(1)(G) to also make direct investments in securities has provided valuable flexibility to sponsors of funds of funds and significant benefits to shareholders. The Redemption Cap (together with the proposed rescission of Rule 12d1-2) would place artificial constraints on available investments and, therefore, would provide less flexibility to the portfolio manager of a fund of funds to design a portfolio that he or she believes is in the best interests of the fund's investors. For example, if Rule 12d1-2 were rescinded, a fund relying on Section 12(d)(1)(G) would be unable to obtain exposure to a particular security available only through direct investment. In addition, a fund relying on the Proposed Rule, while able to make direct investments in securities, would lose the flexibility to redeem acquired fund shares in excess of 3% within a thirty-day period, which may make otherwise attractive investments in acquired funds impracticable. As a result, such a fund may be compelled to decrease its investment in a particular acquired fund to avoid being subject to the Redemption Cap, and the other acquired funds or investments in which the fund may invest may offer less return potential or more risk. The loss of that flexibility may render some fund of funds arrangements less effective in delivering attractive risk/return characteristics (and resulting performance) to their investors.

Increased risk to funds of funds and their investors. In seeking to better protect acquired funds from the risks of certain large redemptions, the Redemption Cap may have the unintended effect of making acquiring funds more risky. An acquiring fund that owns more than 3% of one or more acquired funds in reliance on the Proposed Rule would be exposed to the risk that it is unable to fully liquidate its holdings of those acquired funds to accommodate large redemptions by its own shareholders. This could force the acquiring fund to meet redemptions by selling other assets at potentially undesirable terms, and leave the acquiring fund with an undesired, disproportionately large exposure to the assets held by the acquired fund. An acquiring fund that owns more than 3% of an acquired fund in reliance

⁹ For a further discussion of the interplay between the Redemption Cap and Rule 22e-4, please see the section "Interplay with 15% limit on illiquid investments" below.

on the Proposed Rule also would be exposed to the risk that it is unable to fully redeem its position in the acquired fund at a time where the value of the acquired fund is falling rapidly (for example, during stressed market conditions), which could result in a significant decline in the value of an investor's investment in the acquiring fund.

The Redemption Cap could also unfairly disadvantage investors in fund of funds arrangements relative to other investors who invest in the same acquired fund directly. An investor whose exposure to an acquired fund came through an investment in a fund of funds relying on the Proposed Rule would be subject to the Redemption Cap, while other investors whose exposure to the same acquired fund came through direct investment would not be so limited. As a result, in cases where the fund of funds holds more than 3% of the acquired fund's shares, the direct investors would effectively have priority over the fund of funds investors in accessing liquidity from the acquired fund. This could result in significant harm to the fund of funds investors in circumstances where the acquired fund meets significant redemptions by selling a disproportionately large share of its most liquid assets first, leaving a disproportionately large share of any less liquid assets in its portfolio for its remaining investors, including funds of funds unable to redeem their positions because of the Redemption Cap.

Uneven playing field for funds relying on the Proposed Rule. The Redemption Cap would create a dramatically uneven playing field as between funds of affiliated funds relying on the statutory exemption in Section 12(d)(1)(G) and those relying on the Proposed Rule. Funds relying on Section 12(d)(1)(G) have operated effectively without a Redemption Cap since the 1940 Act was amended to include that statutory exemption in 1996. Whereas funds relying on Section 12(d)(1)(G) could redeem acquired fund shares without limitation, funds relying on the Proposed Rule would be subject to the Redemption Cap. We see no basis for such a distinction, as the fact that a fund of affiliated funds also invests a portion of its assets directly in securities (and thus has to rely on the Proposed Rule) has no bearing on the risks it poses to acquired funds. This distinction would create a regulatory regime in which substantially similar fund of funds arrangements are subject to markedly different conditions, which runs counter to the Commission's stated goal of creating a "more consistent and efficient regulatory framework."¹⁰ We note that this discrepancy could be easily and sensibly addressed by excluding affiliated fund of funds arrangements from the Redemption Cap condition.

Uneven playing field for smaller acquired funds. We expect that the Redemption Cap would have a disproportionately negative impact on smaller acquired funds. To avoid the burdens of the Redemption Cap, we expect that many acquiring funds relying on the Proposed Rule would seek to avoid owning more than 3% of another fund's shares, making it more difficult for small funds (where an investment by an acquiring fund of the same absolute amount would be more likely to exceed 3% of the acquired fund's shares) to attract capital from other funds.

Uneven playing field for certain affiliated funds of funds. The Redemption Cap could have a disproportionately negative impact on funds of funds that invest in a mix of affiliated funds and other

¹⁰ *Id.* at 12-13.

investments (and, therefore, must rely on the Proposed Rule) and that are large relative to the size of the affiliated funds in which they invest. The large relative size of these funds of funds would mean that a relatively modest (in percentage terms) investment in an affiliated fund could trigger the limitations of the Redemption Cap. As a result, such funds of funds may need to reduce their allocations to individual affiliated funds in order to preserve adequate liquidity and reallocate a portion of their assets to unaffiliated funds or to direct investments in securities, even where their advisers may otherwise prefer the investment exposures and complete transparency of holdings of affiliated funds. In some cases, these constraints may make affiliated fund of funds structures unworkable.

Interplay with 15% limit on illiquid investments. By capping the amount of an acquired fund's shares that can be redeemed by an acquiring fund in any thirty-day period, absent the development of a market for open-end mutual fund shares (*i.e.*, a means of disposing of shares other than redeeming those shares to the issuer), the Redemption Cap presumably requires the acquiring fund to treat any excess beyond 3% of the acquired fund's shares as "illiquid" under Rule 22e-4 under the 1940 Act.¹¹ Thus, even if acquiring funds conclude that they can accept the Redemption Cap's limitations on their ability to redeem acquired fund shares from an investment and fiduciary perspective, acquiring funds nonetheless may need to restructure to bring themselves into compliance with the 15% limit on investments in illiquid assets under Rule 22e-4.

B. *Other Protections Exist*

While we acknowledge the Commission's objective of preventing an acquiring fund's threat of large-scale redemptions as a means of exercising undue influence over acquired funds, we do not believe the Redemption Cap is necessary to protect acquired funds from possible overreaching by acquiring funds. Rather, we believe that there are other protections contemplated by the Proposed Rule, as well as existing protections, that appropriately mitigate the risk of undue influence in the context of fund of funds arrangements.

Limits on voting and control under the Proposed Rule. Under the Proposed Rule, an acquiring fund and its "advisory group"¹² would not be permitted to "control" an unaffiliated acquired fund. "Control" would be determined pursuant to Section 2(a)(9) of the 1940 Act, including the rebuttable presumption that any person who directly or indirectly beneficially owns more than 25% of the voting

¹¹ See Rule 22e-4(a)(8), which defines "illiquid investment" as "any investment that the fund reasonably expects cannot be sold or disposed of in current market conditions *in seven calendar days or less* without the sale or disposition significantly changing the market value of the investment . . ." (emphasis added).

¹² "Advisory group" is defined in proposed Rule 12d1-4(d) to mean 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."

securities of a company controls that company.¹³ Also under the Proposed Rule, if an acquiring fund and its advisory group, in the aggregate, held more than 3% of an unaffiliated acquired fund's shares, they would be required to vote those shares either by seeking instructions from their security holders regarding how to vote or by echo/mirror voting the shares in the same proportion as all other holders of the acquired fund's shares. These control and voting requirements are similar to conditions found in current exemptive orders providing relief from the limitations of Section 12(d)(1), except that the voting requirements under the Proposed Rule are even more stringent, applying once a fund owns more than 3% of an acquired fund's shares (as opposed to 25% under exemptive orders). These requirements limit the potential for overreaching by limiting the aggregate size of an acquiring fund's investments in an unaffiliated fund, and ensuring that an acquiring fund has very limited voting power in unaffiliated funds.

Adviser's fiduciary duties. An adviser to an acquiring fund has a fiduciary duty to act in the best interests of that fund, free from any self-dealing. An adviser may breach its fiduciary duty to an acquiring fund if it placed its own interests above the interests of the fund (e.g., by using the threat of redeeming the acquiring fund's investment in an acquired fund to compel an unaffiliated acquired fund to hire the adviser's affiliate). As a result, the fiduciary duty owed to an acquiring fund by its adviser provides meaningful protection against the very risk the Redemption Cap is designed to address.

In the context of funds of affiliated funds, the Commission has long recognized that the duties owed by a common adviser (or advisers that are control affiliates) to both acquiring and acquired funds serve to protect both funds. In this regard, the Proposing Release observed that "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 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)."¹⁴ In view of this observation, the Proposed Rule does not seek to apply its control and voting provisions to funds of affiliated funds, yet does seek to apply the Redemption Cap to funds of affiliated funds. In light of the fiduciary duties owed to both funds in an affiliated fund of funds arrangement, we do not believe that there is a meaningful threat of undue influence through the threat of redemptions and, therefore, do not believe that it is necessary or appropriate to apply the Redemption Cap to affiliated fund of funds arrangements.

Use of in-kind redemptions. The risk of overreach by acquiring funds is mitigated in many cases by the ability of an acquired fund to satisfy redemption requests in kind. Redemptions in kind reduce the potential for undue influence where a shareholder seeks to redeem a substantial position by avoiding much of the disruption that the redemption would otherwise have on the fund's portfolio and its remaining shareholders. In its adopting release for Rule 22e-4, the Commission observed the

¹³ The Proposed Rule relies on the definition of "control" under Section 2(a)(9) of the 1940 Act. See Proposing Release, *supra* n.1, at 163.

¹⁴ Proposing Release, *supra* n.1, at 41.

potential for redemptions in kind to “address any potential fund or shareholder inequities.”¹⁵ Moreover, in practice, an acquired fund’s ability to pay redemption proceeds in kind rather than in cash is often sufficient to help the acquired fund negotiate an orderly redemption schedule with a shareholder requesting a large redemption. While a redemption in kind generally is not a viable option for a fund to satisfy a redemption request by some types of investors (*e.g.*, retail investors), there is no practical reason that an acquired fund could not satisfy part or all of a large redemption request by an acquiring fund in kind.

We further note that we are not aware of any actual instances where an acquiring fund has attempted to exercise undue influence over an acquired fund by using a threat of a large-scale redemption. While we acknowledge the Commission’s concern regarding the potential for this kind of activity, we believe that the existing and proposed protections described above offer appropriate protection for acquired funds, without the need for the imposition of the Redemption Cap (or similar limit on an acquiring fund’s ability to redeem shares of an acquired fund) and its associated burdens.

C. *Potential Alternatives to the Redemption Cap*

While we believe the protections discussed above are adequate to protect acquired funds from the risk of overreach without the need for a Redemption Cap, to the extent the Commission believes additional protections are necessary or appropriate, we recommend that it consider the following measures, individually or collectively, in lieu of the Redemption Cap:

Enhanced disclosure. Acquired funds with more than 3% of their shares held by a single investment company could be required to disclose in their prospectuses the risk that acquiring funds and other large investors could redeem their shares suddenly, which could require the acquired fund to sell assets quickly, including during unfavorable market conditions and/or at undesirable prices, or could otherwise disrupt the acquired fund’s operations. Disclosure of this risk would put investors and prospective investors on notice regarding the possibility of large redemptions and the implications for their investment, allowing them to make informed investment judgments.

In-kind redemptions. Acquired funds could be required to reserve the right to honor large redemption requests in kind, regardless of whether they occur during periods of market stress. As discussed above, redemptions in kind can mitigate the disruption to a fund’s portfolio and its remaining shareholders that can occur when a shareholder makes a large redemption request. The acquired fund’s ability to use redemptions in kind may also discourage attempts by acquiring funds at exercising undue influence through the threat of a large redemption.

To further the effectiveness of redemptions in kind as a defense against attempts at overreach, the Commission could take a number of steps to facilitate an acquired fund’s ability to use redemptions in kind in the case of large redemptions by acquiring funds, including: (a) requiring acquiring funds

¹⁵ Investment Company Liquidity Risk Management Programs, Rel. No. IC-32315 (Oct. 13, 2016), at 242.

relying on the Proposed Rule to commit to waiving any Rule 18f-1 election by the acquired fund and to receiving, at the election of the acquired fund, all or a portion of any redemption proceeds in kind; or (b) requiring acquired funds to disclose their potential use of redemptions in kind for all large redemptions (as opposed to only during stressed market conditions).

Enhanced procedures for unaffiliated fund of funds arrangements. While we do not believe that any additional procedures or other protections in lieu of the Redemption Cap would be necessary for affiliated fund of funds arrangements served by either a single adviser or advisers that are control affiliates,¹⁶ to the extent the Commission believes that additional protections are needed for unaffiliated fund of funds arrangements, we would encourage the Commission to consider requiring conditions similar to those required by current exemptive orders allowing unaffiliated fund of funds arrangements.¹⁷ While these conditions are subject to their own burdens that would themselves benefit from streamlining, our sense is that they have worked effectively in practice and provide a measure of protection for acquired funds against the risk of overreaching by unaffiliated acquiring funds without imposing the same level of burdens and hardships we expect could result from the Redemption Cap.

II. The Multiple-Tier Restriction

One Congressional concern underlying Section 12(d)(1) of the 1940 Act was that complex multiple-tier fund structures may lead to excessive fees and investor confusion.¹⁸ In the Proposing Release, the Commission noted this concern, observing that “although we acknowledge that three-tier structures may, in certain circumstances, provide efficient and cost-effective exposure to market segments, we continue to believe that three-tier structures can obfuscate the fund’s investments, fees, and related risks.”¹⁹ The Multiple-Tier Restriction is designed to protect acquiring fund investors

¹⁶ In this regard, we agree with the reasoning the Commission articulated in suggesting as a possible alternative to the Proposed Rule that the Redemption Cap not be imposed for funds within the same group of investment companies. *See* Proposing Release, *supra* n.1, at 165 (“... [S]uch an alternative potentially would maintain investor protection because fund of funds arrangements involving control affiliates do not raise the same concerns regarding undue influence as other types of fund of funds arrangements. In circumstances where the acquiring fund and acquired fund share the same adviser or subadviser, the adviser or subadviser would owe a fiduciary duty to both funds, serving to protect the best interests of each fund. In addition, in cases where the arrangement involves funds that are advised by advisers that are control affiliates, the acquiring fund adviser is less likely to seek to benefit the 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.”).

¹⁷ For example, under current exemptive orders, an acquired fund’s board must adopt procedures reasonably designed to monitor purchases by the acquired fund in an underwriting in which an affiliate of an acquiring fund is the principal underwriter. Likewise, an acquiring fund’s board must adopt procedures reasonably designed to assure that the acquiring fund’s adviser does not take into account consideration received from an acquired fund or certain of its affiliates. Additionally, current exemptive orders require acquiring funds and acquired funds to enter into participation agreements that state that the funds understand and agree to comply with the terms and conditions of the order.

¹⁸ Proposing Release, *supra* n.1, at 77.

¹⁹ *Id.* at 83.

from unduly complex structures and the concerns associated with them.²⁰ Specifically, the Multiple-Tier Restriction generally would prohibit arrangements where an acquired fund invests in other investment companies in excess of the limits in Section 12(d)(1)(A),²¹ effectively restricting most fund of funds arrangements to two tiers (other than in limited circumstances enumerated in proposed Rule 12d1-4(b)(4)(iii)(A-E)). The Proposing Release states that the enumerated exceptions to the general prohibition on multiple-tier fund of funds structures reflect arrangements that the Commission does not believe “would create an overly complex structure that could confuse investors” or “raise concerns regarding undue influence or layering of fees.”²²

While we support the Commission’s objective of protecting investors from the risk of confusion and excessive fees associated with overly complex fund of funds structures, we believe that the Multiple-Tier Restriction is unnecessarily broad. We encourage the Commission to consider two additional exceptions to the Multiple-Tier Restriction that we believe would provide substantial benefits to funds of funds and their shareholders without implicating the concerns underlying the general prohibition on multiple-tier structures. Namely, and as further discussed below, we encourage the Commission to consider exceptions to allow three-tier structures for investments by an acquired fund in (1) one or more exchange-traded funds (each, an “**ETF**”) whose performance is designed to track the performance of a particular securities index (each, an “**Index ETF**”); and (2) one or more funds in the same “group of investment companies”²³ in arrangements where all three funds (the acquiring fund, the acquired fund, and the fund acquired by the acquired fund) are in the same “group of investment companies” and have either a common investment adviser or advisers that are control affiliates.

A. *Investments in Index ETFs*

Many funds invest a portion of their assets in Index ETFs to gain cost-efficient, highly liquid exposure to a specific asset class. In many cases, these investments reflect an effort to efficiently equitize cash inflows pending other investments. Currently, many acquired funds in fund of funds structures are able to invest without limit in Index ETFs in reliance on exemptive orders issued by the Commission to the ETF provider. For example, an acquired fund in a fund of funds arrangement relying on Section 12(d)(1)(G) is prohibited from investing in other registered open-end investment companies or UITs in reliance on Section 12(d)(1)(F) or (G),²⁴ but may invest in other investment companies in excess of the limits of Section 12(d)(1)(A) pursuant to an exemptive order, including exemptive orders issued to an ETF provider. The rescission of the ETF providers’ exemptive orders contemplated by the Proposal, without providing for similar relief in the Proposed Rule, would eliminate this valuable

²⁰ *Id.* at 77.

²¹ See proposed Rule 12d1-4(b)(4).

²² Proposing Release, *supra* n.1, at 82.

²³ “Group of investment companies” is defined in proposed Rule 12d1-4(d) as “any two or more registered investment companies or business development companies that hold themselves out to investors as related companies for purposes of investment and investor services.”

²⁴ See Section 12(d)(1)(G)(i)(IV).

flexibility, forcing acquired funds to either seek comparable investment exposures through potentially costlier, less liquid means or to forego the additional return potential associated with the practice of equitizing cash through investments in Index ETFs.

While we fully support the objectives underlying the Multiple-Tier Restriction of protecting investors from the excessive fees and potential confusion, we do not believe that these concerns are meaningfully implicated where an acquired fund purchases shares of an Index ETF to equitize cash or otherwise gain exposure to the relevant index. An acquired fund's use of Index ETFs in this way is comparable to an acquired fund's investments in money market funds for short-term cash management purposes, which are expressly excepted from the Proposed Rule's general prohibition on multiple-tier structures,²⁵ except offering a different risk/return profile for equitized cash. With regard to fees, the incremental operating costs associated with an acquired fund's investment in an Index ETF would be reflected in the fee and expense table included in the acquired fund's prospectus pursuant to the disclosure requirements of Form N-1A.²⁶ Any principal investment risks associated with an acquired fund's investment in an Index ETF would be disclosed in the acquired fund's prospectus pursuant to the requirements of Form N-1A.²⁷ The investment exposures associated with an acquired fund's investment in an Index ETF are substantially identical to the exposure that the acquired fund could otherwise achieve through index futures or some other means, which are not similarly restricted and which may be often more costly than trading in shares of an Index ETF. Given the minimal risks presented by an acquired fund's investments in Index ETFs, we see no reason why an acquired fund should be denied the flexibility to obtain investment exposure through an Index ETF when substantially similar exposures are available through other permitted means, particularly where the acquired fund's portfolio manager believes an investment through an Index ETF is in the fund's best interest (as proposed Rule 12d1-4(b)(3)(i) would require the adviser to conclude before making the investment).

B. Investments in Related Funds where the Acquiring Fund Is also a Related Fund

In explaining the general prohibition on three-tier fund of funds structures in the Proposing Release, the Commission reiterates its belief that "three-tier structures can obfuscate the fund's investments, fees, and related risks."²⁸ While we agree that three-tier fund structures may raise a range of issues for consideration in the case of unaffiliated fund of funds structures (*e.g.*, layering of fees, investor confusion caused by complex structures, and pyramiding of control), these issues generally are not present, or can be readily managed, where all three funds in the structure are part of the same group of investment companies and have either a common investment adviser or advisers that are control affiliates. Accordingly, and in light of the benefits afforded by multiple-tier structures of related

²⁵ See Rule 12d1-4(b)(4)(iii)(B).

²⁶ See Form N-1A, Instruction 3(f)(i) to Item 3.

²⁷ See Form N-1A, Item 9(c), requiring a fund to disclose the principal risks of investing in a fund, "including the risks to which the [f]und's particular portfolio *as a whole* is expected to be subject."

²⁸ *Id.* at 83.

funds, we believe that the Commission should consider an exception from the general prohibition on three-tier structures where all three funds (the acquiring fund, the acquired fund, and the fund acquired by the acquired fund) are in the same “group of investment companies” and have either a common investment adviser or advisers that are control affiliates.

We agree with the Commission’s observation in the Proposing Release that three-tier structures can provide benefits to investors, including “efficiency and cost-effective exposure to certain market segments.”²⁹ For example, a top-tier fund may wish to invest a portion of its assets in a middle-tier fixed income fund within the same fund complex, which in turn obtains exposure to different fixed income sectors (*e.g.*, emerging fixed income, high yield) by investing in a bottom-tier of funds within the fund complex, each focusing its investments in a specific fixed income sector. Because each bottom-tier fund in this kind of arrangement is organized as a distinct pool investing in a specific investment strategy or market segment, the arrangement provides a simple way for multiple other funds within the complex to gain precise exposures to that investment strategy or market segment and to benefit from economies of scale. To the extent that a bottom-tier fund receives investments from more than one fund in the complex (or from outside investors), it is able to trade in larger quantities (and, generally, at lower cost) than if its individual investors were to trade in those securities directly, and any savings resulting from the aggregation of trades in this way would accrue directly to the bottom-tier fund’s investors. This approach also facilitates diversification through increased scale, particularly for strategies that invest in less liquid assets traded in large lot sizes primarily by institutional investors.

In cases where all of the funds participating in a three-tier structure are part of the same group of investment companies and have either a common investment adviser or advisers that are control affiliates, we believe that concerns regarding the potential for excessive fees are appropriately mitigated by existing and proposed controls. Under Section 36(b) of the 1940 Act, the investment adviser to a registered fund (including a fund of funds) is deemed to have a fiduciary duty with respect to the receipt of compensation for services paid by the fund or its shareholders to the adviser or any of its affiliates. Where funds in a three-tier structure share a common investment adviser, the adviser would owe the fiduciary duty provided for by Section 36(b) to each fund in the structure. Similarly, where the advisers to the funds in a three-tier structure are control affiliates, we agree with the Commission’s assessment that the risks of overreach by an acquiring fund are significantly diminished.³⁰ A common investment adviser (or advisers that are control affiliates) also would have sufficient familiarity with the fee arrangements of each fund in the structure to incorporate fee waivers, expense caps, or offsets as needed to ensure that the overall structure does not result in excessive fees for any fund. We note that additional protection against excessive fees in three-tier

²⁹ Proposing Release, *supra* n.1, at 83.

³⁰ See Proposing Release, *supra* n.1, at 165 (“In addition, in cases where the arrangement involves funds that are advised by advisers that are control affiliates, the acquiring fund adviser is less likely to seek to benefit the 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.”).

structures would be provided by the Proposed Rule, which requires various findings that the fees investors bear in a fund of funds arrangement are not excessive. For example, under the Proposed Rule, the investment adviser of an acquiring fund that is a management company must, before investing in an acquired fund in reliance on the Proposed Rule and at least annually thereafter, “evaluate the structure and 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.”³¹ The Proposed Rule also provides for oversight by an acquiring fund’s board of directors by requiring an acquiring fund’s adviser to report its finding, and the basis for the finding, to the fund’s board at least annually.

Three-tier structures involving funds in the same group of investment companies pose minimal risk of investor confusion. As with any mutual fund, shareholders of a fund in a three-tier fund of funds structure can determine the monetary value of their holdings at any time from the share price. The prospectus for each fund in a three-tier structure would describe its investment objective, principal strategies and principal risks. Because Form N-1A requires disclosure of the principal risks to which a fund’s portfolio as a whole is subject,³² a top-tier fund would be required to disclose any principal risks to which the portfolio is subject on account of its investments in any acquired funds, including any principal risks arising out of the acquired fund’s investments in any bottom-tier funds. Form N-1A also would require a top-tier fund’s prospectus to disclose in a fee and expense table any direct and indirect operating costs associated with investments in acquired funds, which would include the acquiring fund’s share of any expenses borne by the acquired fund as a result of its investments in any bottom-tier funds.³³ In three-tier structures where all of the funds are part of the same group of investment companies and have either a common investment adviser or advisers that are control affiliates, the risk of investor confusion is further mitigated because there is likely to be greater consistency in the prospectus language used to describe principal investment strategies and risks across the participating funds, and fund sponsors are better positioned to understand (and, therefore, disclose) aggregate investment exposures and expenses.

Finally, we do not believe there is a meaningful risk of “pyramiding” (a practice by which investors’ limited investment in an acquiring fund could be used to control an acquired fund and, therefore, enrich themselves at the expense of the acquired fund’s shareholders) in the context of a three-tier structure in which all funds are part of the same group of investment companies. We note that, although the Commission included control and voting provisions in the Proposed Rule designed to address Congress’s concerns about pyramiding,³⁴ these conditions do not apply in certain circumstances, including if the acquiring fund is in the same “group of investment companies” as the acquired fund.³⁵ In this regard, we agree with the Commission’s observation that “the proposed

³¹ See proposed Rule 12d1-4(b)(3)(i).

³² See Form N-1A, Item 9(c).

³³ See Form N-1A, Instruction 3(f)(i) to Item 3.

³⁴ See proposed Rule 12d1-4(b)(1)(i)-(ii).

³⁵ See proposed Rule 12d1-4(b)(1)(iii).

exceptions [from the control and voting provisions] 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.”³⁶

III. “Foreign Funds” as Acquired Funds under the Proposed Rule and Section 12(d)(1) of the 1940 Act

The Proposing Release requests comment on a number of questions relating to the status of Foreign Funds under the Proposed Rule and Section 12(d)(1) of the 1940 Act more generally. One set of these questions centers on the appropriate treatment of Foreign Funds, when such funds are acquired funds in a fund of funds structure involving a registered investment company as the acquiring fund. Taking into account conversations with current clients, we would like to address that set of questions.

To summarize these questions in brief, the Commission has asked whether it should continue to honor its long-standing interpretative position that a Foreign Fund that makes a private offering in the United States in reliance on Section 3(c)(1) or 3(c)(7) of the 1940 Act is a private fund for purposes of 12(d)(1); whether the Commission should instead consider the nature of the Foreign Fund’s offering outside the United States in determining whether such fund is a private fund for purposes of applying Section 12(d)(1); and whether registered fund investments in Foreign Funds in excess of the limits under 12(d)(1)(A) present concerns that are different than those presented by registered fund investments in domestic private or registered funds.³⁷ In our conversations with the Commission staff regarding the Proposed Rule, the staff has highlighted this set of questions and suggested that the Commission is considering a change in the current regulatory framework applicable to registered fund investments in Foreign Funds. For the reasons set out below, we believe a change in this area would be unwarranted by the statutory text, misguided in relation to the public policy concerns underlying Section 12(d)(1), and disruptive to a significant portion of the asset management industry that relies on a long-standing and workable framework for addressing investments in Foreign Funds.

The current framework governing Foreign Fund offerings into the United States and registered fund investments in Foreign Funds is rooted in the text of Section 7(d) of the 1940 Act, which states, in relevant part, that “No investment company, unless organized or otherwise created under the laws of

³⁶ Proposing Release, *supra* n.1, at 38.

³⁷ The full set of questions is as follows: “Should we continue to take the interpretive position that foreign funds that make private offerings in the United States in reliance on section 3(c)(1) or 3(c)(7) are private funds for purposes of section 12(d)(1)? Alternatively, should we only treat foreign funds that conduct their activities with respect to U.S. investors in compliance with section 3(c)(1) or 3(c)(7) and are privately offered outside the United States as private funds for purposes of section 12(d)(1)? For example, should we take the position that a fund that conducts a private U.S. offering in compliance with sections 3(c)(1) or 3(c)(7), but also conducts a public offering in a foreign jurisdiction (e.g., certain UCITS funds), is an investment company, rather than a private fund, solely for purposes of section 12(d)(1)? Should the treatment of foreign funds as private funds differ when the foreign fund is an acquiring fund versus when the foreign fund is an acquired fund? Are there different or greater concerns, particularly regarding duplicative fees and complex structures, if registered funds are permitted to invest in foreign funds in excess of the limits in section 12(d)(1)(A) than there are with domestic private funds or registered funds?” Proposing Release, *supra* n.1, at 24-25.

the United States . . . shall make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to offer for sale, sell, or deliver after sale, in connection with a public offering, any security of which such company is the issuer.” In a series of no-action letters beginning with Touche, Remnant & Co. in 1984 (the “**Touche Remnant Line**”),³⁸ the Commission staff correctly recognized that Section 7(d) contains no limitation on a Foreign Fund’s ability to make a private placement of securities in the United States. We believe that the Commission staff’s position in the Touche Remnant Line reflected a credible and appropriately flexible interpretation of the statutory text and Congress’s intentions regarding the extraterritoriality of the 1940 Act.³⁹ It also reflected the sensible view that a Foreign Fund’s access to the U.S. markets should be subject to the same type and degree of regulation as applies to domestic funds. Under the Touche Remnant Line, a Foreign Fund making a private placement in the United States may do so without violation of Section 7(d) in reliance on Section 3(c)(1) or Section 3(c)(7) of the 1940 Act.

Congress enacted Sections 3(c)(1) and 3(c)(7), however, not as exemptions from the registration requirements under the 1940 Act, but as exclusions from the definition of “investment company” contained in Section 3(a)(1) of the Act. Thus, like other funds that rely on Sections 3(c)(1) or 3(c)(7) (commonly known as “private funds”), Foreign Funds making private securities offerings in the United States are excluded from the definition of investment company and are not subject to the limits under Section 12(d)(1)(A), where they are acquired funds.

While the request for comment refers to this result as an “interpretive position,” we believe that it is a natural and appropriate reading of the statutory text and reflects Congress’s clear intent. Consider Sections 3(c)(1) and 3(c)(7)(D) of the 1940 Act, which state generally that an issuer relying on Section 3(c)(1) or 3(c)(7) is deemed to be an investment company for purposes of the limitations set forth in Sections 12(d)(1)(A)(i) and 12(d)(1)(B)(i) of the 1940 Act, but only when it is acting as an acquiring fund. The presence of this exclusion from the exclusion, as it were, confirms that Congress

³⁸ *Touche, Remnant & Co.*, SEC No-Action Letter (pub. avail. Aug. 27, 1984). See also *Investment Funds Institute of Canada*, SEC No-Action Letter (pub. avail. Feb. 6, 1996); *Goodwin, Proctor & Hoar*, SEC No-Action Letter (pub. avail. Feb. 28, 1997).

³⁹ The 1940 Act contains no express statement of its extraterritorial applicability. In the absence of such statutory statements, federal courts have generally applied a “conducts or effects” test to determine the application of the 1940 Act to persons or activities outside the United States. While the application of this test to a wide range of activities can involve some ambiguity and uncertainty (especially in light of the U.S. Supreme Court’s decision in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010) not to apply the test in the context of litigation brought under Section 10(b) of the 1933 Act), the Dodd-Frank Act’s addition of Section 214(b) to the Advisers Act suggests that a conducts and effects test may most accurately reflect congressional intent in the context of the asset management industry. Section 214(b) of the Advisers Act provides extraterritorial jurisdiction to U.S. federal courts regarding actions or proceedings brought by the SEC or the United States for violation of Section 206 of the Advisers Act involving (i) conduct within the United States, even if the violation is committed by a foreign adviser and involves only foreign investors; or (ii) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

understood how Section 3(c) interacted with Section 12(d)(1) and intended the result outlined above.⁴⁰

Moreover, a new approach to the statutory text governing this area would raise a number of interpretive challenges and cause significant confusion among industry participants without any clear countervailing benefit. The Commission's questions suggest that the Commission might, for example, at least when interpreting Section 12(d)(1), look to the nature of a Foreign Fund's non-U.S. offering in assessing whether the Fund would be seen as relying on Section 3(c)(1) or 3(c)(7) (and, therefore, be excluded from the definition of investment company). We think this contemplated potential approach would be impractical and unnecessary. Foreign securities markets are subject to local schemes of regulation that were not designed with U.S. principles or U.S. legal concepts in mind. Rather than applying the U.S. securities laws to activities that involve conduct or effects in the United States, such an approach would put the Commission and its staff in the position of being required to apply the U.S. securities laws to activities that may have no material U.S. touchpoints in the context of foreign regulatory regimes that bear little similarity to the U.S. framework.

By way of analogy, it is widely acknowledged that the attempt to delineate foreign public funds from foreign private funds for purposes of applying the Volcker Rule outside the United States has caused significant confusion.⁴¹ Under the Volcker Rule, "foreign public funds" are excluded from the definition of "covered fund."⁴² The agencies jointly adopting the Volcker Rule, including the

⁴⁰ In a no-action letter granted to Red Rocks Capital, LLC in 2011, the staff granted relief that took for granted that Foreign Funds that made offerings in the United States in reliance on 3(c)(1) and 3(c)(7) would not be subject to the limits under 12(d)(1) where they are acquired funds. *Red Rocks Capital, LLC*, SEC No-Action Letter (pub. avail. Jun. 3, 2011) ("**Red Rocks**"). The relief under Red Rocks extended that conclusion, sensibly, to cover Foreign Funds that happen not to rely on 3(c)(1) or 3(c)(7) to sell shares to U.S. persons. Because the Foreign Funds at issue in Red Rocks were listed on foreign exchanges, they could, unlike open-end Foreign Funds, arguably find themselves with shareholders that are U.S. persons without having to rely on any exception under Section 3(c) under the 1940 Act.

⁴¹ See Section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1851). The U.S. Department of the Treasury, reacting specifically to the industry disruption occasioned by this aspect of the Volcker Rule, recommended in 2017 that regulators replace their current approach of analyzing Foreign Funds by analogizing to the 1940 Act with a "simple definition that focuses on the characteristics of hedge funds and private equity funds with appropriate additional exemptions as needed." U.S. Dept. of the Treasury, *A Financial System that Creates Economic Opportunities: Banks and Credit Unions* (June 2017), at 71-72. See also Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act, Federal Reserve Board, FDIC, OCC (July 21, 2017), at p.1 ("A number of foreign banking entities, foreign government officials, and other market participants have expressed concern about the possible unintended consequences and extraterritorial impact of the Volcker Rule and implementing regulations for certain foreign funds ('foreign excluded funds') that are excluded from the definition of 'covered fund' under section 13 and the Agencies' implementing rules with respect to a foreign banking entity."); SIFMA Comment Letter on the Notice of Proposed Rulemaking Revising the 2013 Final Rule (Oct. 17, 2018), at B-16 ("We agree that the existing foreign public fund exclusion is far too narrow and imposes complex requirements on non-U.S. funds that are not applicable to similarly situated RICs and that bear no relevance to whether the fund is sufficiently similar to a RIC. Some of these requirements are difficult or impossible to verify and fail to sufficiently recognize that retail fund structures and regulations outside the United States have developed differently from those for RICs.").

⁴² Volcker Rule Final Rule, 79 Fed. Reg. 5535 (Jan. 31, 2014); see also 12 CFR § 248.10(c) (listing exclusions to definition of "covered fund," including foreign public funds).

Commission, stated in the preamble to the final rule that the intention of the exclusion was to exclude from the definition of “covered fund” foreign funds that are similar to U.S. registered investment companies.⁴³ Questions quickly arose, however, as to the scope of applicability of the foreign public funds exclusion. Under applicable rules, permissible activities for sponsors (including bank sponsors) of foreign public funds in some foreign jurisdictions (*e.g.*, corporate governance structures such as selecting the majority of directors or trustees of the fund), if performed by a banking entity, could result in the bank sponsor being deemed to control the fund for purposes of the Bank Holding Company Act. This would have the effect, among other things, of causing the fund to be an “affiliate” of the banking entity and, consequentially, causing the fund to become a “banking entity” independently subject to the Volcker Rule’s proprietary trading and covered fund prohibitions.

Crafting the definition of “covered fund” under the Volcker Rule to appropriately cover Foreign Funds is an example of the significant interpretive problems faced by regulators and industry participants attempting to apply 1940 Act definitions to Foreign Funds.⁴⁴ Because the definition of “covered fund” incorporates 1940 Act concepts by reference to Sections 3(c)(1) and 3(c)(7) of the Act, the framework has created significant interpretive problems for the banking industry in seeking to understand permissible investments in a range of non-U.S. entities. These burdens are largely a result of requiring an analysis under the 1940 Act of structures that were designed without reference to the 1940 Act definitions. Should the Commission determine to begin distinguishing between foreign public and foreign private funds for any purpose under the 1940 Act, we expect that it would create similar regulatory and interpretive challenges.

We note that any requirement to determine whether a particular non-U.S. issuer would be analogous to an investment company as defined under the 1940 Act (and not, for instance, eligible for an exemption from the definition under Section 3(c)(3) or 3(c)(11) of the Act) would not be without risk or significant effort for the issuer. There may, for example, be a wide variety of publicly offered vehicles outside the United States that, under a U.S. regulatory framework, would qualify for one of the myriad exclusions from the definition of an investment company other than 3(c)(1) or 3(c)(7)—such as non-U.S. commodity pools, bank trusts or collective investment schemes—and thus would be outside the limits of Section 12(d)(1) entirely if they were based in the United States. Non-U.S. issuers may not have the expertise to reliably conduct such an analysis, and U.S. funds seeking to invest in such entities may not have the information required to conduct the analysis themselves. By contrast, analyzing the nature of the U.S. portion of a foreign issuer’s offering is typically a clear and

⁴³ See 79 Fed. Reg. at 5677-78 (“The final rule imposes conditions to ensure that the foreign public fund is distributed predominantly through public offerings outside the United States, is offered to retail investors in the issuer’s home jurisdiction, is distributed in accordance with all applicable requirements for distributing public funds in the jurisdiction in which the distribution is being made, and includes publicly available offering disclosure documents. These requirements were designed to mirror the characteristics of U.S. mutual funds that are outside the applicability of section 619 of the Dodd-Frank Act.”).

⁴⁴ See Volcker Rule – Frequently Asked Questions, 14. How does the final rule apply to a foreign public fund sponsored by a banking entity?, Federal Reserve Board (June 12, 2015), *available at* <https://www.federalreserve.gov/supervisionreg/faq.htm#14>.

discrete task, in that it focuses on how a non-U.S. fund is sold into the United States, and it does not place an additional burden on the non-U.S. entity of analyzing U.S. regulatory concepts within a fundamentally foreign regime. We believe that the Commission and the staff should, therefore, have concrete public policy concerns to address before considering the reversal of a long-standing interpretive structure that has been relied upon by a number of U.S. and non-U.S. actors in making a range of decisions relating to the structure of their securities offerings and investments.

The approach the Commission is suggesting—of bringing under the penumbra of Section 12(d)(1)(A) only acquired Foreign Funds that resemble U.S. publicly offered funds and not private unregulated Foreign Funds—would, in fact, appear to provide little benefit in light of the public policy concerns underlying Section 12(d)(1).⁴⁵ With respect to public policy concerns focused on the interests of the acquired fund (and its shareholders) in such structures, we note that the Commission has no regulatory interest in considering the interests of non-U.S. investment vehicles or their non-U.S. shareholders (and no statutory mandate to do so).⁴⁶ With respect to concerns relating to valuation and the layering of fees, we note that the regulatory regimes applicable to foreign public funds, such as a UCITS, are likely to substantially reduce such risks to any acquiring registered fund and its shareholders rather than exacerbate them. For example, valuation of UCITS portfolio investments is typically based on market quotations or fair value and is subject to oversight by the UCITS independent depository. Similarly, UCITS are subject to detailed disclosure requirements with respect to their current and certain historical fees and expenses. These disclosure requirements, combined with (i) the requirement under Form N-1A that registered funds make detailed disclosures about their own expense structures, including specific and separate disclosure of any material “acquired fund fees and expenses,”⁴⁷ and (ii) oversight of the registered fund’s fees and expenses by a board of directors, including its independent directors, would appear to greatly mitigate concerns regarding such investments.⁴⁸ In any case, it seems plain that such concerns would only be greater in the case of

⁴⁵ As articulated in the Commission’s 1966 report on investment company growth and as repeated in the Proposing Release, the limits under Section 12(d)(1) were principally designed to mitigate four potential concerns: (1) the pyramiding of voting control in the hands of persons that own only a nominal stake in the acquired company; (2) the ability of the acquiring company to exercise undue influence over the adviser of the acquired company through the threat of large-scale redemptions; (3) the difficulty of investors appraising the true value of their investments due to the complex structures involved; and (4) the layering of sales charges, advisory fees, and administrative costs. *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) (the “**PPI Report**”).

⁴⁶ *See, e.g., Red Rocks, supra* n.40, in which the staff granted no-action relief and repeated the applicant’s assertion that “to the extent that the 3% Limit in Section 12(d)(1)(A) was designed to protect the acquired investment company from undue influence by the acquiring investment company and its affiliates, the Commission has no significant regulatory interest in protecting the Subject Foreign Funds.”)

⁴⁷ As discussed above, to the extent an acquiring registered fund incurs fees and expenses in excess of 0.01% of its average net assets as a result of its investment in Foreign Funds, including UCITS, it would be required to disclose those fees and expenses prominently in the fee table of its prospectus. *See* Form N-1A, Instruction 3(f)(i) to Item 3, *supra* n.33 and surrounding discussion.

⁴⁸ One might point to other public policy concerns beyond those identified in the PPI Report. For example, the Commission might want to consider whether the potential for a Foreign Fund to impose liquidity fees or redemption gates might negatively impact the registered acquiring fund’s ability to meet redemptions. Here too, the regulatory regime

non-U.S. private funds (which, of course, are even more clearly excepted from the limits under 12(d)(1)(A) on a plain reading of the statutory text).

The Commission also questioned whether a registered fund's investments in Foreign Funds generally pose different or greater concerns than investments in domestic public or private funds. We do not believe any such generalization is warranted. Regulatory regimes differ widely between different countries and regions, and the risks posed to a registered fund by investments in domestic private funds vary greatly from one such fund to the next. We do not believe there is any basis for the Commission to make any such categorical distinction between domestic and foreign funds in Rule 12d1-4 or otherwise.

We note that we are aware of a number of investment advisers to registered funds that, on behalf of those funds, make significant use of non-U.S. funds, both "public" and "private" (to the extent the distinction is readily apparent), in reliance on the Commission's and the staff's current interpretations under the Touche Remnant Line, Red Rocks and related no-action letters. These registered fund clients, which represent a substantial amount of assets invested on behalf of a large number of underlying shareholders, would be significantly and negatively impacted by any change in the Commission's existing approach of the kind described above. These fund-of-Foreign Fund structures are responsive to real business and operational priorities and serve a legitimate business purpose. Typically, they represent the most cost-efficient way for a fund manager to access a particular asset class or market. In some cases, these structures are used by non-U.S. investment advisers managing internationally oriented registered fund portfolios where the adviser is more familiar with the range of pooled fund options offered outside the United States. Often, additional efficiencies are made possible by the fact that the adviser's non-U.S. clients utilize the same underlying Foreign Funds. In this way, these structures can reduce costs for registered fund investors and allow them to access markets or instruments that would otherwise be unavailable to them, while at the same time enjoying the protections afforded by the 1940 Act (and the other U.S. securities laws).

We urge the Commission, at a minimum, to undertake a more detailed study of the impacts of changes in this area before implementing any change to the current regime, which we believe has worked well over the course of many years for the industry and has not posed any perceptible dangers for Main Street investors.

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applicable to UCITS would help to allay this concern. Our understanding is that UCITS are generally required by law to manage liquidity to ensure that redemptions are paid on a T+3 basis or sooner.

Again, thank you for the opportunity to provide these comments. We stand ready to provide additional comments or to answer any questions you may have.

Very truly yours,

/s/ Thomas R. Hiller
Thomas R. Hiller

/s/ George B. Raine
George B. Raine

/s/ James M. Forbes
James M. Forbes

/s/ Christopher D. Labosky
Christopher D. Labosky

cc: Honorable Jay Clayton, Chairman, U.S. Securities and Exchange Commission
Honorable Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission
Honorable Robert J. Jackson, Jr., Commissioner, U.S. Securities and Exchange Commission
Honorable Elad L. Roisman, Commissioner, U.S. Securities and Exchange Commission
Ms. Dalia Blass, Director, Division of Investment Management, U.S. Securities and Exchange Commission