

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT COMPANY ACT OF 1940**  
**Release No. 30264 / November 15, 2012**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-15095**

**In the Matter of**

**MASSACHUSETTS**  
**MUTUAL LIFE**  
**INSURANCE COMPANY,**

**Respondent.**

**ORDER INSTITUTING**  
**ADMINISTRATIVE AND CEASE-AND-**  
**DESIST PROCEEDINGS PURSUANT TO**  
**SECTIONS 9(b) AND 9(f) OF THE**  
**INVESTMENT COMPANY ACT OF 1940,**  
**MAKING FINDINGS, AND IMPOSING**  
**REMEDIAL SANCTIONS AND A CEASE-**  
**AND-DESIST ORDER**

**I.**

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Massachusetts Mutual Life Insurance Company ("Respondent" or "MassMutual").

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these

proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### Summary

From September 2007 to March 2009, MassMutual offered a Guaranteed Minimum Income Benefit (GMIB) rider—GMIB 5—as an optional feature to the MassMutual Transitions Select and MassMutual Evolution variable annuity products. MassMutual also offered GMIB 6 from September 2007 to December 2008. For an additional fee, the GMIB rider benefit sets a minimum floor for a future amount that can be applied to an annuity option (the "GMIB value"). The GMIB value increases by a compound annual interest rate of 5% for GMIB 5 or 6% for GMIB 6, and allows contract owners to make withdrawals any time during the accumulation period. These riders included a maximum GMIB value or "cap" that limited the amount to which the GMIB value could increase. During the time period that MassMutual offered the GMIB 5 and GMIB 6 riders for sale, its prospectuses and sales literature did not sufficiently explain that once the GMIB value reached the cap, withdrawals would cause *pro-rata* reductions in the GMIB value in many instances. MassMutual's failure, in its disclosures, to sufficiently explain the effect of the cap on withdrawals confused sales agents and others. For example, some believed that a customer could allow the GMIB value to accumulate until it reached the cap and then begin taking withdrawals—a strategy that in fact, under certain circumstances, would have resulted in a rapid decline in the amount available to be annuitized. By taking post-cap withdrawals, contract owners could, under certain circumstances, be left with no future income stream. MassMutual was aware that some sales agents and others did not understand the effect of post-cap withdrawals, which should have led it to improve its disclosures more quickly than it did. Beginning May 1, 2009, MassMutual revised its prospectuses to better explain the consequences of taking withdrawals after the GMIB value reaches the cap.<sup>2</sup> Given the operation of these features, the earliest contract owners could have reached the cap is the year 2022. Recently, MassMutual has undertaken the remedial step of removing the cap entirely from these riders.

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

<sup>2</sup> The findings herein concern MassMutual's prospectuses filed prior to May 1, 2009 that explain the GMIB 5 and GMIB 6 riders, and sales literature used during the time period that MassMutual offered the GMIB 5 and GMIB 6 riders for sale.

## **Respondent**

MassMutual is a diversified financial services company providing life insurance, disability income insurance, long-term care insurance, annuities, retirement and other products to individual and institutional customers. It is organized as a mutual life insurance company and is a registered investment adviser. During the relevant period, MassMutual offered for sale variable annuities called "MassMutual Transitions Select" and "MassMutual Evolution." The Transitions Select and Evolution annuities are described in prospectuses filed with the Commission under the Securities Act of 1933 ("Securities Act") and the Investment Company Act. The annuities' investment choices include funds that are offered through Massachusetts Mutual Variable Annuity Separate Account 4, a registered investment company. MassMutual, as the depositor of Massachusetts Mutual Variable Annuity Separate Account 4, filed the prospectuses describing the Transitions Select and Evolution contracts. MassMutual prepared sales literature for these variable annuities, which is filed with the Financial Industry Regulatory Authority ("Finra") before distribution.<sup>3</sup>

## **Background**

1. MassMutual designs and offers for sale variable annuities including annuities called "Transitions Select" and "Evolution" through prospectuses, sales literature, and wholesalers employed by MassMutual to promote the company's annuity products and explain their features to sales agents.

2. A variable annuity is a hybrid product that is both a security and an insurance contract. The contract owner makes purchase payment(s) to the insurance company and the insurance company agrees to make periodic annuity payments to the contract owner beginning either immediately or at some future date. Variable annuities generally have two contract phases: the "accumulation phase" and the "income phase." During the accumulation phase, contract owners can allocate their purchase payments to be invested in a range of investment options. The principal and investment returns in variable annuities are subject to market risk. As a result, depending on market conditions, the principal plus the accumulated compound returns may be the same, worth more, or less than the sum of purchase payments. The income phase commences when contract owners choose to "annuitize" by surrendering control over their contract assets to the insurance company in return for an income stream. While annuity contracts are designed to provide income to contract owners during the income phase, contract owners generally are permitted to make withdrawals during the accumulation phase subject to conditions, such as surrender charges in the earlier years of the contract.

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<sup>3</sup> Sales literature filed with Finra is deemed filed with the Commission pursuant to Rule 24b-3 under the Investment Company Act.

3. On September 1, 2007, MassMutual began offering two Guaranteed Minimum Income Benefit riders, called Guaranteed Income Plus 5 ("GMIB 5") and Guaranteed Income Plus 6 ("GMIB 6") (collectively, "GMIB riders"). MassMutual offered these riders as optional features to its Transitions Select and Evolution variable annuities. MassMutual offered GMIB riders through prospectuses included in registration statements filed with the Commission. By July 2009, the aggregate investment in GMIB riders, measured by GMIB value, was approximately \$2.5 billion.

4. GMIB riders provide a guaranteed minimum floor for a future amount that can be applied to an annuity payment.

5. A variable annuity with a GMIB rider reflects two values, the contract value and the GMIB value. The contract value fluctuates with the performance of the underlying investment. The GMIB value automatically increases on the contract issue date and each contract anniversary thereafter by 5% (GMIB 5) or 6% (GMIB 6), subject to conditions. MassMutual refers to these annual increases as interest credits and described them as follows in the prospectuses: "On each contract anniversary we will increase your GMIB value by an annual interest rate of 5% for GMIB 5 and 6% for GMIB 6 . . ." Generally, when the contract owners, or investors, annuitize, they will choose to annuitize the greater of the GMIB value or the contract value.<sup>4</sup> Specific annuity payment amounts are calculated according to the guaranteed payout rates in the contract, or current payout rates.

6. MassMutual advertised its GMIB riders as providing "Income Now"—referring to the right to make withdrawals during the contract's accumulation phase—and "Income Later"—referring to the right to receive an income stream in the form of annuity payments. Regarding the Income Later feature, MassMutual's sales literature highlighted the guarantee provided by the riders: "Even if your contract value drops to zero, you can apply your GMIB value to a fixed or variable annuity." This provision protects contract owners against poor investment returns, and enables contract owners to make withdrawals, subject to conditions, while preserving the ability to annuitize based on the (higher) GMIB value.

7. Regarding the Income Now feature, the MassMutual GMIB riders have a "dollar-for-dollar" withdrawal feature. This means that their GMIB value will decline only by the dollar amount of any withdrawal, so long as the withdrawal does not exceed the annual interest credit. If the annual interest credit is, for example, 6%, a contract owner can withdraw during that contract year an amount equal to the amount of interest credited during that contract year and the GMIB value will remain constant in comparison to the GMIB value at the preceding contract year end. The prospectuses described this feature as follows: "During each contract year, we will

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<sup>4</sup> For purposes of this Order, the terms "contract owners" and "investors" are used interchangeably to refer to the purchasers of the GMIB riders.

lower your GMIB value for each dollar that you withdraw up to and equal to the current contract year interest earned on your GMIB value."

8. For any portion of a withdrawal that exceeds the current contract year interest earned on the GMIB value, MassMutual will adjust the GMIB value downward by an amount tied to the percentage decrease in the contract value. The prospectuses described the excess withdrawal feature as follows: "During each contract year, for any amount you withdraw that exceeds the current contract year interest earned on your GMIB value, we reflect that withdrawal amount as a percentage of contract value. We use the percentage of contract value to lower the GMIB value by the same percentage."

9. The prospectuses also disclosed the formula used to calculate the *pro-rata* adjustment for excess withdrawals:

A divided by B, with the result multiplied by C, where:

A = the withdrawal amount in excess of the current contract year interest credited on the GMIB value;

B = the contract value immediately prior to the withdrawal; and

C = the most recently calculated GMIB value.

10. During the relevant period, MassMutual limited the growth of the GMIB value on the riders. It placed a cap of 200% (GMIB 5) and 250% (GMIB 6)—of the purchase payments made during the first two years—on the GMIB value, subject to conditions. If the contract value exceeded the GMIB value, the investor could reset the GMIB value to the (higher) contract value and the new cap would be 200% or 250% of the newly-reset GMIB value, subject to conditions. Absent a reset or withdrawals, the GMIB value on a GMIB 5 rider would reach the cap approximately 15 years after the contract commenced. Absent a reset or withdrawals, the GMIB value on a GMIB 6 rider would reach the cap approximately 16 years after the contract commenced.

11. Neither the prospectuses nor the sales literature sufficiently explained that, if the GMIB value reached the cap, the GMIB value would no longer earn interest. In fact, a disclosure that appeared in the prospectuses, for the first 11 months that MassMutual offered GMIB 5 and 6 riders, implied that interest would continue to accrue after the GMIB value reached the cap: "If the GMIB value is higher than the maximum GMIB value allowed, then your GMIB value will equal the maximum." This disclosure created the impression that MassMutual would continue to credit interest after the GMIB value reached the cap and, consequently, that dollar-for-dollar withdrawals would remain available. Investors could reasonably infer that if the GMIB value reached the cap, as long as their annual withdrawals did not exceed the annual interest credits, their GMIB values would remain at the maximum level (200% or 250%). Similarly, investors

might have inferred that, even if they took excess withdrawals, they could replenish their GMIB values through annual interest credits. This was not, in fact, how the GMIB riders worked.

12. If the GMIB value reached the cap, MassMutual would no longer credit interest to the GMIB account. Because no interest would be credited to the GMIB value at that point, MassMutual would deem every dollar withdrawn to be an excess withdrawal and reduce the GMIB value *pro rata*. For example, if a \$200,000 cap were reached on a GMIB 5 rider with a contract value of \$100,000, and the contract owner were to withdraw \$10,000 (or 5% of the GMIB value), the contract value would decline by \$10,000. But the *pro-rata* adjustment to the GMIB value would be \$20,000. The new GMIB value would be \$180,000 and, as a result, the value of a future annuity income stream would decline. In this scenario—where the contract value is less than the GMIB value—after a number of similar withdrawals, depending on market conditions, both the contract value and the GMIB value could decline to zero. As a result, the contract owner would not have an amount to apply to an annuity and, consequently, would have no future income stream. MassMutual ultimately improved its disclosures to explain the effect of taking withdrawals after reaching the cap, but not until after it had stopped offering the riders. In revised prospectuses issued in May 2009, MassMutual disclosed, with respect to GMIB 5 riders: "Once the maximum GMIB value is reached, unless a reset occurs, the 5% interest credit will no longer be applied and all withdrawals from the contract will reduce the GMIB value in direct proportion to the contract value reduction." The prospectuses contained the same disclosure with respect to GMIB 6 riders.

13. While MassMutual was offering GMIB 5 and GMIB 6 riders, its prospectuses and generic sales literature did not specifically disclose the effect of taking withdrawals after the GMIB value reached the cap, including that: (a) after reaching the cap, MassMutual would no longer apply an interest credit for purposes of taking withdrawals of up to 5% or 6% of the GMIB value, and (b) at that point in the contract, MassMutual would deem all withdrawals to be excess withdrawals that would reduce the GMIB value in direct proportion to the contract value reduction. The disclosures that MassMutual did make—that withdrawals exceeding the interest credited will cause a *pro-rata* adjustment to the GMIB value, and that MassMutual placed a cap on the GMIB value—were insufficient to inform investors of how a key aspect of this feature operated. MassMutual's prospectuses and sales literature also did not sufficiently explain that, once the cap is reached, absent a reset MassMutual will never again credit interest. Thus, contract owners who take withdrawals in the contract years after the GMIB value reached the cap would not, absent a reset, replenish the GMIB value through further interest credits.

14. A number of MassMutual sales agents, wholesalers, and at least one annuity specialist at another insurance sales agency did not understand, from MassMutual's disclosures, that all withdrawals taken in the contract years after the GMIB value reached the cap would result in *pro-rata* reductions of the GMIB value. After reviewing MassMutual's prospectuses and other disclosures, they believed that, if the GMIB value reached the cap, contract owners would continue to earn the annual interest credit—even though the GMIB value was capped—and could take dollar-for-dollar withdrawals annually up to the amount of the credit. After such withdrawals, they misunderstood, the GMIB value would remain at the cap. They mistakenly

believed, for example, that if a \$200,000 cap were reached on a GMIB 5 rider with a contract value of \$100,000, and the contract owner were to withdraw \$10,000, the GMIB value would decline dollar-for-dollar, by \$10,000. They further concluded, mistakenly, that the GMIB value would remain at the capped amount of \$200,000, because the dollar-for-dollar decline in GMIB value would be offset by the annual interest credit.

15. Because MassMutual's disclosures failed to sufficiently explain this aspect of the feature, some sales agents mistakenly believed that contract owners could maximize their benefits by (1) waiting until the GMIB value reaches the cap, then (2) taking annual 5% or 6% withdrawals, and then (3) annuitizing their contracts in order to receive an income stream tied to the maximum GMIB value. If followed, that investment strategy could have severe adverse consequences. By taking withdrawals annually after the cap is reached, contract owners would proportionately reduce their GMIB values and, in turn, decrease the value of their future income streams. In a worst case scenario, contract owners would withdraw all of their contract value and be left with nothing to annuitize and, consequently, no future income stream.

16. While MassMutual was offering GMIB riders, there were indications that sales agents and others did not understand the effect of post-cap withdrawals on the GMIB value, which should have alerted it to the fact that its disclosures were inadequate. Among them were:

a. In January 2008, in preparation for offering MassMutual's GMIB riders to its customers, a broker-dealer's affiliated insurance sales agency published an analysis of the GMIB 6 rider for its registered representatives. The analysis, prepared based on MassMutual's prospectuses, its sales literature, and communications with MassMutual employees, contains a statement that mistakenly represented that, if the GMIB value reached the cap, annual interest credits and the ability to withdraw up to the amount of those credits would remain available to contract owners. Before the insurance sales agency published the analysis, it showed a MassMutual GMIB product expert and MassMutual sales personnel a draft version that included the erroneous description of the rider, but MassMutual did not correct it. After publication, MassMutual senior sales personnel circulated the analysis among its wholesalers without identifying the error.

b. In April 2008, a MassMutual external wholesaler<sup>5</sup> emailed his supervisor his incorrect understanding of the effect of post-cap withdrawals: "Apparently our illustration system will not show any withdraws at any time if the GMIB caps out at the 250%. It is my understanding that the systematic withdraws can still be done and the guarantee income is still available. It is just capped." The wholesaler's email was forwarded to at least two GMIB product experts at MassMutual. None of the email recipients corrected the wholesaler on his misunderstanding. When, in September 2008,

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<sup>5</sup> MassMutual had two classes of wholesalers: external wholesalers who met with sales agents in the field, and internal wholesalers who provided sales support to external wholesalers and sales agents.

the wholesaler learned of the effect of taking withdrawals after the GMIB value reached the cap, he copied another wholesaler on an email in which he wrote, in part, that "[t]his doesn't sound like anything I learned."

c. In September 2008, a Sales Support Director emailed one of the company's GMIB product experts that MassMutual's wholesalers were not informing sales agents of the effect of taking withdrawals after the GMIB value reaches the cap. He wrote, in part: "I would never use this term with a producer [a sales agent] but I feel this is a 'gotcha' . . . . I'm sure there is not a single wholesaler (internal or external) that warns reps and agents that if the client begins withdrawals after hitting the cap the 'dollar-for-dollar' treatment is lost."

d. In October 2008, a supervisory internal wholesaler at MassMutual emailed an external wholesaler and his supervisor that the fact that MassMutual would adjust the GMIB value *pro rata* for all withdrawals taken after the cap "is not clear in the prospectus. I read it and it really is hidden . . . . Almost in code."

e. In November 2008, a sales agent at a general agency of MassMutual complained, to a liaison to MassMutual's home office, that the *pro-rata* adjustment after the cap "is not how it was sold to us, and in turn not how we sold it to our clients. Every agent I have spoken in our office and elsewhere is not aware of this."

17. On December 2, 2008, MassMutual ceased offering GMIB 6 riders, and on March 31, 2009, MassMutual ceased offering GMIB 5 riders. On May 1, 2009, MassMutual revised its prospectuses to explain the consequences of taking withdrawals after the GMIB value reaches the cap.

18. Beginning in April 2012, MassMutual sought the necessary regulatory approvals to eliminate the cap on the GMIB riders. All necessary regulatory approvals to eliminate the cap were received by July 2012, and the change has been communicated to all interested contract owners.

19. As a result of the conduct described above, MassMutual willfully<sup>6</sup> violated Section 34(b) of the Investment Company Act, which makes it unlawful for any person to make any untrue statement of a material fact or to omit to state any fact necessary in order to prevent the statements made, in the light of the circumstances under which they were made, from being

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<sup>6</sup> A willful violation of the securities laws means merely "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

materially misleading in any registration statement, application, report, account, record, or other document filed with the Commission or the keeping of which is required pursuant to Section 31(a) of the Investment Company Act. Prospectus disclosures that do not go far enough in explaining the features of a product violate Investment Company Act Section 34(b). *In re Fundamental Portfolio Advisors, Inc.*, 56 SEC 651, 675 (2003) (“prospectus disclosures, while accurate, do not go far enough”).

### **MassMutual's Remedial Effort**

In determining to not impose a greater penalty, the Commission considered that, in 2012, after the conclusion of the Division of Enforcement's investigation in this matter, MassMutual announced that it would eliminate the cap on the GMIB riders. In a prospectus supplement filed with the Commission on April 16, 2012, MassMutual disclosed that, subject to state approval, there will no longer be a maximum GMIB value for the GMIB 5 and GMIB 6 riders. By July 2012, all states had approved the removal of the maximum GMIB value. MassMutual's remedial actions guarantee that no contract owner will ever reach the cap and are intended to ensure that ultimately no contract owner will be harmed by MassMutual's violation.

### **IV.**

In view of the foregoing, the Commission deems it appropriate, in the public interest, to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Section 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that

- A. Respondent shall cease and desist from committing or causing any violations and any future violations of Section 34(b) of the Investment Company Act.

B. Respondent shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of \$1,625,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to: Enterprise Services Center, Accounts Receivable Branch, HQ Bldg, Room 181, AMZ-341, 6500 South MacArthur Blvd, Oklahoma City, OK 73169.

Payments by check or money order must be accompanied by a cover letter identifying MassMutual as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Stephen L. Cohen, Division of Enforcement, Securities and Exchange Commission, 100 F. St., NE, Washington, DC 20549-5553.

By the Commission.

Elizabeth M. Murphy  
Secretary