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SECTION § 12(d)(1)(G)  
RULE \_\_\_\_\_

**PUBLIC**

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LABILITY 10-19-98

October 19, 1998  
Our Ref. No. 98-381-CC  
MassMutual Institutional Funds  
File No. 811-8274

RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT

Your letter of October 16, 1998 requests assurance that the staff would not recommend enforcement action to the Commission if, as more fully described below, MassMutual Institutional Funds ("MMIF") operates and offers for sale to investors certain "funds of funds" in reliance on Section 12(d)(1)(G) of the Investment Company Act of 1940 (the "Act").

Facts

MMIF is a registered open-end management investment company. Massachusetts Mutual Life Insurance Company ("MassMutual") is a mutual life insurance company organized under the laws of Massachusetts, and an investment adviser registered under the Investment Advisers Act of 1940. MMIF has created four new series that are named the Destiny Funds (the "Top-Tier Funds"). The Top-Tier Funds are modeled after, and will succeed to, four unregistered separate investment accounts currently managed by MassMutual as asset allocation accounts ("SIAs"). The SIAs have been marketed to retirement plans and their participants as asset allocation investments. MMIF created the Top-Tier Funds to market its asset allocation services to investors who are not qualified to invest in the SIAs, including non-qualified deferred compensation plans and other institutional investors.

MassMutual will serve as the investment adviser to each Top-Tier Fund. MassMutual will manage the asset allocation mix of each of the Top-Tier Funds by purchasing and selling shares of certain open-end investment companies that are advised by MassMutual, or one or more of its majority-owned direct or indirect subsidiaries, including OppenheimerFunds, Inc. ("Oppenheimer"), David L. Babson & Co. ("Babson"), or Harbourview Management, Inc. ("Harbourview") (collectively the "Underlying Funds").<sup>1</sup> Because MassMutual directly or indirectly controls Oppenheimer, Babson and Harbourview, all of the Top-Tier and Underlying Funds will be advised exclusively by MassMutual or an entity controlled by MassMutual.

For purposes of marketing the Top-Tier Funds, you represent that MMIF will hold itself out as being related to the Underlying Funds by identifying in its prospectus the

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<sup>1</sup>Oppenheimer is an investment adviser registered under the Advisers Act ("registered investment adviser"), and an indirect majority-owned subsidiary of MassMutual. Harbourview, a registered investment adviser, is wholly owned by Oppenheimer, and thus indirectly owned and controlled by MassMutual. Babson, also a registered investment adviser, is wholly owned by DLB Acquisition Corp., a majority owned subsidiary of MassMutual. Because MassMutual controls Oppenheimer, Harbourview and Babson, they all are affiliated persons of each other within the meaning of Section 2(a)(3)(C) of the Act.

Underlying Funds in which the Top-Tier Funds may invest, and identifying the investment adviser for each Underlying Fund and describing how the adviser is affiliated with MassMutual. The Underlying Funds are marketed separately to investors other than the investors in the Top-Tier Funds. Although the Underlying Funds may omit similar disclosure about the affiliation between MMIF and themselves in their prospectuses, you represent that no Underlying Fund will include in its prospectus or marketing materials any statement that is inconsistent with the disclosure in the Top-Tier Funds' prospectuses concerning how they are related companies because of the affiliation of their investment advisers.

### Analysis

Sections 12(d)(1)(A) and (B) of the Act generally limit certain investment companies from purchasing shares from other investment companies, and limit certain registered investment companies from selling their shares to other investment companies, in excess of certain percentage limitations.<sup>2</sup> The purpose underlying Sections 12(d)(1)(A) and (B) is to prevent investment companies from controlling other investment companies and creating complicated pyramid structures.<sup>3</sup> Section 12(d)(1)(G) of the Act provides that the limits established in Sections 12(d)(1)(A) and (B) do not apply to securities of a registered open-end investment company or registered unit investment trust that are purchased by a registered open-end investment company or a registered unit investment trust, provided that, among other things, the acquired and acquiring companies are "part of the same group of investment companies."<sup>4</sup> Section 12(d)(1)(G)(ii) defines the term "group of investment companies" to

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<sup>2</sup>Specifically, Section 12(d)(1)(A) prohibits any registered investment company from acquiring securities of any investment company, and prohibits any investment company from acquiring securities of any registered investment company, if immediately after the acquisition, the acquiring company owns more than 3% of the voting stock of the acquired company, the value of the securities of the acquired company exceeds 5% of the acquiring company's assets, or the aggregate value of those securities and the securities of other investment companies owned by the acquiring company exceeds 10% of its assets. Section 12(d)(1)(B) generally prohibits a registered open-end investment company from selling its securities to another investment company if immediately after the sale more than 3% of the outstanding voting securities of the acquired company is owned by the acquiring company or more than 10% of the total outstanding voting securities of the acquired company is owned by the acquiring company and other investment companies.

<sup>3</sup>An investment company controlling another investment company could result in a number of abuses, including: (1) the pyramiding of voting control in the hands of persons with only a nominal stake in the controlled company; (2) the ability of the controlling fund to exercise undue influence over the adviser of the controlled company through the threat of large-scale redemptions, and loss of advisory fees to the adviser; (3) the difficulty for investors of appraising the true value of their investments due to the complex structure; and (4) the layering of sales charges, advisory fees, and administrative costs. See, e.g., South Asia Portfolio (pub. avail. Mar. 12, 1997).

<sup>4</sup>Section 12(d)(1)(G) imposes other requirements on the acquiring and the acquired companies in order to qualify for the exemption from Sections 12(d)(1)(A) and (B). You represent that MMIF

mean “any 2 or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.”

Section 12(d)(1)(G) was enacted as part of the National Securities Markets Improvement Act of 1996 (“NSMIA”).<sup>5</sup> The intent underlying Section 12(d)(1)(G) was to codify certain exemptive orders<sup>6</sup> that the Commission had issued permitting certain registered investment companies to purchase shares of other registered investment companies in the same family or group of funds without having to comply with the percentage limitations established in Sections 12(d)(1)(A) and (B) (“affiliated fund of funds”).<sup>7</sup> The pre-NSMIA orders

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and the Underlying Funds will comply in all respects with the other requirements of Section 12(d)(1)(G). You seek the staff’s views only with respect to whether the Top-Tier Funds and the Underlying Funds are in the “same group of investment companies” for purposes of Sections 12(d)(1)(G)(i)(I) and 12(d)(1)(G)(ii) of the Act.

<sup>5</sup>Pub. L. No. 104-290, 110 Stat. 3416 (1996). Specifically, NSMIA renumbered former subparagraph (G) as subparagraph (H), and inserted new subparagraph (G) in its place.

<sup>6</sup>In 1985, the Commission issued the first exemptive order for a fund of funds to Vanguard’s STAR Fund. See Vanguard Special Tax-Advantaged Retirement Fund, Inc., Investment Company Act Release Nos. 14153 (Sep. 12, 1984) (notice) and 14361 (Feb. 7, 1985) (order) (“1985 STAR Order”). Pursuant to the 1985 STAR Order, the STAR fund could purchase no more than 10% of the voting securities of any affiliated fund, and was subject to conditions designed to prevent the layering of sales charges and fees, and to prevent disruptive redemption requests for underlying funds. In 1989, the Commission issued an order exempting T. Rowe Price’s Spectrum Fund from Section 12(d)(1) of the Act, and permitting it to purchase up to 15% of the securities of certain Price funds subject to similar conditions as in the 1985 STAR Order. See T. Rowe Price Spectrum Fund, Inc., Investment Company Act Release Nos. 17198 (Oct. 31, 1989) (notice) and 17242 (Nov. 29, 1989) (order). Between 1989 and 1995, the Commission issued other exemptive orders similar to the STAR and Spectrum Orders to other affiliated funds of funds. In 1995, before NSMIA was adopted, the Commission issued amended orders to the STAR Fund and Spectrum Fund that eliminated most of the existing conditions in the initial orders as earlier amended, except the conditions that the investment companies be related companies, and that no underlying fund would purchase shares of investment companies in excess of the limits prescribed in Section 12(d)(1)(A) of the Act. See T. Rowe Price Spectrum Fund, Inc., Investment Company Act Release Nos. 21371 (Sep. 22, 1995) (notice) and 21425 (Oct. 18, 1995) (order); Vanguard Special Tax-Advantaged Retirement Fund, Inc., Investment Company Act Release Nos. 21372 (Sep. 22, 1995) (notice) (“1995 STAR notice”) and 21426 (Oct. 18, 1995) (order).

<sup>7</sup>See H.R. Rep. No. 622, 104th Cong., 2d Sess. at 42 (1996) (“These conditions [in Section 12(d)(1)(G)], which are similar to the conditions generally imposed by the SEC on companies that are currently permitted to operate funds of funds pursuant to SEC orders . . . .”) (“House Report”). See also S. Rep. No. 293, 104th Cong., 2d Sess. at 7 (1996) (“A new type of fund of funds, involving a fund that invests in other funds in the same group or ‘family’ of funds, has become a popular way for investors to diversify a fund investment through a single, professionally managed portfolio. The SEC has granted individual exemptions from the Investment Company Act’s restrictions to several similar fund of funds arrangements, subject to certain conditions that address the concerns underlying the statutory restrictions

generally were issued to funds of funds in which the Top-Tier and Underlying Funds were related because they shared a common adviser, or because their advisers were affiliated persons within the meaning of Section 2(a)(3)(C)<sup>8</sup> of the Act (“control affiliates”).<sup>9</sup> In NSMIA, Congress also enacted Section 12(d)(1)(J) to authorize the Commission to exempt funds of funds that did not meet the conditions of Section 12(d)(1)(G), including unaffiliated fund of funds.<sup>10</sup>

You contend that the Top-Tier Funds and the Underlying Funds comprise a “group of investment companies” within the meaning of Section 12(d)(1)(G)(ii) because all of their investment advisers are control affiliates of MassMutual, and because the Top-Tier and Underlying Funds will hold themselves out as related companies to investors in the Top-Tier Fund. Specifically, you contend that an affiliated fund of funds may satisfy the requirement in Section 12(d)(1)(G) of “holding themselves out to investors as related companies” by disclosing in the Top-Tier Fund’s prospectus the identity of the Underlying Funds and their

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(such as overly complex corporate structures and excessive distribution fees). S. 1815 enables fund of funds arrangements involving a group of investment companies to be offered without obtaining prior exemptive relief from the Commission.”); Hearings on S. 1815, The Securities Investment Promotion Act of 1996, Before the Committee on Banking, Housing and Urban Affairs, 104th Cong., 2nd Sess. at 4-5 (1996) (appendix to written testimony of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission) (“Senate Hearings”).

<sup>8</sup>Section 2(a)(3)(C) of the Act defines the term “affiliated person” to include “any person directly or indirectly controlling, controlled by, or under common control with, such other person.”

<sup>9</sup>See, e.g., Qualivest Funds, Investment Company Act Release Nos. 21874 (Apr. 5, 1996) (notice) and 21933 (May 1, 1996) (order); Twentieth Century Blended Portfolios, Inc., Investment Company Act Release Nos. 21813 (Mar. 11, 1996) (notice) and 21875 (Apr. 8, 1996) (order). But see 1995 STAR notice, n.6, supra (underlying and top-tier funds were related based upon a common servicing agent that provided each Vanguard fund with most of its corporate management, administrative, shareholder accounting services, distribution services, and also provided advisory services to some of the Vanguard funds).

<sup>10</sup>House Report at 43 (1996) (“The Committee notes that many investment company fund complexes may not include a sufficient number or variety of fund types to permit the creation of a workable affiliated fund of funds. The Committee intends the rulemaking and exemptive authority in new Section 12(d)(1)(J) to be used by the Commission so that the benefits of funds are not limited to investors in the largest fund complexes, but, in appropriate circumstances, are available to investors through a variety of different types and sizes of investment company complexes.”). See also Senate Hearings at 15, n.21 (written testimony of Matthew P. Fink, President, Investment Company Institute) (“we also are pleased that this provision [Section 12(d)(1)(J)] would confirm the SEC’s authority to grant exemptive relief to other ‘fund of funds’ (e.g., funds investing in unaffiliated funds) in addition to the exemptive relief granted statutorily.”).

advisers, and describing the existing control relationship among MassMutual and the other advisers to the Top-Tier and Underlying Funds.

To qualify for Section 12(d)(1)(G)(ii), a fund of funds must consist of a “group of investment companies” that hold themselves out to investors as related companies. In our view, a group of investment companies may not hold themselves out as related companies within the meaning of Section 12(d)(1)(G)(ii) unless they are, in fact, related investment companies. You contend that the Top-Tier and Underlying Funds will be related companies because all of their advisers will be control affiliates of MassMutual. We agree that Top-Tier and Underlying Funds that are advised by the same investment adviser, or by advisers that are control affiliates, would be “related” companies for purposes of Section 12(d)(1)(G)(ii) of the Act. This interpretation is consistent with the pre-NSMIA exemptive orders issued to funds of funds arrangements in which all of the funds’ advisers were affiliated persons within the meaning of Section 2(a)(3)(C) of the Act.

To qualify for Section 12(d)(1)(G)(ii), a related group of investment companies also must hold themselves out to investors as related companies. We believe that a group of registered investment companies sharing a common adviser or having advisers that are all control affiliates can satisfy the “holding out” prong of Section 12(d)(1)(G)(ii) by identifying in the acquiring fund’s prospectus the acquired funds in which the acquiring fund may invest, and disclosing the control relationship among the advisers to the acquiring and acquired funds. In our view, it is not necessary that the acquired funds’ prospectus(es) include comparable disclosure or that the acquired and acquiring funds be marketed as related companies for all purposes and to all potential investors.<sup>11</sup> Rather, we believe that the requirement in Section 12(d)(1)(G)(ii) that the funds must hold themselves out to “investors” as related companies for purposes of investment and investor services refers only to potential investors in the acquiring fund because the relevant inquiry is how the funds are holding themselves out to potential investors in the acquiring fund. Disclosure in the acquiring fund’s prospectus of the identity of the acquired funds in which the acquiring fund may invest, and of the control relationship among the advisers to the acquired and acquiring funds therefore would satisfy the “holding out” requirement of Section 12(d)(1)(G)(ii).

For the reasons set forth above, we concur in your view that the Top-Tier and Underlying Funds are a related group of investment companies that will be holding themselves out to investors as related companies within the meaning of Section 12(d)(1)(G)(ii). We therefore would not recommend enforcement action to the Commission under Section 12(d)(1)

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<sup>11</sup>We note, however, that if the acquired funds’ marketing materials and/or prospectuses include any statements that are inconsistent with the representations made in the prospectuses for the acquiring funds regarding how the acquired and acquiring funds are related companies because of the affiliation of their investment advisers, such statements could constitute evidence that the investment companies are not “holding themselves out” as related companies, and render Section 12(d)(1)(G) unavailable to the fund of funds arrangement.

of the Act if the Top-Tier and Underlying Funds operate funds of funds in reliance on Section 12(d)(1)(G). The staff's position is based particularly on your representations that: (1) the investment advisers to the Top-Tier and Underlying Funds will be MassMutual or control affiliates of MassMutual; and (2) the Top-Tier Funds will disclose in their prospectuses how they are related to the Underlying Funds, as described more fully in your letter. You should note that any different facts or representations might require a different conclusion.



Eileen M. Smiley  
Senior Counsel

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October 16, 1998

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Office of the Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
Judiciary Plaza  
450 5th Street, N.W.  
Washington, DC 20549

Re: MassMutual Institutional Funds ("MMIF"); Section 12(d)(1)(G) of the Investment Company Act of 1940, as amended (the "Act").

Ladies and Gentlemen:

This letter seeks the assurance of the SEC's Division of Investment Management (the "Division") that it will not recommend enforcement action against MMIF or any of the Underlying Funds (hereinafter defined) if MMIF purchases shares from the Underlying Funds and the Underlying Funds sell their shares to MMIF in reliance on Section 12(d)(1)(G) of the Investment Company Act of 1940, as amended (the "Act") on the terms and subject to the conditions set forth herein.

#### I. Background

MMIF is a registered open-end management investment company of the kind described as a "series company" in Rule 18f-2 under the Act. Among its series are four newly created series collectively referred to herein as the "Destiny Funds." The Destiny Funds are modeled after, and will succeed to, four unregistered separate investment accounts currently managed by Massachusetts Mutual Life Insurance Company ("MassMutual") as asset allocation accounts (the "Asset Allocation SIAs"). The Asset Allocation SIAs have been managed as "lifestyle" investment options available to retirement plans and their participants. Based on the investment objective for the particular Asset Allocation SIA, MassMutual manages the asset allocation mix for the Asset Allocation SIAs by purchasing and selling shares of certain open-end investment companies (the "Underlying Funds")<sup>1</sup> managed by MassMutual and its majority-owned direct or

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<sup>1</sup> Currently no Underlying Funds advised by Babson are purchased by any of the Asset Allocation SIAs, although Babson serves as sub-advisor to certain Underlying Funds purchased by these Asset Allocations SIAs.

indirect subsidiaries (viz., OppenheimerFunds, Inc., David L. Babson and Company Inc. and HarborView Asset Management Corporation).<sup>2</sup> The registration of the shares of the Destiny Funds under the Securities Act of 1933, as amended, is intended to allow asset allocation alternatives to be offered to investors which are prohibited from investing in the Asset Allocation SIAs, such as non-qualified deferred compensation plans and other institutional investors. The Destiny Funds are expected to be managed identically to the Asset Allocation SIAs.

## II. Applicable Legal Concepts

With the adoption of the "fund-of-funds" exemption in Section 12(d)(1)(G) of the Act for registered open-end investment companies within the same "group of investment companies" (as defined in Section 12(d)(1)(G)(ii)), registered open-end investment companies may now more readily offer asset allocation strategies to investors by purchasing shares of other registered open-end investment companies within their own "group" without being subject to the limits under Section 12(d)(1)(A), 12(d)(1)(B) or 12(d)(1)(F) of the Act. The purpose of this provision was set forth in the legislative history as follows:

A new type of fund-of-funds, involving a fund that invests in other funds in the same group or "family" of funds, has become a popular way for investors to diversify a fund investment through a single, professionally managed portfolio. . . . S.1815 enables fund of funds arrangements involving a group of investment companies to be offered without obtaining prior exemptive relief from the Commission.

Senate Banking, Housing and Urban Affairs Committee Report 104-293, June 26, 1996. Section 12(d)(1)(G)(ii) defines "group of investment companies as "any two or more registered investment companies that hold themselves out to investors as related companies for the purposes of investment and investor services." Nowhere in the legislative history, however, are the concepts of "holding out" or "investment and investor services" further defined nor is there any further discussion of these concepts.<sup>3</sup> Nonetheless, in our opinion, the Destiny Funds and the

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<sup>2</sup> Harborview Asset Management Corporation is a wholly-owned subsidiary of OppenheimerFunds, Inc., a majority owned subsidiary of MassMutual. David L. Babson and Company Incorporated is a wholly-owned subsidiary of DLB Acquisition Corporation, a majority-owned subsidiary of MassMutual. All of these entities are registered investment advisers. OppenheimerFunds, Inc., HarborView Asset Management Corporation and David L. Babson and Company Incorporated are all "affiliated persons" of each other and of MassMutual by virtue of Section 2(a)(3)(C) of the Act by reason of being under the control of MassMutual (within the meaning of Section 2(a)(9) of the Act).

<sup>3</sup> The term "group of investment companies" is defined in Rule 11a-3 under the Act in the context of certain permitted exchanges among open-end management investment companies. We believe the meaning given this term in the context of permissible exchanges need not be the same as that given the term in the context of permissible fund-of-funds arrangements.

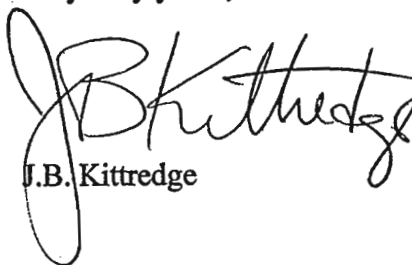


Underlying Funds should be deemed to be within the same "group of investment companies" for purposes of Section 12(d)(1)(G) as long as (1) the Destiny Funds and each of the Underlying Funds is advised by MassMutual or an adviser controlling, controlled by or under common control with MassMutual, (2) the Destiny Funds identify in their prospectus the affiliation of each of the advisers to the Underlying Funds and (3) none of the Underlying Funds disavows its affiliation with MassMutual and the Destiny Funds. We believe such disclosure should meet the requirement that the relevant funds "hold themselves out to investors as related companies" and we believe that the affiliation among the investment advisers should provide substantial protection against the abuses Section 12(d)(1)(A) and (B) and 12(d)(1)(F) were designed to address, namely: (1) the acquiring fund obtaining undue influence over the management of the acquired funds through the threat of large scale redemptions; (2) the acquisition by the acquiring fund of voting control of the acquired fund; and (3) the creation of a complex pyramidal structure which may be confusing to investors.<sup>4</sup>

For the reasons set forth above, we hereby respectfully seek the assurance of the Division that it will not recommend enforcement action against MMIF or any Underlying Fund if the Destiny Funds invest in the Underlying Funds and the Underlying Funds sell their shares to the Destiny Funds in accordance with the conditions and restrictions set forth in Section 12(d)(1)(G) of the Act.

If you have any questions or require any additional information regarding this letter, please contact me at (617) 951-7392. Please acknowledge receipt of this letter by date stamping the enclosed copy and returning the same in the stamped, addressed envelope.

Very truly yours,



J.B. Kittredge

JBK/ejf

cc: Mercer Bullard  
Steven L. Kuhn

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<sup>4</sup> See Vanguard Star Fund, Notice of Application (Investment Company Act Release No. 21373) (September 22, 1995) at p. 11. The possible layering of sales charges, advisory fees and administrative costs, are otherwise dealt with by the provisions in Section 12(d)(1)(G)(III) (aa) and (bb). Note also that the complexity of the fund-of-funds structure is further limited by the requirement in Section 12(d)(1)(G)(IV) that the acquired company must have a policy that prohibits it from operating as a fund-of-funds in reliance on Section 12(d)(1)(G) or Section 12(d)(1)(F) of the Act.