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May 2, 2019

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

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

Dear Ms. Countryman,

Clifford Chance US LLP appreciates the opportunity to comment on the proposed rules and amendments entitled "Fund of Funds Arrangements", SEC Release Nos. 33-10590 and IC-33329 (December 19, 2018), 84 Fed. Reg. 1286 (February 1, 2019) (the "Release"), published by the Securities and Exchange Commission (the "Commission" or "SEC") regarding fund of funds arrangements and new proposed rule 12d1-4 (the "Proposed Rule") under the Investment Company Act of 1940, as amended (the "1940 Act").

We support and commend the Commission's efforts to streamline and enhance the regulatory framework applicable to fund of fund investments. We believe that certain aspects of the Proposed Rule, along with the corresponding proposed rescission of rule 12d1-2 under the 1940 Act and individual exemptive orders for certain fund of funds arrangements, would provide a more uniform set of regulations and rules that would, in turn, provide benefits to the industry and investors as a whole, while continuing to protect and address the concerns underlying Section 12(d)(1) of the 1940 Act. However, we urge the Commission to extend the scope of the Proposed Rule to private funds[1] and unregistered investment companies, such as foreign funds (collectively, for purposes of this letter, "private funds"). We believe extending the Proposed Rule to private funds would not be inconsistent with the purpose of Section 12(d)(1) and that protections can be implemented to ensure the Commission has adequate information on private funds that choose to

[1] Private funds means funds that are excepted from the definition of an "investment company" pursuant to Section 3(c)(1) or Section 3(c)(7) of the 1940 Act.

invest in accordance with the conditions of the Proposed Rule.[2] Specifically, we believe expanding the information provided by private fund advisers in Form PF[3] in order to capture the information the Commission intends to rely on by adopting the Proposed Rule would allay the concerns of the Commission regarding the lack of reporting requirements for private funds.

The Proposed Rule would permit registered investment companies and business development companies ("BDCs") to acquire the securities of another registered investment company or BDC in excess of the limits imposed by Section 12(d)(1) of the 1940 Act, subject to certain conditions.[4] The new framework set forth by the Proposed Rule would cover open-end funds, unit investment trusts ("UITs"), closed-end funds (including BDCs), exchange-traded funds ("ETFs"), and exchange-traded mutual funds ("ETMFs"), in each case both as acquiring and acquired funds.[5] However, private funds are specifically excluded from the Proposed Rule's scope.

In the Release, the Commission noted that the exclusion of private funds from the Proposed Rule is consistent with the approach in the 2008 Proposing Release.[6] However, the Commission was noticeably silent on the policy reasons for the exclusion of private funds in the 2008 Proposing Release. Under the Proposed Rule, the Commission takes a markedly different approach and specifically addresses the exclusion of private funds. The Commission's policy arguments for excluding private funds focus on the lack of reporting and record retention requirements applicable

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2 While we have generally limited the scope of this letter to a discussion of the type of funds to be included within the purview of the Proposed Rule, we also respectfully disagree with the condition proposed by the Commission in the Release that would limit an acquiring fund from redeeming or tendering more than 3% of an acquired fund's total outstanding shares in any 30-day period. We believe such limitation provides very little protections to acquired funds and their shareholders, and would create unnecessary redemption limitations on acquiring funds.

3 The Commission could also consider adopting a new reporting form for private funds that are not advised by registered investment advisers and which intend to rely on the Proposed Rule in order to capture the reporting information that could otherwise be accomplished by amending Form PF.

4 Release at page 14.

5 Release at page 14.

6 Exchange-Traded Funds, Proposed Rule, SEC Release Nos. 33-8901 and IC-28193 ("2008 Proposing Release"). The 2008 Proposing Release proposed a new rule 12d1-4 under the 1940 Act, among other things, that would have permitted investment companies to acquire shares of ETFs in excess of the limitations on those investments under section 12(d)(1) of the 1940 Act, subject to certain conditions intended to address the concerns underlying those limitations. Rule 12d1-4 as set forth in the 2008 Proposing Release was not adopted. The scope of the 2008 Proposing Release's rule 12d1-4 was also more limited than the current Proposed Rule, which would apply more broadly than only to ETFs.

to private funds as compared to registered investment companies, specifically noting the reporting requirements on Form N-CEN (as amended by the Proposed Rule) and Form N-PORT and the record retention requirements of rule 31a-1 under the 1940 Act.[7] The Commission also notes some of the arguments set forth by several commenters on the 2008 Proposing Release supportive of including private funds, but does not refute or expand upon any of these arguments.[8]

However, the 2008 Proposing Release predated the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") which dramatically changed the regulatory landscape for private funds and their advisers. The transformation in the market and regulatory environment for private funds since the passage and subsequent implementation of Dodd-Frank cannot be overlooked in evaluating the scope of the Proposed Rules. Prior to Dodd-Frank, many private fund advisers were exempted from registration with the Commission in reliance on the "private adviser" exemption previously contained in Section 203(b)(3) of the Investment Advisers Act of 1940, as amended (the "Advisers Act").[9] As a result of Dodd-Frank's elimination of the private adviser exemption, investment advisers with a principal place of business in the United States or that manage private fund assets from a United States place of business are now generally required, subject to certain exemptions, to register with the Commission if their regulatory assets under management equal or are greater than $150 million.[10] This significant shift in approach has resulted in increased oversight and scrutiny of the private fund market as well as increased reporting by advisers to private funds.[11] Coupled with the SEC staff's continued focus on certain aspects of private fund advisers as part of its exam priorities,[12] the changes ushered in by Dodd-Frank created a far more robust regulatory and reporting regime, to which many private fund advisers are now subject, than existed in 2008.

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7 Release at pages 19-20.

8 Release at page 19.

9 Rules Implementing Amendments to the Investment Advisers Act of 1940, SEC Release No. IA-3221, page 5.

10 *See*, 15 U.S.C. § 80b-3; Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, SEC Release No. IA-3222.

11 *See*, Form PF, General Instructions; Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, SEC Release No. IA-3145, pages 18-19.

12 *See, e.g.*, 2019 Examination Priorities, U.S. Securities and Exchange Commission Office of Compliance Inspections and Examinations.

While we appreciate the Commission's policy concerns and transparency in its decision to exclude private funds from the scope of the Proposed Rule, we believe that the altered regulatory landscape as a result of Dodd-Frank and proposed expanded reporting requirements for private funds as discussed in this letter, warrants the inclusion of private funds in the Proposed Rule. In addition, while we agree with certain of the policy arguments set forth by the 2008 commenters,[13] we believe the increased scrutiny and oversight of private funds and their investment advisers as a result of Dodd-Frank adequately addresses the concerns that underlie Section 12(d)(1) of the 1940 Act and the policy considerations of the Commission.

While we believe investors would greatly benefit from the inclusion of all private funds within the ambit of the Proposed Rule, we understand the policy concerns in extending the Proposed Rule to certain private funds or to foreign funds. Accordingly, we would suggest, if the Commission was not amenable to expanding the scope of the Proposed Rule to all private funds, that the Proposed Rule only include private funds that are either (A) (i) United States domiciled and (ii) advised by registered investment advisers that report on Form PF, or (B) if such private fund is a foreign fund, it be advised by a registered investment adviser and it have a registered office in the United States. These limitations would allow the Commission and its staff access to such registered investment advisers and their private fund clients. Indeed, the SEC staff stated in its 2018 "Annual Staff Report Relating to the Use of Form PF Data" that "[B]efore Form PF was adopted, the Commission and other regulators had more limited visibility into the economic activity of private funds. With the significant increase in private fund advisers registered with the Commission in 2012, Form PF represented an improvement in available data about private funds compared with the third-party data on which the Commission would otherwise rely."[14]

As noted above, one of the main justifications the Commission provides for excluding private funds from the Proposed Rule is the lack of reporting requirements (i.e., Form N-CEN and Form N-PORT) for private funds compared to registered investment companies. While neither private funds nor their investment advisers report on Form N-CEN or Form N-PORT, generally private fund advisers that are registered with the Commission must file on Form PF.[15] If private

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[13] *See, e.g.*, Comment Letter of Managed Fund Association (May 18, 2017); Comment Letter of The Bar of the City of New York (May 9, 2008); Comment Letter of State Street Global Advisors (May 19, 2008).

[14] Annual Staff Report Relating to the Use of Form PF Data, U.S. Securities and Exchange Commission (December 14, 2018), page 1.

[15] *See*, Form PF, General Instruction 1; Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, SEC Release No. IA-3145, pages 18-19.

funds are included in the Proposed Rule's scope, we believe the Commission should also amend Form PF accordingly.[16] For instance, Form PF could be amended to include a requirement for private fund advisers to report if any of the private funds they advise relied on the Proposed Rule during the reporting period, thereby providing the Commission with the same census-type information it intends to obtain by amending Form N-CEN.[17] In addition, Form PF, which already requires information regarding the private funds advised by the investment adviser in Section 1b,[18] could be amended to include a requirement for private fund advisers to report the acquired fund holdings of any private funds they advise that intend to rely on the Proposed Rule. If the investment adviser advises any such private funds, it should also be required to file Form PF quarterly (as is already required for "large hedge fund advisers" and "large liquidity fund advisers"[19]) in the same way Form N-PORT must be filed quarterly. Amending Form PF as suggested above is an efficient solution to address the policy concerns of the Commission regarding the disparate reporting requirements for private funds as compared to registered investment companies.

Another policy concern cited by the Commission in the Release involves private fund adviser recordkeeping requirements. Registered investment advisers are already required to keep certain books and records pursuant to rule 204-2 of the Advisers Act.[20] We propose extending the record retention requirements for registered private fund advisers that advise private funds and private funds that are not advised by a registered investment adviser which intend to rely on the Proposed Rule to include records for such private funds that comply with rule 31a-1 of the 1940 Act. This requirement, along with reporting in a similar manner to that of registered investment companies, would, we believe, adequately address the main policy concerns of the Commission and provide helpful data and information regarding fund of funds arrangements to the Commission.

We believe that the proposed changes to the Proposed Rule and additional disclosure requirements outlined above would more than adequately address the policy concerns of the Commission with including private funds within the scope of the Proposed Rule as set forth in the

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16 As noted previously, the Commission could also adopt a new form for those private funds that are not advised by registered private fund advisers reporting on Form PF.

17 Release at page 94.

18 *See*, Form PF, Section 1b.

19 *See*, Form PF, General Instruction 1.

20 17 CFR § 275.201-2.

Release. Further, while the conditions of the Proposed Rule address the policy concerns on which Section 12(d)(1) is predicated, we do not believe extending the Proposed Rule to capture the subset of private funds described above would negatively impact the policy concerns that underpin Section 12(d)(1). As such, we believe the expansion of the Proposed Rule to include private funds is entirely consistent with the Commission's policy concerns and would also more closely align with the treatment of such private funds under Section 12 of the 1940 Act, which are treated as investment companies for the limited purposes of Section 12(d)(1)(A)(i) and 12(d)(1)(B)(i).

We respectfully request that the Commission consider our recommendations and appreciate the opportunity to provide such comments. If you would like to discuss any of the comments in further detail or if you have any questions, please feel free to contact the undersigned at [redacted].

Sincerely,

Clifford R. Cone
Clifford Chance US LLP

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

Ms. Dalia Blass
Director, Division of Investment Management