

May 2, 2019

**VIA ELECTRONIC DELIVERY**

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

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

Dear Ms. Countryman,

We appreciate the opportunity to respond to the request by the U.S. Securities and Exchange Commission (“SEC” or “Commission”) for comments regarding the above-referenced release (the “Proposing Release”).<sup>1</sup> The Commission proposes a new framework to regulate fund of funds arrangements with the intent to “streamline and enhance the regulatory framework” through a comprehensive rulemaking package.<sup>2</sup> The Proposing Release contains four key components: (i) proposed Rule 12d1-4 under the Investment Company Act of 1940 (the “1940 Act”), which would permit acquiring funds to invest in acquired funds in excess of statutory limits subject to certain conditions; (ii) proposed rescission of Rule 12d1-2 and proposed amendments to Rule 12d1-1, which are current regulatory exemptions from statutory limits; (iii) proposed rescission of certain exemptive orders and withdrawal of no-action letters issued by the staff of the SEC’s Division of Investment Management (the “SEC staff”) applicable to fund of funds arrangements; and (iv) proposed amendments to Form N-CEN.<sup>3</sup> In addition, the

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<sup>1</sup> Fund of Funds Arrangements, SEC Rel. No. IC-33329, 84 Fed. Reg. 1286 (Feb. 1, 2019).

<sup>2</sup> *Id.*

<sup>3</sup> Unless the context requires otherwise, the term “funds” generally refers to investment companies registered under the 1940 Act (other than a face-amount certificate company) and business development

Commission solicited comments on, among other things, potential revisions to “acquired fund fees and expenses” (“AFFE”) disclosure requirements relating to investments in other funds, including BDCs. We acknowledge the resources, care and thoughtfulness that the Commission and the SEC staff put into the preparation of the Proposing Release and appreciate the opportunity to offer comments.

Dechert LLP is an international law firm with a wide-ranging financial services practice that serves clients in the United States and abroad. In the United States, we represent a substantial number of U.S. mutual fund complexes, closed-end funds, exchange-traded funds (“ETFs”), BDCs, fund boards, fund independent directors, fund advisers and fund service providers. In developing these comments, we have drawn on our extensive experience in the financial services industry generally. Although we have discussed certain matters addressed in the Proposing Release with some of our clients, the comments that follow reflect only the views of a group of attorneys in our financial services practice, and do not necessarily reflect the views of our clients, other members of our financial services practice or the firm generally.

We agree with the Commission that the combination of statutory exemptions, Commission rules and exemptive orders that have developed over time to facilitate the evolution of fund of funds arrangements have “created a regulatory regime where substantially similar fund of funds arrangements are subject to different conditions.”<sup>4</sup> We also agree that fund of funds arrangements are attractive investment options to many investors, providing benefits such as efficient diversification, and otherwise provide acquiring funds with investment flexibility for various portfolio management purposes, including access to specific asset classes or for hedging portfolio exposures. We, therefore, support the Commission’s goal of “creat[ing] a more consistent and efficient regulatory framework for fund of funds arrangements” that avoids the exemptive application process, “while also providing funds with investment flexibility to meet their investment objectives in an efficient manner.”<sup>5</sup>

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companies (“BDCs”). Proposed Rule 12d1-4 would allow a fund (referred to as an “acquiring fund”) to acquire shares of any other fund (referred to as an “acquired fund”) in excess of the limitations currently imposed by the 1940 Act without obtaining individual exemptive relief from the SEC.

<sup>4</sup> Proposing Release at 1288.

<sup>5</sup> *Id.* at 1288-89. We also support the Commission’s consideration of comments received in response to a package of new fund of fund rules and rule amendments proposed in 2008, which focused principally on ETFs and ultimately was not adopted. *See* Exchange-Traded Funds, SEC Rel. No. IC-28193, 73 Fed. Reg. 14618 (Mar. 18, 2008).

However, we believe that certain aspects of the proposed rulemaking package are neither necessary to address the Commission’s stated concerns regarding the regulation of fund of funds arrangements nor appropriate in light of the benefits offered by funds of funds that comply with the current regulatory regime. As reported by the Investment Company Institute (“ICI”), more than 1,500 funds of funds (for this purpose, those investing at least half of their assets in other funds) had \$2.1 trillion in assets as of the end of 2018.<sup>6</sup> Further, as noted in a comment letter submitted by the ICI and based on responses to its member survey, 516 funds with \$1.8 trillion in assets regularly held more than 3% of an acquired fund’s shares.<sup>7</sup>

Accordingly, we suggest that the Commission reconsider certain components of the proposed rulemaking package and, at a minimum, consider alternative measures that would support the Commission’s goals while disrupting fewer of the current fund of funds products held by investors and the issuers and markets in which the acquired funds ultimately invest, if the Commission adopts a final rule.<sup>8</sup>

## **I. PROPOSED RULE 12d1-4**

### **A. Congressional Concerns of Undue Influence Can Be Effectively Addressed Without a Redemption Limit**

Fund of funds arrangements that rely on proposed Rule 12d1-4 would be subject to a redemption limit, which would prohibit an acquiring fund that holds more than 3% of an

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<sup>6</sup> See Table 49 of Data Section 5, in *2019 Investment Company Factbook*, available at [www.icifactbook.org](http://www.icifactbook.org).

<sup>7</sup> See Comment Letter of the Investment Company Institute (April 30, 2019) (the “ICI Fund of Funds Letter”) at 7.

<sup>8</sup> We note that the Commission indicated in the Proposing Release that it believes one year is adequate time for funds of funds to bring their future operations into conformity the rulemaking. The Commission specifically requested comment on whether funds that are relying on Section 12(d)(1)(G) and Rule 12d1–2 should be “grandfathered” in any final rulemaking. See Proposing Release at 1311. We would submit that the Commission “grandfather” funds of funds that are relying on the existing statutory, regulatory and exemptive order framework. We believe that this would not only preserve many fund of funds arrangements that benefit shareholders and acquiring funds today but also avoid potential market disruption and artificial market activity associated with the transition of fund of fund portfolios, including with respect to the underlying markets in which the acquired funds invest.

acquired fund's total outstanding shares from redeeming, submitting for redemption or tendering for repurchase, more than 3% of the acquired fund's total outstanding shares in any 30-day period. As noted in the Proposing Release, this redemption limit is rooted in historical Congressional concerns that "an acquiring fund could threaten large-scale redemptions as a means of exercising undue influence over an acquired fund."<sup>9</sup> However, we believe that the proposed redemption limit would significantly disrupt many fund of funds structures that operate today, including asset allocation funds and target date funds that involve dynamic reallocations or follow a pre-determined glidepath and are currently a part of many U.S. retirement plans.

We also believe that the proposed redemption limit is unnecessarily restrictive to acquiring funds' effective and efficient portfolio management activities by, for example, imposing significant, artificial liquidity constraints on acquiring funds and affecting acquiring fund liquidity risk management practices. In addition, we believe the proposed redemption limit would introduce a number of unintended consequences and could lead to the restructuring of many existing fund of funds arrangements, which could adversely affect investors in fund of funds arrangements, discourage the development of newer fund of funds offerings and reduce investment options for investors. Moreover, we believe that the proposed redemption limit would not place acquired fund types on an equal playing field and would treat acquiring funds differently from, for example, institutional investors that may invest in and freely redeem from acquired funds.

Ultimately, the proposed redemption limit is designed to address a risk that is not clearly evident in the marketplace. We suggest that this condition simply be removed from any final rulemaking applicable to fund of funds arrangements.

*i. Redemption Limit is Contrary to Precedent and Incompatible with the Diverse Uses of Fund of Fund Arrangements*

The proposed redemption limit is not included as a condition of contemporary fund of funds exemptive orders approved by the SEC. A small number of older orders contained a condition limiting acquiring fund redemptions to 1% of an acquired fund's total

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<sup>9</sup> Proposing Release at 1298.

outstanding securities.<sup>10</sup> However, this condition was later removed by superseding orders, demonstrating that the Commission deemed such a condition unnecessary to address historical Congressional and investor protection concerns that also are set forth in the Proposing Release.

In advocating for removal of the short-lived historical condition limiting redemptions, applicants took the position that the condition was not contained in more contemporary fund of funds relief.<sup>11</sup> These applicants further argued that the Commission had growing experience regulating fund of funds structures since granting the initial relief<sup>12</sup> and that, moreover, removing the condition would provide flexibility to portfolio managers and facilitate “prudent investment management” while ensuring that investors were protected.<sup>13</sup> The Commission agreed and relieved those few applicants from such a redemption limitation.

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<sup>10</sup> See T. Rowe Price Spectrum Fund, Inc., *et al.*, Notice of Application, SEC Rel. No. IC-17198 (Oct. 31, 1989) (notice) and IC-17242 (Nov. 29, 1989) (order); T. Rowe Price Spectrum Fund, Inc., *et al.*, Amended and Restated Application, SEC Rel. No. IC-21371 (Aug. 23, 1995); Norwest Bank Minnesota, N.A., *et al.*, Notice of Application, SEC Rel. No. IC-20640 (Oct. 19, 1994) (notice) and IC-20697 (Nov. 10, 1994) (order); Norwest Bank Minnesota, N.A., *et al.*, Second Amended Application, SEC Rel. No. IC-22056 (June 27, 1996). A 1989 notice filed in connection with the T. Rowe Price Spectrum Fund, Inc. application contained the following condition: “Redemptions from any [acquired fund] by [acquiring fund] will be limited to 1% of the [acquired fund]’s assets in any period of less than 30 days, except where necessary to meet [acquiring fund] shareholder redemption requests.” In 1995, T. Rowe’s order was superseded and this condition was removed. A 1994 notice filed in connection with Norwest Bank Minnesota, N.A.’s request for relief contained the following condition: “Each [acquiring fund] will limit any redemptions resulting from a reallocation in its equity and fixed income positions to no more than 1 percent of [an acquired fund] total outstanding securities during any period of less than thirty days.” The condition was originally imposed to “insure that no significant redemptions in the [acquired funds] will occur as a result of reallocations.” In 1996, Norwest was granted superseding exemptive relief and this condition was removed.

<sup>11</sup> See Norwest Bank Minnesota, N.A., *et al.*, Second Amended Application, SEC Rel. No. IC-22056 (June 27, 1996) at 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 21-22; See also T. Rowe Price Spectrum Fund, Inc., *et al.*, Amended and Restated Application, SEC Rel. No. IC-21371 (Aug. 23, 1995) at 11. T. Rowe’s initial exemptive order provided some flexibility to meet the redemption requests of acquiring fund shareholders in the form of the following condition: “Redemptions from any [acquired fund] by [acquiring fund] will be limited to 1% of the [acquired fund]’s assets in any period of less than 30 days, *except where necessary to meet [acquiring fund] shareholder redemption requests.*” (emphasis added) T. Rowe Price Spectrum Fund, Inc., *et al.*, Notice of Application, SEC Rel. No. IC-17198 (Oct. 31, 1989).

This history reveals that a limitation on acquiring fund redemptions was only included in a small number of exemptive orders issued nearly 30 years ago, was never adopted on a widespread basis, has since been eliminated and has not appeared in subsequent relief. Adopting a redemption condition, such as the condition in Proposed Rule 12d1-4, would reverse the progress that the Commission has made in efficiently regulating fund of funds arrangements, impeding investment management and requiring industry participants to operate under more restrictive requirements than are currently imposed. The Proposing Release does not cite evidence that the facts regarding the Congressional and investor protection concerns underlying Section 12(d)(1) have changed in a way which should lead the Commission to take a different approach in protecting investors from those concerns. Accordingly, we do not believe it is now necessary to resurrect this outdated condition.

Moreover, the proposed redemption limit is incompatible with the diverse range of valid, contemporary uses of fund of funds structures that do not present the Congressional and investor protection concerns once associated with fund of funds arrangements. For example, a fund that implements periodic rebalancing to seek to achieve shareholder objectives, such as a target date fund operating consistent with a pre-determined glidepath, might be unable to continue to efficiently and fully achieve its scheduled, periodic rebalancing through fund of funds arrangements, as the redemption limit may restrict the fund's ability to reallocate its investments in acquired funds in a timely manner consistent with its principal investment strategy and shareholder expectations. Further, asset allocation fund of funds that seek to maintain disclosed investment exposures or profiles may be unduly limited in their ability to reallocate investments in acquired funds in response to market developments. As a result, advisers to these types of funds would be required to evaluate whether the existing rebalancing protocol and investments are viable under the proposed redemption limitation and consider potential adjustments to investment strategies.

As the Proposing Release concedes, views of fund of funds arrangements “have evolved over the years as fund of funds structures have developed to include investor protections and serve purposes that benefit investors.”<sup>14</sup> Often, funds invest in other funds in pursuit of their investment objective and in accordance with their disclosed principal investment strategies to, for example, efficiently gain exposure to a certain asset type or sector.

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<sup>14</sup> Proposing Release at 1287.

However, there is no evidence in the Proposing Release that supports the contention that these types of fund of funds structures are vulnerable to undue influence generally or that their vulnerability to undue influence has increased in a way that should lead the Commission to take a different regulatory approach to protect against those concerns, though the limitation would apply even without any indicia of intent to influence.<sup>15</sup>

*ii. Unnecessarily Restrictive to Efficient Portfolio Management Activities;  
Negative Ramifications under the Liquidity Rule*

The proposed redemption limit could unduly constrain a portfolio manager's flexibility to meet acquiring fund redemption requests by unnecessarily forcing the portfolio manager to liquidate more desirable positions or otherwise deviate from intended liquidity management strategies. Acquiring fund portfolio management teams utilize investments in other funds for a variety of purposes. As noted in the Proposing Release, these purposes include asset allocation, diversification, exposure to particular markets or asset classes, equitizing cash, hedging and risk management. We believe that the proposed redemption limitation could unnecessarily restrict portfolio manager discretion with respect to investing in acquired funds and pose meaningful challenges to the reallocation of assets when deemed by the portfolio management team to be in the best interest of the acquiring fund and its shareholders. There are a number of reasons why a portfolio manager may prefer to sell an acquired fund over another investment or why a portfolio manager may deem it in the best interest of an acquiring fund to sell a specific acquired fund. The proposed redemption limit would unnecessarily handcuff the efficient portfolio management of acquiring funds and introduce a meaningful new factor into investment and redemption decision-making for portfolio management teams, in each case, we believe, to the potential detriment of acquiring fund shareholders.<sup>16</sup>

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<sup>15</sup> The Proposing Release does acknowledge that the proposed redemption limit, along with other conditions in Proposed Rule 12d1-4, protect against "a broader set of circumstances" than the Commission's exemptive orders, which feature more "targeted and prescriptive provisions." *Id.* at 1326.

<sup>16</sup> We note that in the Proposing Release the Commission stated that it "expect[s] that the impact of the redemption limit on funds' investment flexibility would likely be small" given its examination of the number of acquiring funds holding more than 3% of an acquired fund's outstanding shares and redemptions of listed (unlisted) acquired fund shares exceeding the 3% redemption limit. However, we believe that these holding levels and redemption patterns also support the notion that the redemption limit itself is not necessary. Further, we believe that this data does not take into account the anticipated negative impact on portfolio manager discretion that may result from the proposed redemption limit.

We are separately concerned that the proposed redemption limit would create considerable difficulties for many acquiring funds in complying with their obligations under Rule 22e-4 under the 1940 Act (the “Liquidity Rule”).<sup>17</sup> Thus, the proposed redemption limit could have substantial negative ramifications on portfolio managers’ liquidity risk management practices and the usage of fund of funds arrangements overall. In addition, considerations under the Liquidity Rule may further exacerbate the concerns about disparate treatment of fund types as described below. As a result of concerns such as those summarized below, acquiring funds seeking to avoid additional portfolio management and operational challenges under the Liquidity Rule may invest more cautiously, and in smaller amounts, in acquired funds or invest in a greater number of acquired funds or in larger funds (to the detriment of smaller funds) so as to avoid triggering the redemption limit.

First, we believe the proposed redemption limitation could result in the need for acquiring funds to classify all or a portion of otherwise highly liquid investments as illiquid investments irrespective of the true liquidity of the acquired fund shares, because the acquiring fund would be unable to dispose of the portion of the acquired fund’s shares exceeding the 3% limitation within 30 days, let alone seven calendar days.<sup>18</sup> Further, if these and other acquired fund shares constitute a sufficiently large portion of the acquiring fund’s assets, the acquiring fund may exceed the 15% limit on illiquid investments, thus triggering obligations to report the incident to the board and to take necessary remedial

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<sup>17</sup> Investment Company Liquidity Risk Management Programs, SEC Rel. No. IC-32315, 81 Fed. Reg. 82142 (Oct. 13, 2016).

<sup>18</sup> Under the Liquidity Rule, an “illiquid investment” means 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. The Liquidity Rule requires that non-money market funds classify their portfolio investments into the categories of “highly liquid investments,” “moderately liquid investments,” “less liquid investments” and “illiquid investments.” These determinations depend upon how quickly the fund can reasonably expect a given investment to be either convertible to cash or sold or disposed of, as applicable, without a significant change to the market value of the investment. For example, any investment that the fund reasonably expects to be convertible into cash in current market conditions in three business days or less without the conversion to cash significantly changing the market value of the investment qualifies as a “highly liquid investment.” Mutual fund shares would ordinarily be expected to be highly liquid investments. *See* Investment Company Liquidity Risk Management Programs Frequently Asked Questions, at FAQ. 23, available at <https://www.sec.gov/investment/investment-company-liquidity-risk-management-programs-faq>.

actions.<sup>19</sup> In the most immediate sense, classifying such an investment as illiquid could force an acquiring fund to unexpectedly adjust its portfolio composition so as to stay within the 15% limit solely as a result of the level of its investment in a particular acquired fund at a given time, which could adversely impact the acquiring fund's shareholders.<sup>20</sup>

Second, we believe that the redemption limit would frustrate the ability of an acquiring fund that has exceeded the 15% limit to take corrective action. Although the Liquidity Rule does not require a fund in excess of the 15% limit to divest its illiquid investments, it does require the fund's board to review the fund's plan to bring its illiquid investments that are assets down to or below 15% of its net assets within a reasonable period of time, every 30 days so long as the fund's holdings in illiquid investments still exceed the 15% limit. Under the proposed redemption limit, however, an acquiring fund might be unable to unwind its investments in acquired fund shares as quickly as it otherwise would be able to. This could prolong the amount of time it takes an acquiring fund to bring itself within the 15% limit. In addition, an acquiring fund's portfolio management team may be limited in its options to appropriately remove the excess in a manner that the adviser deems consistent with its fiduciary duties to the acquiring fund (*e.g.*, a portfolio manager may be unable to dispose of certain acquired fund holdings or may be less willing to invest more in acquired funds, depending on the circumstances).

Third, we believe that the redemption limitation would, at a minimum, result in significant operational challenges in connection with classifying investments under acquiring funds' liquidity risk management programs. In classifying investments, non-money market funds must take into account specified factors, including market depth, which involves assessing whether trading various portions of positions in individual investments in amounts that the fund reasonably anticipates trading (the "reasonably anticipated trading size") is reasonably expected to affect the investment's liquidity. If so, this must be taken into

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<sup>19</sup> The Liquidity Rule prohibits funds from acquiring any illiquid investment if, immediately after the acquisition, the fund would have invested more than 15% of its net assets in illiquid investments that are assets.

<sup>20</sup> As the Proposing Release acknowledges, an acquiring fund may need up to 10 months to fully unwind its investment in an acquired fund if the acquiring fund holds up to the control limit of 25% of the acquired fund's outstanding shares under proposed Rule 12d1-4. Further, if, for example, the acquired fund and the acquiring fund are in the same group of investment companies, which would render the funds exempt from the control limitation, the unwinding timeline for the acquiring fund could be considerably longer under proposed Rule 12d1-4.

account when classifying the investment. The redemption limitation could complicate this process considerably as it relates to acquired funds of which the acquiring fund holds shares in excess of the statutory limit.

Additionally, we believe that the potential impact of the proposed redemption limitation may result in portfolio management teams reducing exposures to acquired funds as their holdings approach the 3% limit as a liquidity risk management measure in response to the looming redemption limitation. As a result, the portfolio managers may also determine to invest in other funds or assets than they otherwise would have invested at that time, solely to avoid the potential consequence of being subject to an arbitrary redemption limitation. As a result, acquiring fund shareholders may be adversely impacted.

*iii. Exemption for Secondary Market Sales Place Fund Types on Unequal Playing Field; Proposed Redemption Limit May Also Penalize Specific Fund of Funds Arrangements*

We are concerned that the proposed redemption limit would not place all fund types on a fair and level playing field with respect to fund of funds arrangements. This outcome would be contrary to the sentiment expressed by the Commission in the Proposing Release and stated purposes of the proposed rulemaking package, which include creating a more consistent and efficient regulatory regime and avoiding subjecting substantially similar arrangements to different conditions.<sup>21</sup> Collectively, these notions suggest an objective of equal treatment to the extent possible. We are concerned that, in the name of protecting against potential undue influence, the proposed redemption limit confers enormous, potentially outcome determinative, advantages on certain fund types.

Under the proposed redemption limit, an acquiring fund investing in a fund above the 3% threshold would not be able to entirely redeem its investment within a given thirty day period—the larger the acquiring fund’s investment, the longer it would take to unwind its position through redemptions with the acquired fund. By contrast, an acquiring fund investing in a listed product, such as an ETF, listed closed-end fund or listed BDC, would be able to fully dispose of its investment through secondary market transactions with no such limitation on timing, regardless of the size of the acquiring fund’s investment. Thus,

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<sup>21</sup> See Proposing Release at 1288. See also *Id.* at 1290 (characterizing proposed Rule 12d1-4 as “level[ing] the playing field” for fund of fund arrangements).

the redemption limit would powerfully incentivize acquiring funds to invest in listed products rather than in unlisted products like mutual funds.<sup>22</sup>

The proposed redemption limit would also result in different treatment for investments by acquiring funds in acquired funds in reliance on proposed Rule 12d1-4 as compared to Section 12(d)(1)(G), which allows a registered open-end fund or unit investment trust (“UIT”) to invest – without limit – in other open-end funds and UITs that are in the same “group of investment companies,” subject to certain conditions. Although acquiring funds relying on either proposed Rule 12d1-4 or Section 12(d)(1)(G) would be permitted to invest in acquired funds in excess of statutory limits, acquiring funds relying on Section 12(d)(1)(G) would not be subject to a redemption limit on acquired fund shares. Thus, open-architecture fund of funds (*i.e.*, funds of funds that invest inside and outside of funds in the same group of investment companies) would be potentially disadvantaged relative to acquiring funds that limit investments in acquired funds to those that are in the same group of investment companies and would be incentivized to potentially adjust their strategies to be able to operate in accordance with Section 12(d)(1)(G). To the extent that open-architecture funds deem, after consideration of the relevant factors and the impact of the conditions of proposed Rule 12d1-4, it prudent to transition to closed-architecture funds (*i.e.*, funds of funds that invest only in funds in the same group of investment companies), these funds of funds may have more limited opportunities to invest in certain types of specialized asset classes or fund complexes and may need to incur costs to launch new strategies solely to provide sufficient asset class coverage for their funds of funds. Over time, this may further limit competition in the industry, raise barriers to entry for new fund managers that may lose a significant market of investors and could even cause further consolidation in the industry or limit investment options for investors.

We also believe that the proposed redemption limit may disproportionately penalize smaller mutual funds.<sup>23</sup> Although larger mutual funds may offer some comfort that an acquiring

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<sup>22</sup> To be clear, we are troubled by the proposed redemption limit itself, not with the exemption therefrom. The proposed redemption limit raises serious concerns because it would not affect all fund types equally.

<sup>23</sup> We note that this outcome would be inconsistent with remarks delivered by Dalia Blass, Director of the SEC’s Division of Investment Management on March 18, 2019. During her keynote address at the Investment Company Institute’s Mutual Funds and Investment Management Conference, Director Blass raised concern that there may be “barriers making it harder for small and mid-sized fund sponsors to compete” in the current mutual fund marketplace and announced a planned outreach initiative targeting such fund sponsors, *available at* <https://www.sec.gov/news/speech/speech-blass-031819>.

fund is unlikely to exceed the 3% holdings threshold, smaller mutual funds, by contrast, would be more likely to trigger the threshold for acquiring funds. For example, a small relative investment by a large acquiring fund (such as less than 1% of its assets) may exceed 3% of the acquired fund shares and a smaller investment may be less desirable from the acquiring fund's portfolio management perspective. Consequently, acquiring funds may disfavor arrangements involving investments in smaller mutual funds or, at a minimum, begin placing a greater emphasis on the size of the acquired fund and less of an emphasis on traditional investment merits when balancing investment decision-making factors.

The Proposing Release acknowledges the potential for some (but not all) of these consequences, but ultimately concludes that “[a]ny decrease in the attractiveness of open-end funds as acquired funds because they are unlisted would be mitigated at least partially by an increase in the attractiveness of open-end funds as acquired funds because open-end funds are larger than most registered funds and thus acquiring funds’ holdings in open-end funds are less likely to violate the 3% limit of the redemption condition.”<sup>24</sup> However, even if this prediction ultimately proves correct, it does not address the problem of fairness. Regardless of whether, or to what extent, certain fund types benefit more than others under the new regulatory framework, we believe that the Commission should be setting a level playing field for fund of funds arrangements across fund type and fund size, facilitating normal market developments and not creating them, particularly where, as in the instant case, they would be detrimental to funds of funds, shareholders and markets.

*iv. Possible Alternatives*

For the above stated reasons, we believe that the proposed redemption limit is unnecessary and will discourage the development of a fair and thriving ecosystem for fund of funds arrangements. Accordingly, we suggest that the Commission eliminate this provision from any final rulemaking. To the extent, however, that the Commission includes a form of the redemption limit in a final rulemaking, we suggest that the Commission consider potential exemptions that would better address the Commission's cited concerns underlying the proposed redemption limit without significantly disrupting existing fund of funds structures.<sup>25</sup>

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<sup>24</sup> Proposing Release at 1235, n. 300.

<sup>25</sup> For example, as an initial alternative, we believe that participation agreements could continue to be an appropriate mechanism to govern an acquiring fund's acquisition of more than 3% of an acquired fund's outstanding voting securities. We agree that the use of participation agreements remains an appropriate

**B. Private and Foreign Funds Should be Permitted to Rely on Proposed Rule 12d1-4 as Acquiring Funds**

As noted above, we support the Commission’s efforts to create a uniform regulatory framework governing fund of funds arrangements. We believe expanding proposed Rule 12d1-4 to permit private funds<sup>26</sup> and unregistered investment companies, such as foreign funds,<sup>27</sup> to rely on the proposed rulemaking as “acquiring funds” would be in the best interests of both the investing public and registered funds that would serve as acquired funds.

In enacting Section 12(d)(1), Congress sought to curb the potential abuses characteristic of fund of funds relationships, including “pyramiding” of control and undue influence of an acquiring fund, duplicative and excessive fees and overly complex structures.<sup>28</sup> In the case of private and foreign funds investing in registered funds, the Commission has expressed particular concern that private and foreign funds may control or exercise undue influence over the activities of the registered funds in which they invest primarily by influencing the policies and operations of acquired registered funds or increasing business pressures, such

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means to address the SEC’s concerns. *See* ICI Fund of Funds Letter at 14. Moreover, if the redemption limit is retained in the final rulemaking (though, to be clear, we believe the redemption limit should be eliminated), other potential alternatives that would potentially preserve many of the valid, contemporary uses of fund of funds structures that do not present the types of perceived risks identified in the Proposing Release include (i) a redemption limit that more closely resembles the permissive and discretionary framework set forth under Section 12(d)(1)(F), which would anchor the redemption limit to statutory language, thus reflecting Congressional intent and making limitations on large scale redemptions a question of the acquired fund’s prerogative at any given time, (ii) an exception from the redemption limitation when the acquiring fund and the acquired fund are part of the same group of investment companies and (iii) an exception for certain redemptions that do not have any indicia of an intent to unduly influence the acquired fund (such as in the case of redemptions that are necessary to meet acquiring fund shareholder redemption requests or rebalance a portfolio in accordance with stated objectives and strategies).

<sup>26</sup> A “private fund” is an issuer that would be an “investment company,” as defined in Section 3 of the 1940 Act, but for Section 3(c)(1) or 3(c)(7) of the 1940 Act.

<sup>27</sup> The term “foreign fund” refers to an “investment company” as defined in Section 3(a)(1)(A) of the 1940 Act that is organized outside the United States and that does not offer or sell its securities in the United States in connection with a public offering.

<sup>28</sup> *See Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth*, H.R. Rep. No. 2337, 89th Cong., 2d Sess. (1966) (“PPI Report”).

as via the possibility of large scale redemptions.<sup>29</sup> As further explained below, we believe that the conditions included in proposed Rule 12d1-4 to address these concerns with respect to registered acquiring funds should also function effectively with respect to private and foreign acquiring funds (even without the proposed redemption limitation, which we believe should be removed from any final rulemaking for the reasons as described above).

*i. Private Funds*

Allowing private funds to invest in registered funds, including ETFs, beyond the 3% limit of Section 12(d)(1) would also be beneficial from an economic perspective.<sup>30</sup> Private funds may invest in ETFs (and other registered funds) for a variety of reasons, including equitizing cash balances, obtaining efficient exposures to certain markets or asset classes and hedging and risk management purposes. These investments in registered acquired funds may improve liquidity in certain types of registered funds, enhance the arbitrage process for ETFs and otherwise benefit the scale of these registered funds. We therefore suggest that any final rulemaking be amended to facilitate these activities to the benefit of acquiring and acquired fund investors.

In addition to these benefits, we believe that including private funds within the scope of “acquiring funds” under proposed Rule 12d1-4 would not expose acquired fund investors to the concerns outlined in the PPI Report, because the conditions of proposed Rule 12d1-4 (even without the imposition of the proposed redemption limit) would function to protect against the SEC’s stated concerns with respect to acquired registered

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<sup>29</sup> See PPI Report (“This potential for control, basic to the fund holding company structure, carries with it obvious dangers to investors in registered investment companies. The management of a fund holding company may, by threat of redemption, induce deviations from the investment program or policy of registered companies subject to its influence. Should such influence be exercised, and to the extent it is so exercised, the management of the portfolio companies concerned would pass to persons other than those chosen by the stockholders to perform that function.”).

<sup>30</sup> See Comment Letter of Dechert LLP (Sept. 28, 2018) (“permitting funds relying on Sections 3(c)(1) and 3(c)(7) to be acquiring funds would increase the level of investments by private funds in the ETF marketplace and thus create additional liquidity in the ETF marketplace.”); Comment Letter of OppenheimerFunds (Oct. 1, 2018) (“private funds’ being able to rely on fund of funds relief to the same extent as registered funds ... would provide additional liquidity in the ETF marketplace. Therefore, we support a future rulemaking to adopt streamlined fund of funds relief and believe that doing so will ease compliance burdens associated with these types of fund of funds arrangements.”); Comment Letter of the Investment Company Institute (Sept. 21, 2018).

funds.<sup>31</sup> Specifically, proposed Rule 12d1-4 would prohibit a private acquiring fund and its advisory group from controlling an acquired registered fund, and “control” would be determined consistent with the 1940 Act. In addition, under proposed Rule 12d1-4, if an acquiring fund and its advisory group, in the aggregate, hold more than 3% of an acquired fund’s outstanding voting securities, the acquiring fund and each other member of the advisory group would be required to vote those securities in the manner prescribed by Section 12(d)(1)(E)(iii)(aa) (*e.g.*, “pass-through” voting or “mirror” voting). This provision of proposed Rule 12d1-4 would reduce the concern that a private or foreign fund would be able to unduly influence an acquired fund through activist voting measures.<sup>32</sup>

We note, however, that closed-end funds are subject to certain unique considerations by virtue of being frequent targets of proxy contests and other shareholder activism efforts.<sup>33</sup> To the extent that the final rule allows private funds to invest in registered funds in excess of the 3% limit of 12(d)(1)(A)(i), we recognize that specific provisions relating to control and voting may be necessary with respect to private fund investments in closed-end funds. For example, a final rule that permits private funds to invest in closed-end funds beyond Section 12(d)(1)(A)(i)’s 3% limit could also require the private fund to comply with the limitations of Section 12(d)(1)(C). This would limit any acquiring private fund and other investment companies and private funds having the same investment adviser (and companies controlled by such investment companies and private funds), to owning 10% (or less) of the total outstanding voting stock of the closed-end fund.<sup>34</sup>

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<sup>31</sup> Additionally, although we believe 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, we note that in a fund of funds structure in which a private fund is the acquiring fund in reliance on proposed Rule 12d1-4, the conditions of the proposed rulemaking would address the concerns set forth in the PPI Report regarding duplicative fees and overly complex structures.

<sup>32</sup> We believe these concerns would also be addressed by allowing the use of participation agreements as a mechanism to govern fund-of-fund investments. *See* ICI Fund of Funds Letter at 14.

<sup>33</sup> *Id.* at 18.

<sup>34</sup> *Id.* at 30. The Commission also could consider working with Congress to amend Section 12(d)(1) and/or Sections 3(c)(1) and 3(c)(7) to further govern investments by private funds in closed-end funds. *See* Rose DiMartino, *Protecting Closed-End Fund Investors: A Call to Amend 1940 Act Section 12(d)(1)(A)*, 26 *The Investment Lawyer* 1 (Jan. 2019). *See also* ICI Fund of Funds Letter at 30.

*ii. Foreign Funds*

We understand and support the Commission’s significant regulatory interest in protecting U.S. registered funds and their shareholders from the abuses that Congress sought to curtail in adopting Section 12(d)(1).<sup>35</sup> However, for the same reasons described above with respect to private funds, we believe that permitting foreign funds to rely on proposed Rule 12d1-4 would not present the potential for harm to U.S. investors that Congress sought to address in enacting Sections 12(d)(1)(A) and (B).<sup>36</sup>

**C. Concerns Regarding Overly Complex Structures Can be Meaningfully Addressed with Flexibility in the Acquired Fund Investment Limits**

*i. Exception for Short-Term Cash Management Purposes*

We believe that the proposed exception from the limitation on investments by acquired funds in other funds as set forth in proposed Rule 12d1-4(b)(4)(iii)(B) unduly limits the portfolio management discretion of acquired fund advisers with respect to investments in other funds. First, we believe that the Commission should eliminate the requirement in proposed Rule 12d1-4(b)(4)(iii)(B) that the investment be for “short-term cash management purposes” and instead revise the rule to more closely align with the current language of Rule 12d1-2, which permits investments in securities issued by a money market fund, when the acquisition is in reliance on Rule 12d1-1. We also believe that the Commission should expand the scope of this exception to include investments in other types of short-term bond funds that are not money market funds under Rule 2a-7 as deemed advisable by the acquired fund’s adviser (*e.g.*, funds that have a dollar-weighted average

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<sup>35</sup> The Commission’s PPI Report to Congress highlighted concerns regarding an unregistered open-end investment company incorporated in Canada, operating in Switzerland and marketing to U.S. military service members stationed overseas. The fund had acquired controlling interest in multiple U.S. registered funds. After the PPI Report was published, the Commission brought an enforcement action via administrative proceedings under the Securities Exchange Act of 1934 (the “1934 Act”) against two U.S. registered broker-dealers, alleging that they had offered and sold unregistered interests in the Canadian fund, which violated Section 5 of the Securities Act of 1933 (the “1933 Act”) and Section 7 of the 1940 Act.

<sup>36</sup> As with respect to private funds, we believe the use of participation agreements would be an appropriate mechanism to address the historical Congressional and investor protection concerns relating to investments made by foreign funds.

portfolio duration of no more than three years).<sup>37</sup> In each case, these refinements would provide appropriate investment discretion and flexibility to acquired fund advisers in managing cash, complying with asset coverage requirements and other legitimate portfolio management purposes and would be consistent with certain SEC exemptive orders and SEC staff no-action letters without creating overly complex structures.<sup>38</sup>

*ii. Section 3(c)(1) or 3(c)(7) Structured Finance Vehicles*

We believe that the prohibition of proposed Rule 12d1-4 on acquired funds' acquisition of securities of issuers that would be investment companies but for Section 3(c)(1) or 3(c)(7) of the 1940 Act ("3(c)(1)/(7) Funds") in excess of the limits in Section 12(d)(1)(A) is overly restrictive and inconsistent with the statutory framework that Congress established in Section 12(d)(1). Further, the approach in the proposed rulemaking to defining private funds (the term used throughout the Proposing Release) by reference to Sections 3(c)(1) and 3(c)(7) of the 1940 Act is overbroad and would potentially capture many categories of issuers that do not come within the meaning of "private funds," as that term is generally understood.

Proposed Rule 12d1-4's restriction on acquired funds' investments in 3(c)(1)/(7) Funds is not supported by the statutory framework established by Congress. By its terms, Section 12(d)(1) applies to registered investment companies and unregistered investment companies (e.g., foreign funds). It does not apply to companies excluded from the definition of "investment company." Sections 3(c)(1) and 3(c)(7) each provides that a company relying on either of those exclusions is nonetheless treated as an investment company for purposes of the limitations in Sections 12(d)(1)(A)(i) and (B)(i) relating to the acquisition by a 3(c)(1)/(7) Fund of securities issued by a registered open-end fund. Taken together, these provisions establish a clear statutory framework established by Congress under which a 3(c)(1)/(7) Fund is limited in its ability to acquire shares of a

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<sup>37</sup> Alternatively, we suggest that the Commission consider a corresponding revision to the existing language of Rule 12d1-1 to expand the rule to cover investments in short-term bond funds.

<sup>38</sup> See, e.g., See Franklin Templeton Investments, SEC No-Action Letter (pub. avail. April 3, 2015) (the "Franklin Templeton Letter"); Thrivent Financial for Lutherans and Thrivent Asset Management LLC, SEC No-Action Letter (pub. avail. Sep. 27, 2016) (the "Thrivent Letter"); Burnham Investors Trust, *et al.*, SEC Rel. No. IC-26784, 70 Fed. Reg. 13552 (Mar. 15, 2005) (notice) and SEC Rel. No. IC-26832 (Apr. 12, 2005) (order); Putnam American Government Income Fund, *et al.*, SEC Rel. No. IC-26200 (Oct. 1, 2003) (notice) and SEC Rel. No. IC-26414 (Apr. 9, 2004) (order).

registered fund, while a registered fund may invest without limit in 3(c)(1)/(7) Funds under Section 12(d)(1)(A). Indeed, the very deliberate, limited and directional application of Section 12(d)(1) to 3(c)(1)/(7) Funds underscores Congress' intent not to limit registered funds' investments in 3(c)(1)/(7) Funds under Section 12(d)(1)(A), and nothing in the Congressional record indicates that Congress wished to limit registered funds' access to such investment opportunities.<sup>39</sup>

This view is further supported by Section 12(d)(1)(G) of the 1940 Act, which permits registered funds to invest in other registered funds within the same group of investment companies in excess of the Section 12(d)(1)(A) limits. Section 12(d)(1)(G)(i)(IV) restricts an acquired fund in a Section 12(d)(1)(G) arrangement from acquiring securities of other registered open-end investment companies in reliance on Section 12(d)(1)(G) or (F), reflecting concerns over the formation of three-tier investment company structures.<sup>40</sup> This provision does not, however, also limit an acquired fund's ability to invest in 3(c)(1)/(7) Funds.<sup>41</sup>

To the extent that any final rule does limit an acquired fund's acquisition of private funds, we believe that the definition of private funds should be substantially narrowed from the expansive definition for purposes of proposed Rule 12d1-4 (*i.e.*, all 3(c)(1)/(7) Funds), which encompasses not only hedge funds, private equity funds and other similar types of

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<sup>39</sup> 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 1940 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).

<sup>40</sup> See House Report No. 104-622 to Accompany H.R. 3005, the Securities Amendments of 1996, 104th Congress, June 17, 1996 at 43 ("This provision will prevent a fund of funds from investing in other funds of funds. The provision 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.").

<sup>41</sup> We further note that a House of Representatives committee report accompanying the enactment of Section 12(d)(1)(J) of the 1940 Act—which grants the Commission authority to issue exemptive rules and orders under Section 12(d)(1)—stated that the committee "expects that the Commission will use this authority 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." *Id.* at 43-44. We believe that the imposition of new restrictions not grounded in the statutory framework is inconsistent with the "progressive" approach urged by Congress.

pooled investment vehicles (“private investment funds”), but also captures many other categories of issuers not historically considered pooled investment vehicles. Many issuers that are not private investment funds nevertheless adopt offering practices designed to satisfy Section 3(c)(7).

Even when an issuer does rely on Section 3(c)(1) or 3(c)(7), such reliance does not, in and of itself, signify that the issuer is a private investment fund. There are examples of the Commission and the SEC staff drawing distinctions between private investment funds on the one hand and other issuers that may rely on Section 3(c)(1) or 3(c)(7) on the other. For example, Form ADV and Form PF identify several categories of 3(c)(1)/(7) Funds, including “hedge funds,” “private equity funds” and “securitized asset funds” (*e.g.*, structured finance vehicles, such as collateralized loan obligations).<sup>42</sup> The Commission has thus expressly recognized a meaningful distinction between structured finance vehicles and private investment funds.

The SEC staff has also acknowledged such a distinction. Form N-1A requires an open-end fund to disclose in its prospectus the fees and expenses it incurs as a result of its investment in other investment companies or 3(c)(1)/(7) Funds (*i.e.*, AFFEs).<sup>43</sup> However, notwithstanding the form’s express reference to 3(c)(1)/(7) Funds, the SEC staff has stated that AFFEs are “intended to include the expense of investments in investment companies, hedge funds, private equity funds, and other entities traditionally considered pooled investment vehicles” and that a fund may exclude “expenses associated with investments in structured finance vehicles, collateralized debt obligations, or other entities not traditionally considered pooled investment vehicles.”<sup>44</sup> Both the Commission and the SEC staff have thus acknowledged a meaningful distinction between private investment funds and structured finance vehicles.

We believe that Rule 12d1-4 should similarly recognize the important distinctions between private investment funds and structured finance vehicles. Concerns relating to complex

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<sup>42</sup> See Form ADV; Form PF.

<sup>43</sup> See Instruction 3.f to Item 3 of Form N-1A. Forms N-2 and N-3 apply similar requirements to closed-end funds and separate accounts offering variable annuity contracts, respectively. See the section below entitled “Request for Comment on Potential AFFE Disclosure Revisions.”

<sup>44</sup> SEC Division of Investment Management, Staff Responses to Questions Regarding Disclosure of Fund of Funds Expenses (May 23, 2007), available at <http://www.sec.gov/divisions/investment/guidance/fundfundfaq.htm>.

structures and layering of fees and expenses are not implicated by such issuers.<sup>45</sup> Further, limiting acquired funds' ability to invest in the securities of these issuers could have a profound adverse impact on registered funds and their shareholders, structured finance vehicles and the broader economy.

#### **D. The Control Provisions Should be Revised**

Proposed Rule 12d1-4 generally prohibits an acquiring fund *and its advisory group* from controlling, individually or in the aggregate, an acquired fund. Proposed Rule 12d1-4 also requires that, if an acquiring fund *and its advisory group*, in the aggregate, hold more than 3% of the outstanding voting securities of an acquired fund, each of those holders will vote its securities in the manner prescribed by Section 12(d)(1)(E)(iii)(aa).<sup>46</sup> Proposed Rule 12d1-4(d) defines "advisory group" 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."

We support the goal of preventing an acquiring fund from exerting undue influence over an acquired fund and the approach of using the 1940 Act concept of "control" to safeguard against potential coercive behavior. We further agree with the Commission that the

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<sup>45</sup> We note, for example, that unlike most private investment funds, structured finance vehicles typically have straightforward, long-only investment strategies, invest in a narrowly defined set of assets (*e.g.*, secured corporate loans) and provide transparency regarding their underlying portfolios. These vehicles generally issue fixed or floating rate debt instruments with specified reference rates and spreads as well as equity-like residual interests. In the ordinary course, the periodic payments made on such debt instruments are unaffected by the internal expenses of the issuer, including any fees paid to the manager or sponsor of the vehicle.

<sup>46</sup> Under Section 12(d)(1)(E)(iii)(aa), an acquiring fund must either (i) seek instructions from its shareholders as to the voting of all proxies with respect to the acquired fund shares and vote such proxies only in accordance with their instructions (*i.e.*, "pass-through" voting); or (ii) vote the shares held by the acquiring fund in the same proportion as the vote of all other shareholders (*i.e.*, "mirror" voting). We note that the imposition of mandatory "pass-through" or "mirror" voting for all members of the advisory group could be at odds with the proxy voting policies and principles of an adviser or other members of the advisory group and their respective clients. Accordingly, we recommend that the Commission consider narrowing the scope of the mandated voting protocol to avoid potentially superseding existing voting arrangements, and client expectations, with proposed Rule 12d1-4.

ownership of an acquiring fund’s advisory group should not be aggregated with the ownership of an acquiring fund’s sub-advisory group when assessing control over an acquired fund. However, we believe that the control provisions of proposed Rule 12d1-4 should reflect the operational complexities involved in determining the extent of ownership in the shares of an acquired fund by a person in an acquiring fund’s “advisory group.”

Many acquiring funds are advised by entities that are part of large and complex financial services organizations. These organizations are typically required to install information barriers and other controls to limit the amount, type and flow of information shared throughout different parts of the organization. Other operational complexities, such as the use of different reporting, accounting or recordkeeping systems, could hinder an acquiring fund and its investment adviser from determining the extent of ownership in the shares of an acquired fund by a person in the acquiring fund’s “advisory group.” These complexities may be heightened with respect to financial services organizations that manage investments throughout the world.

The Commission has recognized that complex financial services organizations comprise various business units that operate independently of each other. In a 1998 release modifying the beneficial ownership reporting requirements, the Commission permitted, in certain circumstances, the disaggregation of beneficial ownership for purposes of Section 13 of the 1934 Act.<sup>47</sup> We believe that a similar disaggregation approach, perhaps based on the use of information barriers or other separations, is appropriate in the context of determining compliance with the control provisions of proposed Rule 12d1-4.

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<sup>47</sup> See Amendments to Beneficial Ownership Reporting Requirements, SEC Rel. No. 34-39538, 63 Fed. Reg. 2854 (Jan. 16, 1998) (“In those instances where the organizational structure of the parent and related entities are such that the voting and investment powers over the subject securities are exercised independently, attribution may not be required for the purposes of determining whether a filing threshold has been exceeded and the aggregate amount owned by the controlling persons.”).

To alleviate some of these concerns, we also believe that the SEC should add a “knowing” standard (such as those contained in Section 12(d)(1)(B)<sup>48</sup> and Section 17(a)<sup>49</sup>) to the control provisions of proposed Rule 12d1-4. For example, proposed Rule 12d1-4 could prohibit an acquiring fund and its advisory group from *knowingly* controlling, individually or in the aggregate, an acquired fund. This standard could require a level of diligence to account for situations where an acquiring fund and its investment adviser knew, or should have known, that the acquiring fund and its advisory group controlled the acquired fund. We believe that adopting a knowing standard or concept of information or other barriers would significantly reduce the operational burdens for large financial services organizations with varied and complex business lines, while still achieving the Commission’s goal of protecting acquired funds against coercive behavior.<sup>50</sup>

#### **E. Best Interest Finding Should Provide for Appropriate Flexibility**

Proposed Rule 12d1-4 contains certain conditions designed to prevent duplicative and excessive fees in fund of funds arrangements. The conditions require an acquiring fund’s investment adviser (rather than its board of trustees/directors, as required under current SEC exemptive orders) to: (i) evaluate the aggregate fees associated with the acquired fund investment and the complexity of the fund of funds arrangement; and (ii) find that the acquired fund investment is in the best interests of the acquiring fund. The Commission states in the Proposing Release that an adviser should consider fees such as recordkeeping, sub-transfer agency and administrative services with any eye towards duplication.

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<sup>48</sup> Section 12(d)(1)(B) generally provides that it is unlawful for an acquired company *knowingly* to sell or otherwise dispose of any security issued by the acquired company to an acquiring company or any company or companies controlled by the acquiring company, if immediately after such sale or disposition outstanding voting stock, (i) more than 3% of the total outstanding voting stock of the acquired company is owned by the acquiring company and any company or companies controlled by it; or (ii) more than 10% of the total outstanding voting stock of the acquired company is owned by the acquiring company and other investment companies and companies controlled by them.

<sup>49</sup> Section 17(a), in relevant part, prohibits first-tier and second-tier affiliates of a fund, acting as principal, from (i) *knowingly* selling any securities or other property to the fund or (ii) *knowingly* purchasing any securities or other property from the fund.

<sup>50</sup> We acknowledge that many existing exemptive orders with respect to fund of fund arrangements include a similar provision. However, we anticipate that, given the overall proposed rulemaking, the number of fund groups that would rely on proposed Rule 12d1-4 would be significantly greater than the number that rely on the exemptive orders, and may include additional fund groups. Thus, the fund groups impacted by this condition may be quite extensive.

Proposed Rule 12d1-4 would require the adviser to make this finding before investing in acquired funds in reliance on proposed Rule 12d1-4, and thereafter with such frequency as the acquiring fund's board of trustees/directors deems reasonable and appropriate (but no less frequently than annually). Proposed Rule 12d1-4 would also require an acquiring fund's investment adviser to report its finding, as well as the basis for the finding, to the board, which would continue to oversee fund of funds arrangements.

Consistent with the Commission's goal of "providing funds with investment flexibility to meet their investment objectives in an efficient manner,"<sup>51</sup> we suggest that the Commission not set forth specific factors that an adviser must consider in connection with this evaluation and, instead, permit an adviser to consider those factors that it deems relevant to the evaluation. The Proposing Release focuses largely on objective, cost-related considerations, which would be one set of factors, among others, that a portfolio management team might evaluate in connection with making an investment decision. As the Commission noted in the Proposing Release, "whether to invest in an acquired fund to achieve a fund's investment objective, rather than other types of assets, is a question of portfolio management."<sup>52</sup> Accordingly, portfolio managers should be given deference and afforded flexibility with respect to their consideration of factors that they deem most relevant to the proposed best interest finding, including subjective factors relating to investment merits. Instead, we suggest that the Commission simply reiterate and defer to the fiduciary judgment of advisers and fund boards.<sup>53</sup> Further, we suggest that the SEC clarify that an adviser need only conduct the evaluation and reach a best interest finding before investing acquiring fund assets in an acquired fund under proposed Rule 12d1-4 as

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<sup>51</sup> Proposing Release at 1288-89.

<sup>52</sup> *Id.* at 1302.

<sup>53</sup> *See, e.g.*, Fund of Funds Investments, SEC Rel. No. IC-27399, 71 Fed. Reg. 36640 (June 20, 2006) at n. 52 (stating "Section 36(b) of the [1940] Act [15 U.S.C. 80a-35(b)] imposes on fund advisers a fiduciary duty with respect to their compensation. We believe that to the extent advisory services are being performed by another person, such as the adviser to an acquired money market fund, this fiduciary duty would require an acquiring fund's adviser to reduce its fee by the amount that represents compensation for the services performed by the other person."). In this release, the SEC also stated "fund directors have fiduciary duties, which obligate them to protect funds from being overcharged for services provided to the fund, regardless of any special findings we might require." *Id.* at 36644.

We also suggest that the Commission be mindful in adopting any final rulemaking that, in some cases, acquiring funds have a legitimate preference to invest in a fund in the same group of investment companies rather than in a similar fund outside of the same group of investment companies.

opposed to reporting such finding to the board. To require otherwise would be unduly burdensome and potentially disadvantageous to acquiring funds as fund advisers may be limited in their ability to timely adjust portfolio investments consistent with their portfolio management discretion.

**F. Certification for Separate Accounts Funding Variable Insurance Contracts Should be Eliminated**

We suggest that the Commission reconsider and eliminate the condition of proposed Rule 12d1-4 that would require an acquiring fund to obtain a certification from the insurance company offering the separate account (investing in the acquiring fund) that the insurance company has determined that the fees borne by the separate account, acquiring fund and acquired fund, in the aggregate, are consistent with the standard set forth in Section 26(f)(2)(A). Although we recognize that this condition is based on a condition of exemptive orders applicable to fund of funds arrangements, we believe that this condition is unnecessary because of the existing fee and expense statutory regimes and established checks and balances at the variable insurance contract, acquiring fund and acquired fund levels and the other conditions of proposed Rule 12d1-4.

While Section 26(f)(2)(A) imposes a “reasonableness standard” with respect to “fees and charges deducted under the contract,”<sup>54</sup> acquiring and acquired fund advisory agreements are subject to review and approval by their respective boards in accordance with Section 15(c) of the 1940 Act, which requires approval by a majority of a fund’s independent trustees. In addition, an adviser to a fund is subject to a fiduciary duty under Section 36(b) of the 1940 Act with respect to the receipt of compensation for services, or of payments of a material nature, from the fund. Further, proposed Rule 12d1-4(b)(3)(i) would require that the acquiring fund’s adviser evaluate the aggregate fees associated with the acquiring fund’s investment in acquired funds in reliance on proposed Rule 12d1-4 and make a specific best interest finding and report the same to the acquiring fund’s board. Based on this statutory and regulatory framework, we believe that the proposed certification requirement is superfluous and should be eliminated.

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<sup>54</sup> Under Section 26(f)(2)(A), it is unlawful for a separate account or its sponsoring insurance company to sell a contract “unless the fees and charges deducted under the contract, in the aggregate, are reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the insurance company, and . . . the insurance company so represents in the registration statement for the contract.”

Further, the proposed certification requirement applies only to acquiring funds offered as investment options underlying variable insurance contracts. As a stated goal of the Commission in the Proposing Release is to create a consistent rules-based regime for funds of funds and to level the playing field, we believe that the proposed certification requirement would be incompatible with the notion of creating a consistent regulatory framework. We also believe that the proposed certification requirement would unduly introduce potentially significant logistical and other challenges and complications for acquiring funds available as investment options under variable insurance contracts and for insurers.<sup>55</sup> We therefore believe that these considerations further support the recommended elimination of the proposed certification requirement from any final rulemaking.

## II. PROPOSED RESCISSION OF EXEMPTIVE ORDERS

The Proposing Release indicates that the Commission intends to rescind currently-effective exemptive relief permitting fund of fund arrangements as part of its final rulemaking (the “Relief Rescission”). Although we would encourage the Commission to ensure that it has appropriately considered the expected impact of such action, we believe it is equally important that the Commission not foreclose the possibility that fund sponsors could continue to seek and obtain exemptive relief for fund of funds arrangements following any final rulemaking.<sup>56</sup>

As the Commission is aware, neither fund of funds structures nor the regulations applicable to such structures have remained static over time. Presumably recognizing the benefits of such structures, Congress, in 1940, declined to enact an absolute prohibition on fund of funds arrangements (discarding proposals to do so) when enacting Section 12(d)(1) of the

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<sup>55</sup> In addition, we note that this condition may present particular legal and business complications for acquiring funds that are offered as underlying investment options for variable contracts issued by insurance companies that are not affiliated with the funds’ adviser.

<sup>56</sup> In some cases, exemptive orders that provide relief from the limits of Section 12(d)(1) to allow for certain fund of funds arrangements also provide relief from other provisions of the 1940 Act with respect to other types of transactions or arrangements. We urge the Commission to clarify and confirm in the adopting release for any final rulemaking that the withdrawal of exemptive orders for fund of funds arrangements is limited only to the relief from Section 12(d)(1) and that it does not affect relief from other provisions of the 1940 Act granted in those orders.

1940 Act (then Section 12(c)(1)).<sup>57</sup> In 1970, Congress expanded the scope of prohibited fund of funds arrangements to address certain abuses perceived to be associated with the development of fund holding companies (*i.e.*, funds that primarily invest in other investment companies).<sup>58</sup> More recently, in 1996, Congress enacted Section 12(d)(1)(G) – to permit acquiring funds to invest in the funds within the same group of investment companies – and 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*,”<sup>59</sup> the Commission then fostered innovation in and the development of modern fund of funds arrangements through, among other things, exemptive relief for novel fund of funds arrangements and the adoption of Rule 12d1-1, Rule 12d1-2 and Rule 12d1-3 under the 1940 Act.

Although we commend the Commission for seeking to streamline the framework applicable to fund of funds arrangements, we would urge the Commission to be cognizant of Congress’ Section 12(d)(1)(J) mandate as it considers any final rulemaking in this area. As the history of Section 12(d)(1) has shown, neither the nature nor regulation of fund of funds arrangements has remained static over time. Looking forward, we expect that fund of funds sponsors will continue to innovate new fund of funds arrangements in the future—both in response to perceived market opportunities and unforeseen developments—which would provide additional investment options for investors. For example, fund sponsors may seek relief to expand currently-permitted arrangements to include three-tiered structures when such structures can be demonstrated to address historical concerns and can be implemented consistent with the public interest and the protection of investors.<sup>60</sup> Thus, to the extent the Commission does not expressly codify its

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<sup>57</sup> House Hearings, 76th Cong., 3d Sess., at 113 (1940).

<sup>58</sup> H.R. Rep. No. 91-1382, 91st Cong., 2d Sess., at 11 (1970). The Commission identified these abuses in its PPI report.

<sup>59</sup> 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.

<sup>60</sup> In the immediate term following the adoption of any final rulemaking, we expect that the Commission may also receive requests for exemptive relief from fund sponsors for whom the Relief Rescission has

intention to do so in any final rulemaking, we hope that the Commission will continue to engage in constructive dialogue with fund sponsors by reviewing applications for exemptive relief under Section 12(d)(1)(J) of the 1940 Act in the future. This posture would not only be consistent with the spirit of Section 12(d)(1)(J) but would provide an incentive for fund sponsors to continue to operate and innovate fund of funds arrangements to the benefit of investor choice in an evolving asset management industry.

### III. PROPOSED WITHDRAWAL OF NO-ACTION LETTERS

The Proposing Release states that the SEC staff is reviewing no-action and interpretive letters relating to Section 12(d)(1) to determine whether any such letters should be withdrawn in connection with the adoption of proposed Rule 12d1-4.<sup>61</sup> The Commission observed that certain of these letters may be “moot, superseded, or otherwise inconsistent” with proposed Rule 12d1-4. Based on that standard, we believe that certain positions previously expressed by the SEC staff in no-action and interpretive letters should not be withdrawn. We think, for example, that the no-action letters addressing investments (i) by foreign funds in registered U.S. funds,<sup>62</sup> (ii) by registered U.S. funds in foreign funds<sup>63</sup> and (iii) by registered U.S. funds in “central funds,”<sup>64</sup> subject to the conditions set forth in those letters, remain consistent with the purposes and policies underlying proposed Rule 12d1-4. We have discussed certain of these letters below. Further, the withdrawal of these letters in their entirety would significantly disrupt existing fund of funds arrangements and would impose significant burdens on those investment companies (and

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eliminated significant or unique provisions of currently-existing exemptive relief. In some cases, it is possible that the fund sponsor’s fund of fund operations are contingent upon such provision(s); in others, such provision(s) may be less critical. In either case, while acknowledging that a primary purpose of proposed Rule 12d1-4 is to streamline the conditions applicable to fund of funds arrangements, we would also encourage the Commission to critically engage with fund sponsors who submit such requests for relief.

<sup>61</sup> Proposing Release at 1312.

<sup>62</sup> See Dechert LLP, SEC No-Action Letter (pub. avail. Aug. 24, 2009) (the “2009 Dechert Letter”); Dechert LLP, SEC No-Action Letter (pub. avail. Mar. 8, 2017) (the “2017 Dechert Letter” and, together with the 2009 Dechert Letter, the “Dechert Letters”).

<sup>63</sup> See Red Rocks Capital, LLC, SEC No-Action Letter (pub. avail. June 3, 2011) (the “Red Rocks Letter”).

<sup>64</sup> See the Franklin Templeton Letter; the Thrivent Letter. In the Thrivent Letter, the so called “Core Fund” was described as “a fixed-income fund that could have a dollar-weighted average portfolio maturity of up to 3 years.”

their sponsors) that currently rely on them, which may include reduced assets in the funds and higher transaction costs associated with less efficient alternative structures and investments. We therefore recommend that the SEC staff proceed cautiously before withdrawing any no-action or interpretive letter, to better understand the impact to the U.S. mutual fund industry and mutual fund shareholders of withdrawing these letters. Given the number of no-action letters pertaining to fund of funds structures, and the significance of these letters to the fund industry and benefits to fund investors, we also recommend that the SEC staff specifically identify the letters that it proposes to withdraw and provide an opportunity for the industry and investors to provide comment on the proposed withdrawal of particular letters, including the perceived benefits of the letters and the anticipated impact of such withdrawal.

#### A. The Dechert Letters

In the 2009 Dechert Letter, the SEC staff stated that it would not recommend enforcement action against a foreign fund if it purchases shares issued by a registered U.S. fund in excess of the 5% and 10% limits in Sections 12(d)(1)(A)(ii) and (iii) if: (i) the foreign fund complies with the 3% limit in Section 12(d)(1)(A)(i); (ii) the foreign fund does not offer or sell securities in the United States or to any U.S. person; (iii) the foreign fund's transactions with its shareholders are consistent with the definition of "offshore transactions" in Regulation S under the 1933 Act; and (iv) the registered U.S. fund complies with the restrictions of Section 12(d)(1)(B).<sup>65</sup> In providing this relief, the SEC staff recognized that Section 12(d)(1)(A)(i) (*i.e.*, the 3% limit) was sufficient to protect a registered U.S. fund from the abuses that Section 12(d)(1) was designed to address from a foreign fund that purchases the shares of the registered U.S. fund.<sup>66</sup> Sections 12(d)(1)(A)(ii) and (iii) (*i.e.*, the 5% and 10% limits), in contrast, are intended to protect *acquiring* funds and their shareholders (in this case, the foreign funds and their shareholders), and the SEC staff implicitly acknowledges that "the Commission has no significant regulatory interest in protecting [foreign] acquiring funds and their shareholders."

A subsequent no-action letter expanded on this relief to apply to certain master-feeder arrangements involving a foreign fund's investments in registered U.S. funds, including in

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<sup>65</sup> See 2009 Dechert Letter.

<sup>66</sup> See *Id.* (citing the PPI Report).

excess of the 3% limit in Section 12(d)(1)(A)(i).<sup>67</sup> In the 2017 Dechert Letter, the SEC staff indicated that it would not recommend enforcement action in the case of a foreign feeder fund acquiring securities of a single registered U.S. fund in excess of the limits in Section 12(d)(1)(A), provided that it does so in compliance with the conditions of Section 12(d)(1)(E) (as modified in certain respects to account for the laws and/or market practices of the foreign jurisdiction in which the foreign feeder fund operates). As with the 2009 Dechert Letter, the SEC staff implicitly acknowledged that “the SEC generally has no significant U.S. regulatory interest in protecting such *foreign* acquiring funds and their security holders from certain potential abuses that Sections 12(d)(1)(A) and (B) were designed to address (*i.e.*, duplicative fees and unnecessary complexity).”<sup>68</sup>

Because foreign funds are currently excluded from the scope of proposed Rule 12d1-4 as “acquiring funds,” the withdrawal of the Dechert Letters (without codifying the relief in connection with proposed Rule 12d1-4) would significantly curtail the extent to which foreign funds may invest in registered U.S. funds and, consequently, the extent to which registered U.S. funds may market their shares to non-U.S. investors. Registered U.S. funds currently relying on these no-action letters could face a precipitous decline in assets as foreign funds would be required to reduce their holdings to within the Section 12(d)(1)(A) limits. Such a reduction in assets could have an adverse impact on the registered U.S. funds and their shareholders by diminishing the benefits—such as economies of scale and other efficiencies—that accompany larger fund sizes. In light of the significant protections afforded by the conditions of the Dechert Letters, continued reliance on the letters would not be inconsistent with the purposes and policies underlying proposed Rule 12d1-4.

## **B. The Red Rocks Letter**

In the Red Rocks Letter, the SEC staff stated that it would not recommend enforcement action against a registered U.S. fund if it purchases or otherwise acquires shares of certain foreign funds, in excess of the limits in Section 12(d)(1)(A), subject to certain conditions included in that letter. The no-action letter permits a registered U.S. fund to acquire shares

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<sup>67</sup> See 2017 Dechert Letter. See also Principal Investors Fund Inc., SEC No-Action Letter (pub. avail. May 13, 2005) (permitting foreign pension plans that may be deemed to meet the definition of investment company in the 1940 Act to invest in registered U.S. funds in excess of the 3% and 10% limits in Section 12(d)(1)(A)(i) and (iii)).

<sup>68</sup> 2017 Dechert Letter. (emphasis in original).

of a foreign fund in excess of the 3% limit in Section 12(d)(1)(A)(i). Similar to the Dechert Letters, the SEC staff recognized that the SEC has no significant interest in protecting foreign acquired funds. In addition, the no-action letter permits a registered U.S. fund to acquire shares of foreign funds in excess of the 5% and 10% limits in Sections 12(d)(1)(A)(ii) and (iii) because, in other contexts (namely, Section 12(d)(1)(F)), Congress has determined these types of fund of funds arrangements do not implicate the purposes and policies underlying Section 12(d)(1)(A). The no-action letter is beneficial to the U.S. mutual fund industry because it provides registered U.S. funds greater flexibility to obtain exposure to foreign securities markets. Because the Red Rocks Letter remains consistent with the purposes and policies underlying proposed Rule 12d1-4, the SEC staff should not withdraw this letter.

### **C. The Franklin Templeton and Thrivent Letters**

In the Franklin Templeton Letter, the SEC staff stated that it would not recommend that the Commission take any enforcement action in connection with a three-tier arrangement in which an acquiring fund relying on Section 12(d)(1)(G) purchases or otherwise acquires shares of an acquired fund that, in turn, acquires shares of a “central fund”—a registered fund offered exclusively to other funds within the same fund complex for purposes of efficient portfolio management. The no-action letter permits acquired funds to themselves acquire shares of a central fund beyond the 3% limit in Section 12(d)(1)(A)(i), provided that certain conditions are met, including that the acquired fund comply with the 5% and 10% limits in Sections 12(d)(1)(A)(ii) and (iii).<sup>69</sup> The SEC staff subsequently expanded upon this relief in the Thrivent Letter, in which it indicated that it would not recommend enforcement where an acquired fund invests up to 25% of its assets in certain central funds solely for short-term cash management purposes.

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<sup>69</sup> The other conditions of the Franklin Templeton Letter include: (i) that the acquired fund would comply with the provisions of Section 12(d)(1)(G) (other than with respect to its investments in the central fund); (ii) that the acquired fund’s investment adviser would waive management fees otherwise payable by the acquired fund in an amount equal to any management fees paid to the investment adviser (or its affiliates) by the central fund; (iii) that shares of the central fund would not be subject to a sales load, redemption fee or Rule 12b-1 fee; (iv) that the central fund would not acquire securities of any investment company or any company relying on Section 3(c)(1) or 3(c)(7) of the 1940 Act; (v) that share of the central fund would be sold solely to funds within the same fund complex; and (vi) that prior to an initial investment in the central fund, an acquired fund’s board of trustees, including a majority of the disinterested board members, consider the reasons for and benefits expected to be realized from the investment.

As the SEC staff expressly acknowledged in the Thrivent Letter and implicitly recognized in the Franklin Templeton Letter, these types of arrangements do not implicate the concerns about complex fund structures that Sections 12(d)(1)(A) and (B) were designed to address. Further, as Franklin Templeton observed in its incoming letter, the use of central funds can “reduce the trading and settlement costs and other operational inefficiencies associated with managing each [f]und’s investments” separately. The withdrawal of these letters (without codifying the relief in connection with proposed Rule 12d1-4) would reduce acquired funds’ ability to benefit from such efficiencies, which could negatively impact such funds and their shareholders. We also note that the Commission has requested comments as to whether proposed Rule 12d1-4 should allow acquired funds relying on Section 12(d)(1)(G) to invest in a third-tier central fund in order to centralize the portfolio management of floating rate or other instruments.<sup>70</sup> For the reasons discussed above, we believe that preserving these letters or codifying the investments described in the Franklin Templeton and Thrivent Letters in the list of exceptions in proposed Rule 12d1-4(b)(4)(iii)(B) would be appropriate.

#### **IV. REQUEST FOR COMMENT ON POTENTIAL AFFE DISCLOSURE REVISIONS**

In 2006, the SEC adopted amendments to Forms N-1A, N-2, N-3, N-4 and N-6 (the “Forms”), the forms for registration statements used by registered investment companies and BDCs to offer their securities. The amendments require a registered fund or BDC to disclose as an additional operating expense line item in its prospectus fee table its pro rata share of the operating expenses charged by each “acquired fund,” *i.e.*, each fund in which the acquiring fund invests, expressed as a percentage of the acquiring fund’s net asset value (the “AFFE requirements” or “AFFE rule”). The adopting release indicates that the purpose of the 2006 amendments was to provide investors with (i) “a better understanding of the actual costs of investing in a fund that invests in other funds” and (ii) “the means to compare directly the costs of investing in alternative funds of funds, or the costs of investing in a fund of funds to a more traditional fund.”<sup>71</sup>

Unfortunately, the AFFE expense line item is added to the acquiring fund’s actual operating expenses and increases the “total annual fund operating expenses” line item, *i.e.*,

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<sup>70</sup> Proposing Release at 1309.

<sup>71</sup> Fund of Funds Investments, SEC Rel. No. IC-27399, 71 Fed. Reg. 36640 (June 20, 2006) at 36651.

the “bottom line” expense ratio shown in the prospectus fee table. Because true operating expenses necessarily reduce a fund’s total return, many investors and financial intermediaries, *e.g.*, investment advisers and fund platforms, regard a fund’s expense ratio as a critical factor in evaluating competing funds. A high expense ratio can eliminate a fund from further consideration. The AFFE line item component of a fund’s expense ratio, however, is not a true fund operating expense. It is not deducted from the fund’s net investment income and therefore does not reduce the fund’s total return or net asset value. The SEC recognized this discrepancy in adopting the AFFE rule, specifying that a fund may clarify in a footnote to the fee table that the total annual fund operating expenses shown in the fee table (which include AFFE) do not correlate with the ratio of expenses to average net assets shown in the fund’s financial highlights (which do not).<sup>72</sup> Nevertheless, market participants accustomed to using a fund’s expense ratio as a critical factor for evaluating a fund generally do not deduct the AFFE line item from the expense ratio.

#### **A. The AFFE Rule Can Make the Prospectus Fee Table Confusing**

The AFFE rule requires a fund to add to its own operating expenses the expenses that other funds (*i.e.*, acquired funds) actually incur. The result is an inflated percentage for the “total annual fund operating expenses” line item in its prospectus fee table. The “Expense Example” that follows the fee table uses this inflated percentage to calculate the operating expenses for various time periods of a \$10,000 investment in the acquiring fund, thus reinforcing the impression that expenses attributable to underlying funds are actually incurred by the acquiring fund. The clarifying footnote allowed by the Forms, which explains that AFFE are not reflected in the acquiring fund’s financial highlights, reflects the discrepancy between the fund’s fee table and the expenses actually incurred by the fund. This legally mandated discrepancy undermines a stated objective of the AFFE rule by suggesting to investors that expenses incurred by an underlying fund are expenses incurred by the investing fund in managing that portfolio. Instead of providing “a better understanding of the actual costs of investing in a fund that invests in other funds,” the AFFE requirement creates the misimpression that the acquiring fund’s operating expenses are higher than they actually are and implies that the acquiring fund is engaged in the same operating activities as the acquired fund. Rather than facilitating “a better understanding” of the “actual costs of investing in a fund,” the AFFE rule obfuscates, by requiring acquiring funds to artificially inflate their fee table expense ratio.

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<sup>72</sup> See Instruction 3(f)(vii) to Item 3 of Form N-1A.

## **B. The AFFE Requirements Have Disproportionately Harmed BDCs**

An unintended consequence of the artificially inflated expense ratio resulting from the AFFE line item and the consequent increase in an acquiring fund's expense ratio has been to discourage sponsors of mutual funds, closed-end funds, ETFs and other registered investment companies from investing in BDCs. Due to the nature of the BDC business model, a BDC's expense ratio usually is many multiples of the expense ratio of a typical mutual fund, closed-end fund or ETF. The process of evaluating prospective small, non-public companies, monitoring portfolio company performance, making available "significant managerial assistance" (as required by the 1940 Act) and negotiating transactions for the acquisition or sale of portfolio securities is labor intensive and costly. Moreover, most BDCs use leverage, and the cost of servicing debt can be significant. It follows that an acquiring fund's BDC investments disproportionately elevate that fund's AFFE operating expense line item in its prospectus fee table, which, in turn, increases the acquiring fund's expense ratio.

The expense ratio is a critical factor in distinguishing competing mutual funds and ETFs that track indices. To avoid the distorting effect of AFFE on the stated expense ratio of these funds, the fund industry encouraged index providers to remove BDCs from their indices. In 2014, S&P and Russell announced that BDCs would no longer be eligible for inclusion in their family of indices. Mutual funds and ETFs that passively track these indices are now essentially prohibited from investing in BDCs. Advisers to actively managed funds who would like exposure to the markets in which BDCs invest also have reduced their BDC holdings in light of the risk of losing distribution opportunities due to an expense ratio inflated by a high AFFE line item.<sup>73</sup>

The decline in mutual fund and ETF investment in BDCs harms investors in those mutual funds and ETFs on one hand, and investors in BDCs on the other hand. Where fund managers avoid investing in BDCs, their investors are deprived of the potential returns and other benefits that BDCs can provide.<sup>74</sup> The harm to BDC investors is more direct.

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<sup>73</sup> See The 2Q18 BDC Scorecard (Jan. 18, 2017) ("2Q18 BDC Scorecard").

<sup>74</sup> A fund adviser that lacks the resources necessary to invest directly in middle market companies can gain exposure to this market by investing in BDCs. Moreover, unlike direct middle market investments, BDC

Liquidity of BDC shares has declined substantially since BDCs were dropped from the major indices in 2014.<sup>75</sup> Third-party research analyst coverage of BDCs has also declined, perhaps as a result of reduced investment activity. The reduction of BDC investment by mutual funds and ETFs has also reduced institutional ownership of BDC shares, thereby weakening BDC governance.<sup>76</sup> In this regard, institutional shareholders are significantly more likely to participate in shareholder meetings than retail shareholders, particularly fund managers, which are subject to a fiduciary obligation to do so.<sup>77</sup>

### **C. The AFFE Requirements Inhibit Capital Formation**

BDCs were created by Congress (pursuant to the Small Business Investment Incentive Act of 1980) to help direct additional financing to small- and mid-sized U.S. companies.<sup>78</sup> This mission is reflected in the statutory requirement that BDCs invest 70% of their assets in U.S. privately-owned operating companies or U.S. companies with a market capitalization of less than \$250 million (referred to as “qualifying assets”). As a result of a series of reforms in banking regulation over the last decade, BDCs have indeed emerged as an important source of financing to small- and mid-sized U.S. businesses. Unfortunately, the AFFE requirements have had the unintended consequence of undermining BDCs’ Congressional mandate by discouraging mutual funds, closed-end funds and ETFs from making investments in BDCs. The House Committee on Appropriations has recognized this fact and repeatedly urged the SEC to modify the AFFE requirements in order to address the “unintended, harmful consequences” experienced by BDCs.<sup>79</sup>

### **D. Suggested Revisions to the Forms**

In light of the foregoing, we propose that the SEC revise the Forms to require acquiring funds to instead disclose expenses attributable to underlying fund investments outside of

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shares are highly liquid. Thus, a fund manager can increase or decrease the fund’s exposure to middle market companies in an instant.

<sup>75</sup> See 2Q18 BDC Scorecard.

<sup>76</sup> See *Id.*

<sup>77</sup> See *Id.*

<sup>78</sup> Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, 94 Stat. 2275 (1980) (codified in various sections of the United States Code).

<sup>79</sup> H.R. Rep. No. 115-792, 115th Cong., 2d Sess. (2018).

the actual fee table, such as in a new footnote to the fee table (or elsewhere). Alternatively, the SEC could revise the Forms to simply exclude BDCs from the definition of “acquired fund” for this purpose. We believe that these modifications would maintain appropriate investor protections through accurate and sufficiently prominent disclosure pursuant to the purposes of the AFFE rule, while helping to reverse the misimpressions conveyed by the current AFFE fee table disclosure requirements and the adverse consequences that those requirements have imposed on BDCs and the funds that wish to invest in them.

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We appreciate the opportunity to comment on the Proposing Release. Please feel free to contact Julien Bourgeois at (202) 261-3451, Brenden P. Carroll at (202) 261-3458, Allison M. Fumai at (212) 698-3526, Jeremy I. Senderowicz at (212) 641-5669 or James V. Catano at (202) 261-3376 with any questions about this submission.

Very truly yours,

/s/ Dechert LLP

Dechert LLP

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