

PUBLIC

SEP 28 1995

Our Ref. No. 95-236-CC
MassMutual Institutional
Funds
File No. 811-8274

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter dated September 21, 1995 requests our assurance that we would not recommend enforcement action to the Commission if MassMutual Institutional Funds (the "Trust") calculates standardized average annual total return in the manner described in your letter and includes these total return figures in its prospectus, statement of additional information, advertisements, and sales literature.

The Trust is an open-end management investment company with seven series ("Funds"), each having four classes of shares. 1/ Each Fund has an investment objective designed to correspond to the investment objective of an existing unregistered separate investment account ("SIA") of MassMutual. 2/ Shortly before the effective date of the Trust's registration statement, the assets of each SIA were transferred to the corresponding Fund in exchange for Class 4 shares of the Fund. Prior to the public offering of the Trust's shares, the SIAs held all the shares of the Trust (except those held by MassMutual as a result of its contribution of the Trust's initial capital), and each Fund contained the same portfolio securities that were held by the corresponding SIA immediately prior to the transfer of assets.

MassMutual is the investment adviser for each Fund, and has served as the investment adviser for each SIA from its inception. Certain of the Funds have sub-advisers, each of which was also sub-adviser to the corresponding SIA prior to the transfer of assets. You state that the investment policies, objectives, guidelines, and restrictions of each Fund are in all material respects equivalent to those of the corresponding SIA. Moreover,

1/ Shares of Classes 1, 2 and 3 are offered primarily to employer-sponsored defined contribution plans. Class 4 shares are offered only to unregistered separate investment accounts of Massachusetts Mutual Life Insurance Company ("MassMutual") and certain of its affiliated life insurance companies.

2/ The SIAs were created as investment vehicles for pension plans qualified under Section 401 of the Internal Revenue Code. The SIAs are exempt from registration under the Investment Company Act of 1940 ("1940 Act") in reliance on Section 3(c)(11).

you also state that the management practices of the each Fund are in all material respects identical to the corresponding SIA. 3/

You represent that the Funds effectively are continuations of pre-existing accounts that were created for purposes entirely unrelated to the establishment of a performance record. Two of the seven SIAs have existed for more than 20 years, and two others have existed for more than 10 years. Of the other three SIAs, one was established in 1987, one in 1989, and one in 1991.

You state that, before the transfer of assets, only investment management fees and custody charges were paid directly from SIA assets. Other fees related to investment in the SIAs were paid by the participating pension plans. Therefore, Fund expenses generally are higher than those that were paid by the corresponding SIA. 4/

The Trust proposes to include in its prospectus or statement of additional information, and its advertisements and sales literature, the performance of the SIAs for the periods prior to the date the Trust's registration statement became effective in calculating the total return of each class. Specifically, the standardized average annual total return of each class will be calculated for the preceding one, five and ten year periods (or since inception of the applicable SIA if it has been in existence less than five or ten years) by including the corresponding SIA's total return calculated in accordance with Item 22(b)(i) of Form N-1A for periods prior to September 30, 1994. 5/ You further

3/ As further evidence that the Funds are managed in a materially equivalent manner to the corresponding SIAs, you note your belief that, although not required to, the SIAs likely would have been able to comply with the investment restrictions imposed by Subchapter M of the Internal Revenue Code. Telephone conversation with Richard M. Howe on September 28, 1995.

4/ The initial expense level of each Class 4 was equal to the level of expenses of the corresponding SIA. Telephone conversation with Richard M. Howe on September 21, 1995.

5/ You represent that any quotation of the Trust's performance that includes the performance of the SIAs will be accompanied by disclosure that: (1) the quoted performance data includes the performance of the SIAs for periods before the Trust's registration statement became effective; (2) the SIAs were not registered under the 1940 Act and therefore were not subject to certain investment restrictions that are imposed by the Act; and (3) if the SIAs had been registered under the 1940 Act, the SIAs' performance may have been adversely affected.

propose that, for this purpose, the performance of the SIAs be adjusted to reflect the deduction of the fees and expenses of the classes of the corresponding Fund as stated in the fee table included in the Trust's prospectus dated October 3, 1994, the effective date of the Trust's registration statement. You maintain that omitting the SIAs' performance prior to the registration of the Trust would deny potential investors access to important investment information.

Rule 482(e)(3) under the Securities Act of 1933 requires that fund advertisements containing performance data include quotations of average annual total return calculated in accordance with Item 22(b)(i) of Form N-1A for one, five, and ten year periods. 6/ If a fund's registration statement has been in effect for less than any of those periods, the time during which the fund's registration statement has been in effect must be substituted for the period or periods otherwise required. 7/ The requirement that standardized performance data not include periods prior to a fund's registration is intended in part to preclude an adviser from establishing a number of funds for the purposes of generating performance data, and then registering those "incubator funds" with the best performance records so that the newly registered funds can use that performance. 8/

Under the circumstances set forth in your letter, we would not recommend enforcement action to the Commission if the SIA performance data prior to the effective date of the Trust's registration statement were included in calculating total return used in the Trust's prospectus, statement of additional information, advertisements and sales literature, despite the

6/ Item 22(b)(i) requires a fund that advertises performance data to include in its registration statement average annual total return quotations calculated in accordance with a formula set forth in that Item. Rule 34b-1 under the 1940 Act requires that sales literature (*i.e.*, material that accompanies or follows delivery of a fund's prospectus) that contains performance data include the total return information required by Rule 482(e)(3).

7/ Rule 482(e)(3); Instruction 5 to Item 22(b)(i) of Form N-1A.

8/ See Lemke, Lins & Smith, Regulation of Investment Companies §22.01, n.4 (1995). When amendments to Rule 482 were adopted in 1988, the adopting release stated that a fund would not be permitted to advertise its performance prior to the effectiveness of its registration statement because "funds are likely to be managed differently before they are offered to the public." Investment Company Act Rel. No. 16245 (Feb. 2, 1988).

fact that the SIAs were not registered entities. 9/ This position is based particularly on your representations that (1) each Fund is managed in a manner that is in all material respects equivalent to the management of the corresponding SIA, and (2) the Funds were created for purposes entirely unrelated to the establishment of a performance record.

With respect to your proposal to adjust the performance of the SIAs to reflect the fees and expenses of the Funds, the staff generally takes the position that an investment company may not recalculate its standardized total return to reflect new Rule 12b-1 fees or other internal fund expenses, but must calculate standardized total return using the actual fees charged to the Funds. 10/ This position is based, at least in part, on the rationale that reflecting revised expenses in total return might require frequent and burdensome recomputations that could not readily be verified by Commission examiners. 11/

While, as a general matter, we continue to adhere to this position, we would not recommend enforcement action to the Commission if, under the circumstances described in your letter, the Trust restates the prior performance of the corresponding SIAs to reflect the fees and expenses of each class as stated in the fee table included in the Trust's initial prospectus. In reaching this conclusion, we note particularly that: (1) you propose a one-time recalculation of the SIAs' performance and the Trust will not adjust the performance of the SIAs to reflect future changes in the internal expenses of a class; (2) you represent that it would not be practicable to determine the actual expenses associated with an investment in the SIAs, as

9/ In Growth Stock Outlook Trust, Inc. (pub. avail. Apr. 15, 1986) the staff took the position that a closed-end fund may include in its prospectus the performance of its investment adviser's similarly managed private accounts as a substitute for fund performance during the first year of the fund's operations. Because each Fund is essentially a continuation of its corresponding SIA, the limitations set forth in the Growth Stock letter do not apply here. Accordingly, the Trust's use in its prospectus of performance data that incorporate the SIAs' performance need not be limited to the first year of the Trust's operations.

10/ Id. In contrast, the staff has taken the position that an investment company should use its current sales load in calculating standardized total return. IDS Financial Corp (Dec. 19, 1994); The Managers Core Trust (pub. avail. Jan. 28, 1993).

11/ Kidder, Peabody Equity Income Fund, Inc. (pub. avail. Nov. 1, 1991).

certain of those expenses were paid directly by the relevant plans rather than by the SIAs and these expenses varied among plans; and (3) your proposed adjustment to the SIAs' performance will result in total return figures for the Funds that are no higher than would result from the use of the actual expenses paid out of the assets of the SIAs. 12/

You should note that, because this response is based on the facts and representations in your letter, different facts or representations may require a different conclusion. 13/

Jana M. Cayne
Jana M. Cayne
Attorney

12/ See note 4 and accompanying text supra.

13/ The above analysis also would apply to an investment company that relied on the exception for private investment companies set forth in Section 3(c)(1) or the exception for common trust funds set forth in Section 3(c)(3) of the 1940 Act prior to its registration.

m

MassMutual

1995
Section
346-1
Public
Availability 9/28/95

September 21, 1995

Office of the Chief Counsel
Division of Investment Management
Securities and Exchange Commission
Judiciary Plaza
450 Fifth Street, N.W.
Washington, DC 20549

Re: Massachusetts Mutual Life Insurance Company
MassMutual Institutional Funds
File Nos. 33-73824 and 811-8274

Ladies and Gentlemen:

Massachusetts Mutual Life Insurance Company ("MassMutual") is the investment adviser to MassMutual Institutional Funds (the "Trust"). The Trust is an open-end, management investment company registered with the Securities and Exchange Commission (the "Commission") pursuant to the Registration Statement referenced above (the "Registration Statement"). The Trust consists of seven series (the "Funds"), each having four classes of shares ("Classes"). Class 1, 2 and 3 shares are offered primarily to employer-sponsored defined contribution plans. Class 4 shares are only offered to unregistered separate investment accounts of MassMutual and certain of its affiliated life insurance companies.

Each of the seven Funds has an investment objective, policies and practices designed to correspond to the investment objective, policies and practices of a corresponding MassMutual separate investment account (collectively, the "SIAs"). The SIAs are

Office of Chief Counsel
MassMutual Institutional Funds
September 21, 1995
Page 2

not registered investment companies as they each are exempt from registration under Section 3(11) of the Investment Company Act of 1940, as amended. Each of the SIAs contributed all of its portfolio securities to the corresponding Fund in exchange for Class 4 shares.¹ As a result of this exchange, the seven SIAs were effectively converted from separate investment accounts having their own portfolios of investments to separate investment accounts investing solely in Class 4 shares of the Funds. Since the SIAs constitute the predecessors of the Funds, the Trust's initial prospectus contained historical investment performance for the SIAs (adjusted to reflect anticipated expenses, net of management fee waivers) of each Class of each Fund.

It is proposed that the Trust calculate the performance for each Class of each Fund for periods commencing prior to the transfer of the SIA assets by including the corresponding SIA's total return adjusted to reflect the deduction of fees and expenses applicable to each Class as stated in the Fee Table of the Trust's initial prospectus which was effective October 3, 1994. Total return would be calculated pursuant to SEC approved methodology as currently set forth in Item 22 of Form N1-A. These fees and expenses would include sales charges (if any should be imposed) and Rule 12b-1 fees and, in the case of Class 4, any charges at the SIA level.

Any quotation of the performance of the Trust that includes the performance of the SIAs will be accompanied by disclosure that states that: (1) the quoted performance data includes the performance of the SIAs for periods before the Trust's Registration Statement became effective; (2) the SIAs were not registered under the 1940 Act and therefore were not subject to certain investment restrictions that are imposed by the 1940 Act, and (3) if the SIAs had been registered under the 1940 Act, the SIAs performance may have been adversely affected.

Therefore, we hereby respectfully seek the assurance of the SEC's Division of Investment Management (the "Division") that it will not recommend enforcement action against the Trust or its underwriters, if the performance of each of the SIAs are deemed to have been the performance of the corresponding Fund, restated to reflect the fees and charges of each Class of the Fund, for purposes of calculating

¹ The Trust obtained an order from the Commission permitting it to offer multiple Classes of shares and to transfer assets from the SIAs to the corresponding Fund of the Trust. See, Release No. IC-20455 (August 9, 1994).

Office of Chief Counsel
MassMutual Institutional Funds
September 21, 1995
Page 3

the performance of each of the Funds for the use in sales material, including applicable prospectuses and statements of additional information.²

Such treatment will provide potential investors with information they should have before investing and is consistent with the Division's positions in analogous situations and its interpretations of the policies underlying the Commission's mutual fund advertising rules.

Background

The Trust was organized under the laws of the Commonwealth of Massachusetts as a Massachusetts business trust pursuant to an Agreement and Declaration of Trust dated May 28, 1993. The Trust consists of seven series or Funds, each having four Classes of shares. Each Fund has a separate investment objective designed to correspond to the investment objective, policies and practices of an existing SIA of MassMutual. The assets of the SIAs were transferred to the corresponding Funds on September 30, 1994 in exchange for Class 4 shares. The Trust's Registration Statement was declared effective, and the Trust commenced a public offering of its shares, on October 3, 1994. Thus, upon commencement of the public offering of the Trust's shares—except for \$107,000 of initial capital provided by MassMutual—the SIAs held all of the shares of the Trust and each Fund's investment portfolio was identical to the portfolio of the corresponding SIA immediately prior to the public offering.

MassMutual has served as investment adviser for each of the SIAs since their inception and is the investment adviser to each of the Funds. The investment sub-advisers which served certain of the SIAs prior to the exchange of assets, are the investment sub-advisers for the corresponding Funds. The investment policies, objectives, guidelines and restrictions of the Funds are in all material respects equivalent to those of the corresponding SIA. Moreover, the investment management practices and financial characteristics of each SIA are in all material respects identical to those of the corresponding Fund. As the SIAs were unregistered investment companies, formal testing of the SIAs to ensure compliance with provisions the Investment Company Act of 1940 and Sub-Chapter M of the

² We are not asking that the respective Funds be treated as the successors of the corresponding SIAs for financial accounting purposes. Thus, any performance figures used in the Trust's financial statements, such as in the Financial Highlights, will reflect the actual performance of the Funds from the date of inception, that is as of the Effective Date of the Trust's Registration Statement.

Office of Chief Counsel
MassMutual Institutional Funds
September 21, 1995
Page 4

Internal Revenue Code applicable to registered investment companies, was not conducted. The SIAs' assets, like those of a registered investment company, are marked-to-market on a daily basis. The SIAs, moreover, operate under the federal tax laws and state insurance laws so that any income or gain realized, after the deduction for expenses, is allocated to pension plan investors by way of an increase in the value of the a plan's units (i.e. shares) in the SIA.

If a pension plan client purchases a group annuity contract from MassMutual that is supported by the SIAs, the client would pay MassMutual a variety of fees related to the operation of the plan. These fees vary depending upon the size of the pension plan, both in terms of assets and participants, the type of contract purchased, and the level of service desired. The fees might relate to plan recordkeeping, plan participant recordkeeping, anti-discrimination testing under the Employee Retirement Income Security Act ("ERISA"), consulting services and commissions to sales representatives and intermediaries. Investment management fees and custody charges were the only expenses paid by the SIAs. It would be difficult, if not impossible, to retroactively determine what all the charges and expenses were for approximately 2000 plans with many different contracts with diverse fee arrangements and then to recalculate SIA performance to reflect all of these fees and charges. Therefore, we propose using the expenses associated with Classes 1, 2 and 3 of the Funds as stated in the Fee Table of the Trust's initial prospectus because these expenses approximate the investment management, custody fees and the contract level fees paid by pension plans that invested their assets in the SIAs prior to the establishment of the Trust. We propose using the expenses associated with Class 4 of the Funds as stated in the Fee Table of the Trust's initial prospectus because these expenses are the same type of expenses, investment management and custody fees, paid by the SIAs prior to the establishment of the Trust. However, as a practical matter, a pension plan that purchases a SIA product and thus invests indirectly in the underlying Class 4 shares, pays separate and varied contract level charges not at the Fund or SIA levels, but at the contract level. This is required because the Class 4 shares are offered only to SIAs of MassMutual and because of ERISA limitations on the expenses that could be charged at the Fund level.

Since the Trust considers it appropriate to treat each SIA's performance record as the performance record of the corresponding Fund, the Trust's initial prospectus dated October 3, 1994 set forth the average annual total return and cumulative total return for the SIAs (adjusted to reflect anticipated expenses, net of management fee waivers, of each Class of each Fund) for the one-, three-, five- and 10-year (or since inception, if less than 10 years) periods ended December 31, 1993. The Trust

Office of Chief Counsel
MassMutual Institutional Funds
September 21, 1995
Page 5

believes that it is appropriate to continue to include SIA performance data in the Trust's prospectus and statement of additional information beyond the initial one-year period. It is proposed that the Trust calculate the performance for each Class of each Fund for periods commencing prior to the transfer of the SIA assets by including the corresponding SIA's total return adjusted to reflect the deduction of fees and expenses applicable to each Class. These fees and expenses would include sales charges (if any should be imposed) and Rule 12b-1 fees, and in the case of Class 4, any charges that might be imposed at the SIA level.³

Division Positions on Performance Advertising

We believe that the policies underlying the Commission's performance advertising rules require the Funds to include the SIAs' performance prior to commencement of the Trust's operations when quoting their own performance. The Commission, in adopting amendments to the advertising rules in 1988, stated that the amendments were designed to "prevent misleading performance claims by funds and to permit investors to make meaningful comparisons among fund performance claims in advertising."⁴

Omitting the SIAs' performance would deny potential investors access to information they should have before investing and would be inconsistent with prior positions of the Division and the Commission. A purchaser of a Fund which has, in effect, a ten or twenty year investment track record should be able to determine what that record is. In no-action letters issued subsequent to adoption of the 1988 advertising rule amendments, the Division has stated that

it would be inappropriate...to permit a fund to eliminate past performance results from its performance advertising if the SEC's policy is not to be eroded.⁵

³ Currently, there are no charges at the SIA level and ERISA does not permit the SIAs to impose any additional investment-related charges at the SIA level beyond those charges paid by the Trust without the approval of the plan fiduciary.

⁴ Advertising by Investment Companies, Securities Act Rel. No. 6753, Investment Company Act Rel. No. 16,245 (February 2, 1988).

⁵ See, John Hancock Asset Allocation Trust (January 3, 1991); Zweig Series Trust (Jan. 10, 1990) and The Fairmont Fund Trust (December 9, 1988).

Office of Chief Counsel
MassMutual Institutional Funds
September 21, 1995
Page 6

Thus, for example, the Division has refused to give no-action assurance where a fund wished to exclude from its performance quotations performance from a period prior to a change in investment strategies.⁶ The Division also refused to provide no-action assurance on omitting prior performance information where a new adviser had assumed responsibility for the fund but an individual who was the president and a director of a predecessor adviser was also chief executive officer of the fund during both advisers' tenure.⁷ In contrast, the Division has allowed funds with the same investment objectives to exclude performance for periods prior to a change in investment advisers only where the new adviser is not affiliated with the previous adviser.⁸

The reorganization of the SIAs into the Funds is comparable to that described in Managers Core Trust in which a newly-created feeder fund in a "core and feeder" fund structure was allowed to calculate its performance based on the prior performance of the pre-existing fund that transferred its assets to the core fund.⁹ Additional feeder funds were also allowed to use the performance of the core (which in turn was based on the performance of the pre-existing transferor), restated to reflect the fees and expenses of the respective feeder. Each of the key factors emphasized in Managers Core Trust are present in the situation presented here:

- (1) The Trust has succeeded to all of the predecessor SIAs' net assets and, except for the initial seed capital, these constituted all of the Trust's net assets.
- (2) The investment policies, objectives, guidelines and restrictions of the SIAs and the corresponding Funds are in all material respects equivalent.
- (3) The investment management practices and financial characteristics of each SIA were in all material respects identical to those of the corresponding

⁶ Id.

⁷ Zweig Series Trust (January 10, 1990).

⁸ See, Unified Funds (April 23, 1991) where the new adviser was not owned, controlled or managed by any prior owner or any principal thereof); Philadelphia Fund, Inc. (Oct. 17, 1989) and Investment Trust of Boston Funds (April 13, 1989).

⁹ Managers Core Trust (January 28, 1993). See also, IDS Financial Corp. (December 19, 1994).

Office of Chief Counsel
MassMutual Institutional Funds
September 21, 1995
Page 7

Funds.

- (4) The investment adviser and sub-advisers of the Funds are identical to the investment adviser and investment sub-advisers of the predecessor SIAs.
- (5) The SIAs will continue to exist after the reorganization.¹⁰

Similarly, we believe that it is necessary and appropriate for each Class of each Fund to restate the prior performance of the corresponding SIAs to reflect the current fees and expenses of that Class and to use such performance data wherever it is advertising the Trust's performance.¹¹

These precedents reflect the common theme that if a fund and its predecessor are in reality the same entity over time with the same managers, then its performance should reflect its entire history. Absent a dramatic change, such as in investment management, past performance cannot and should not be excluded from the presentation of performance data. Performance advertising should accurately reflect the particular investment adviser's performance and the adviser's performance record should be available to potential investors regardless of the legal form of the fund - which has little if any relevance to the nature or quality of the investment management service being provided. This is why no-action letters issued subsequent

¹⁰ In the case of the Trust, as was the case in Managers Core Trust, the Funds are not merely similar to the corresponding SIAs, they are a continuation of the same investment portfolios. Accordingly, the one-year limitation for the use of an investment adviser's performance of similar accounts should not be applicable to or appropriate for the Trust's use of the SIAs performance history. Growth Stock Outlook Trust, Inc. (April 15, 1986).

¹¹ The Division has taken no-action positions in analogous situations where registered investment companies have proposed changes in legal form or domicile, or both. See, CIGNA Aggressive Growth Fund, Inc. (February 15, 1985) and United States Goldshares, Inc. (September 17, 1984). This analogy is supported by the following facts: (1) the investment objectives, policies, practices and restrictions of the predecessor SIAs and the corresponding Funds are in all material respects equivalent; (2) each Fund succeeded to all of the corresponding SIA's assets and such assets constituted all of the Funds' assets (other than seed money); (3) MassMutual is the investment adviser for each SIA and for each Fund, and (4) the investment sub-advisers which served certain of the SIAs are the investment sub-advisers for the corresponding Funds.

Office of Chief Counsel
MassMutual Institutional Funds
September 21, 1995
Page 8

to the adoption of the 1988 rule amendments have consistently placed practical reality over legal formality, whether those letters permitted funds to exclude prior performance,¹² declined to permit funds to exclude prior performance,¹³ or permitted funds to use prior performance.¹⁴

If the SIAs had been registered investment companies, we believe their performance would have to be included when the Funds advertise their performance. There is no reason in this case to apply different rules merely because the SIAs are not registered investment companies. The SIAs were created years ago to fund qualified pension plans and represent investments by a large number of such plans. Both the group annuity contracts used to market the SIAs and the SIAs themselves were and are exempt from the registration requirements of the securities laws. Two of the seven SIAs have existed for over 20 years, two more have existed for more than 10 years and these four SIAs represent almost 80% of the approximately \$2.8 billion of assets transferred to the Trust. The other three SIAs were established in 1987, 1989, and 1991. Because of the nature of the reorganization and the history of the SIAs, there should be no concern that the investment adviser has engaged in picking among a group of incubator funds to enhance its performance record.

The Trust is designed as a vehicle for the investment of plan assets which are being accumulated over the long-term to provide for retirement benefits, and in that context consideration of long-term performance by prospective investors is vital. Omitting the performance history of the SIAs from the Trust's performance record will deprive investors of material information regarding long-term performance of significant importance to them in making investment decisions.

¹² See, Unified Funds (April 23, 1991) (fund had new, unaffiliated investment adviser); Philadelphia Fund, Inc. (October 17, 1989) and Investment Trust of Boston Funds (April 13, 1989).

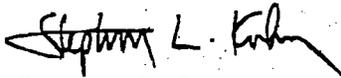
¹³ See, John Hancock Asset Allocation Trust (January 3, 1991); Zweig Series Trust (January 10, 1990) and The Fairmont Fund Trust (December 9, 1988).

¹⁴ See, Manager's Core Trust, supra.

Office of Chief Counsel
MassMutual Institutional Funds
September 21, 1995
Page 9

If you have any questions, or require any additional information regarding this letter, please contact Richard M. Howe at (413) 744-6165. Please acknowledge receipt of this letter by date-stamping the enclosed copy and returning the same to me in the stamped, addressed envelope.

Very truly yours,



Stephen L. Kuhn
Vice President and
Associate General Counsel

10002111