

NOT ICA
SECTION 17(d)
RULE 17d-1
PUBLIC
AVAILABILITY 6/7/00

June 7, 2000
Our Ref. No. 00-671146
Massachusetts Mutual Life
Insurance Company
File No. 801-8059

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

By letter dated June 6, 2000, you request our assurance that we would not recommend enforcement action to the Commission under Section 17(d) of the Investment Company Act of 1940 ("Investment Company Act") and Rule 17d-1 thereunder if, as described in your letter, Massachusetts Mutual Life Insurance Company ("MassMutual"),¹ on behalf of itself and open-end and closed-end investment companies and certain private accounts for which it serves as investment adviser, aggregates orders for the purchase and sale of private placement securities, for which MassMutual negotiates no term, other than price.

FACTS

You state that MassMutual maintains a general account, which is used to fund its obligations to policyholders, and provides investment management to insurance company and non-insurance company subsidiaries, which are considered proprietary accounts. You state that MassMutual also serves as investment adviser to investment companies ("Funds") registered under the Investment Company Act, and private accounts, including investment funds that are excepted from the definition of investment company under Section 3(c) of the Investment Company Act ("Section 3(c) Funds").² Additionally, you represent that MassMutual serves as investment adviser to state and municipal pension plans that are excluded from investment company regulation under Section 2(b) of the Investment Company Act ("Section 2(b) Funds"). For purposes of this letter, Section 3(c) Funds, Section 2(b) Funds, private accounts, and MassMutual's proprietary accounts are referred to collectively as "Accounts."

You state that MassMutual proposes to aggregate the orders of one more Funds and one or more Accounts for the purchase or sale of certain private placement securities ("Non-

¹ You state that MassMutual is a mutual life insurance company registered with the Commission as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"). You also state that the term "MassMutual" includes successors and any current or future direct or indirect subsidiary that provide investment advice to clients, including any registered investment company.

² You state that the Section 3(c) Funds include, but are not limited to: (a) private funds that are excepted under Section 3(c)(1); (b) qualified purchaser funds that are excepted under Section 3(c)(7); (c) pension trusts and collective trust funds that are excepted under Section 3(c)(11); and (d) insurance company general accounts that are excepted under Section 3(c)(3).

negotiated Private Placement Securities”). You state that the term “Non-negotiated Private Placement Securities” includes securities, warrants, conversion privileges, and other rights: (a) which are exempt from registration under the Securities Act of 1933 (“Securities Act”), or are purchased in transactions exempt from such registration requirements; and (b) the terms of which (other than price) have not been directly or indirectly negotiated by MassMutual. You state that the degree to which the terms of private placement securities may be subject to negotiation varies from offering to offering. You state that, for example, some of these securities have conversion and maturity provisions, call protections, and other financial covenants that can be negotiated. You state that for purposes of this request, Non-negotiated Private Placement Securities include those private placement securities for which MassMutual, on behalf of the Funds and the Accounts, only negotiates price³ and does not directly or indirectly negotiate any of the other terms. You state that the Non-Negotiated Private Placement Securities typically would involve securities issued in reliance upon Rule 144A, although other exemptions might be available.

You maintain that the Funds can benefit from participating in aggregated orders for the purchase and sale of Non-negotiated Private Placement Securities (“Aggregated Transactions”). You represent that when MassMutual is able to aggregate client purchases, the larger size of the order gives MassMutual an advantage in negotiating the price and in receiving a larger portion of the securities offered on behalf of itself and its clients in the event that its order is not filled completely (“partial fill”). You also represent that a large purchase in one offering can improve the ability of MassMutual and its clients to participate in future offerings. You assert that through Aggregated Transactions, the Funds are able to participate in offerings that otherwise might not be available to them because the assets of the Accounts are far greater than the assets of the Funds.⁴

³ You state that the price may be negotiable depending on the amount of the offering that a purchaser is willing to buy. You state that the “price” that MassMutual negotiates varies depending on the type of security involved. You state that: (i) in the case of a fixed-income security, the price that MassMutual may negotiate includes the face amount of the instrument plus the yield; (ii) in the case of an equity security, the price includes the offering price; (iii) in the case of a convertible bond, debenture or preferred stock, the price includes the conversion price; and (iv) in the case of warrants, the price includes the exercise price.

⁴ You state that the Funds will benefit from aggregated sales of Non-negotiated Private Placement Securities. You state that the Funds may hold small amounts of Non-negotiated Private Placement Securities relative to the amounts that the Accounts may hold. You state that some institutional investors may be unwilling to acquire a small amount of Non-negotiated Private Placement Securities and that, as a result, the Funds could benefit from participating in aggregated sales. You state that the Funds also could

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You represent that MassMutual proposes to aggregate purchase and sale orders of Non-negotiated Private Placement Securities on behalf of the Funds and Accounts as follows:

1. MassMutual's Board of Directors (or the Investment Committee of the Board) will approve a trade aggregation policy statement (the "Policy Statement") designed to ensure that Aggregated Transactions are made in a manner that is fair and equitable to, and in the best interests of, the Funds and the Accounts. The Policy Statement will establish an aggregation committee comprised of senior officers of MassMutual that will be responsible for developing written aggregation procedures ("Procedures") designed to result in fair and equitable participation in Non-negotiated Private Placement Securities offerings or sales of such securities.⁵

2. The Procedures for the aggregation of transactions will be fully disclosed in MassMutual's Form ADV and separately to all participating Funds and Accounts.

3. The trustees (including a majority of the disinterested trustees) of each Fund will approve the Procedures and any material changes to the Procedures before the Fund may participate in Aggregated Transactions.

4. As an initial step, each portfolio manager of a Fund or Account will review the Fund's or Account's investment objectives, investment restrictions, cash position, need for liquidity, sector concentration, and other objective criteria, and determine whether a purchase or a sale of a Non-negotiated Private Placement Security is an appropriate transaction for that Fund or Account. Each Fund and Account will receive individualized investment advice and treatment.

5. MassMutual will not engage in an Aggregated Transaction on behalf of a Fund and an Account unless the transaction is consistent with MassMutual's duties to the Fund or the

take advantage of reduced transaction costs in an aggregated sale. You state that aggregated sales of private placement securities generally do not involve the negotiation of any terms of the securities, although the price at which a sale is effected may be negotiated.

⁵ You state that the Procedures will set out objective criteria designed to take into account the unique investment objectives, needs, and constraints of each participating Fund and Account at any given time. You state that MassMutual has procedures and mechanisms in place that are reasonably designed to implement its aggregation policies.

Account, including its duty of best execution (which includes the duty to seek best price), and the terms of its investment advisory agreement with each client for which trades are being aggregated.

6. The Procedures will be used to produce written (on paper or electronically) allocation statements for each proposed Aggregated Transaction (each, an "Allocation Statement"), which will be prepared before or at the time that MassMutual indicates to an issuer or a prospective seller or buyer its interest in engaging in an Aggregated Transaction.

7. The Allocation Statement will describe specifically how Non-negotiated Private Placement Securities or proceeds from an aggregated sale of such securities will be allocated among participants. If there is a sufficient amount of Non-negotiated Private Placement Securities, in the case of a purchase, or proceeds, in the case of a sale, to satisfy all participants, the securities or proceeds will be allocated among the participants in accordance with the Allocation Statement. If there is an insufficient amount of Non-negotiated Private Placement Securities or sale proceeds to satisfy all participants, the securities or proceeds will be allocated pro rata based on the allocation that each Fund and Account would have received if there was a sufficient amount of securities or proceeds and they were allocated according to the Allocation Statement.

8. An Aggregated Transaction may be allocated on a basis different from that specified in the Allocation Statement if all participants receive fair and equitable treatment, and the reason for the deviation is recorded in writing (on paper or electronically) promptly and approved by a member of the aggregation committee in writing (on paper or electronically) at or prior to settlement.⁶

9. MassMutual will review the Procedures at least annually to ensure that they are adequate to prevent any Fund or Account from being systematically disadvantaged as a result of the Aggregated Transactions. If MassMutual discovers that the Procedures are not being

⁶ You state that there may be many reasons for deviating from the Allocation Statement. You state that, for example, from the time that the Allocation Statement is completed to the date of settlement, an Account or a Fund may no longer have the cash available to purchase a Non-negotiated Private Placement Security. Similarly, during this time period, an Account or a Fund may have met or exceeded concentration limits in the same industry as the Non-negotiated Private Placement Security. You state that needing a period of time up to settlement to obtain approval is necessary because a member of the aggregation committee may not be available to approve deviations once any deviation has been identified.

followed or that the Procedures do not have the intended results, it will take whatever corrective measures are necessary, including revising the Procedures.

10. No Fund or Account participating in an Aggregated Transaction will be favored over any other Fund or Account, because each Fund and Account taking part in a transaction will participate at the same unit price. Transaction costs and expenses will be shared by the participants on a pro rata basis according to the amount of their participation.

11. MassMutual will receive no additional compensation or remuneration of any kind as a result of an Aggregated Transaction that is not shared pro rata with the other participants in the Aggregated Transaction.⁷

12. Cash and securities of Funds and Accounts participating in an Aggregated Transaction may be deposited in a single account with one or more banks or broker-dealers only so long as reasonably necessary to settle the Aggregated Transaction on a delivery-versus-payment basis. Cash or securities will be held collectively following settlement only so long as reasonably necessary to deliver the cash or securities to each participant's custodian.

13. MassMutual will maintain written records of each Aggregated Transaction involving a Non-Negotiated Private Placement Security of a Fund or Account in an easily accessible place for a period not less than five years, the first two years in an appropriate office of MassMutual. These records will indicate, for each Fund and Account participating in an Aggregated Transaction, the amount of Non-negotiated Private Placement Securities allocated to or sold from the Fund and the Account, the date that the Fund and Account acquired, liquidated or otherwise disposed of the position, and the price paid or received by the Fund and Account each time. MassMutual also will maintain in an easily accessible place for a period not less than five years, the first two years in an appropriate office of MassMutual, written explanations of deviations from Allocation Statements, including written approvals of deviations by a member of the Aggregation Committee, and the Policy Statements, Procedures, and Allocation Statements.

⁷ You state that MassMutual may receive transaction fees (including break-up fees or commitment fees, but excluding broker's fees or any other compensation, fee or other remuneration prohibited by Section 17(e) of the Investment Company Act) that are payable to the participants in an Aggregated Transaction when MassMutual is a participant. You represent that any transaction fees payable to the participants of an Aggregated Transaction will be distributed on a pro rata basis to the participants in amounts proportionate to their respective investments. You have not asked, and we take no position regarding, whether Section 17(e) of the Investment Company Act prohibits the receipt by MassMutual of any transaction fees.

ANALYSIS

Section 17(d) of the Investment Company Act provides that the Commission may adopt rules that limit or prevent registered investment companies from participating in joint transactions with affiliated persons on a basis different from or less advantageous than that of any other participant. Rule 17d-1, in relevant part, provides that no affiliated person of a registered investment company, and no affiliated person of an affiliated person,⁸ may participate as a principal in any joint enterprise, joint arrangement, or profit-sharing plan, as defined in the rule,⁹ without first obtaining an order from the Commission. Section 17(d) and Rule 17d-1, taken together, are designed to regulate, among other things, situations in which persons making the investment decisions for the investment company may have a conflict of interest and the danger exists that the investment company or its controlled company may be overreached by such persons.¹⁰

Some element of combination or profit motive generally must be present for Section 17(d) and Rule 17d-1 to apply.¹¹ The requisite element of combination generally is present, for

⁸ You state that MassMutual is an affiliated person of the Funds because MassMutual is their investment adviser. You also state that MassMutual could be deemed an affiliated person of the Funds or Accounts to the extent that MassMutual is deemed to control them or if MassMutual owned 5% or more of the voting securities of such Fund or Account. In addition, you state that the Funds and other Accounts could be affiliated with each other to the extent that they are deemed to be under common control of MassMutual. See Section 2(a)(3) of the Investment Company Act.

⁹ Rule 17d-1(c) defines a “[j]oint enterprise or other joint arrangement or profit-sharing plan” to include any contract or arrangement concerning an enterprise or undertaking whereby an investment company and an affiliated person of the company “have a joint or a joint and several participation, or share in the profits of such enterprise or undertaking.”

¹⁰ See Investment Company Act Release No. 5128 (Oct. 13, 1967) (proposing amendments to Rule 17d-1). See also Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3rd Sess. 256 (Apr. 9, 1940) (statement of David Schenker, Chief Counsel, Securities and Exchange Commission, Investment Trust Study) (indicating that the purpose of Commission rules to be promulgated under Section 17(d) (originally drafted as Section 17(a)(4)) is to “insure fair dealing and no overreaching”).

¹¹ SMC Capital, Inc. (pub. avail. Sep. 5, 1995) (“SMC”) (citing, among other things, SEC v. Talley Industries, Inc., 399 F.2d 396, 403 (2d Cir. 1968), cert. denied, 393 U.S. 1015 (1969)).

example, when an investment company and its affiliate act in concert or otherwise combine or coordinate their activities as principals with respect to a third party.¹²

In SMC, we stated that the mere aggregation of orders for advisory clients, including a registered investment company, would not violate Section 17(d), provided that the investment company participates on terms no less advantageous than those of any other participant. SMC did not request relief with respect to the aggregation of orders involving private placement securities, however, and we expressed no view with respect to the aggregation of orders for such securities. We believe that the aggregation of orders involving private placement securities raises concerns under Section 17(d) and Rule 17d-1 that are not raised by the aggregation of orders involving publicly traded securities in the secondary markets. In particular, as discussed below, aggregated orders involving private placement securities may involve conflicts of interest between an investment company and its affiliate that may increase when the aggregated orders involve the negotiation of one or more terms of the private placement securities.¹³

Conflicts of Interest Between an Investment Company and Its Affiliated Persons.

Aggregated orders for the purchase or sale of private placement securities may involve a conflict of interest between an investment company and an affiliated person of the investment company. A conflict of interest may arise if an affiliated person has both a material pecuniary incentive and the ability to cause the investment company to participate with it in an aggregated transaction. For example, an investment adviser may be interested in participating in an offering of private placement securities but may not be able to participate in the offering if the ability to receive a portion of the offering depends on the size of the purchase order and the adviser's order

¹² See, e.g., SEC v. Midwest Technical Development Corp., [1961-64 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91, 252 (D. Minn. July 5, 1963) (parallel investments by the directors of the fund and the fund “evidence a pattern of conduct that they were collaborating from time to time with respect to the investments available to them” in violation of Section 17(d) and Rule 17d-1). See also Bloom v. Bradford, 480 F. Supp. 139, 145 (E.D.N.Y. 1979) (Section 17(d) requires “an intentional act of agreement or at least a consensual pattern”).

¹³ We note that the aggregation of orders of an investment company with those of its affiliated persons for the purchase of securities offered in a public offering may, in some cases, involve conflicts of interest and the negotiation of the terms of the securities and, thus, raise concerns under Section 17(d) and Rule 17d-1. Our no-action positions in SMC, and in this letter, do not address the aggregation of orders for those securities.

is too small.¹⁴ As a result, the adviser would have the incentive to aggregate its order with the orders of others. In that circumstance, the adviser would have the material pecuniary incentive and the ability to cause an investment company client to participate with it in an aggregated purchase of the private placement securities, even though the investment company's participation may not be in its best interests.¹⁵

In contrast, aggregated orders for the purchase or sale of publicly traded securities in the secondary market are unlikely to create such a conflict of interest. In its request for no-action relief, SMC described as a "theoretical conflict of interest" the possibility that the aggregation of orders for publicly traded securities could cause an adviser to purchase unsuitable securities for one client account so as to reduce the execution costs for an account in which advisory employees owned an interest. SMC asserted that the gains from aggregation in terms of reduced execution costs would be highly unlikely to provide incentives to an adviser to purchase unsuitable investments for one client account.

We believe that when an affiliated person of an investment company, such as its investment adviser, has both a material pecuniary incentive and the ability to cause the investment company to participate with it in an aggregated transaction for the purchase or sale of private placement securities, the aggregated transaction would involve the requisite element of combination or profit motive for Section 17(d) and Rule 17d-1 to apply.¹⁶ Section 17(d) and

¹⁴ You acknowledge that, in some circumstances, an adviser and other non-investment company clients of the adviser could benefit from the participation of an investment company client in an Aggregated Transaction because the investment company's participation could increase the size of the order and enhance the adviser's ability to negotiate the price and receive a larger portion of the securities offered in the case of a partial fill.

¹⁵ An investment adviser also may, in some cases, have a material pecuniary incentive to cause the investment company to participate in an aggregated transaction with another client of the adviser, such as an advisory account in which employees of the adviser have material financial interests.

¹⁶ We note that an investment company's investment adviser is not the only affiliated person of an investment company that may have the ability to cause the investment company to participate with it in an aggregated transaction. For example, other persons who control the investment company within the meaning of Section 2(a)(9) of the Investment Company Act also may have the ability to cause the investment company to participate with it in an aggregated transaction.

Rule 17d-1 would apply in that circumstance, even if the investment company participates on the same terms as those of the other participants.¹⁷

We believe that the concerns of overreaching that Section 17(d) and Rule 17d-1 were designed to address are not raised, however, if an affiliated person that effects, or participates in, an aggregated transaction in which the investment company participates does not have both a material pecuniary incentive and the ability to cause the investment company to participate in the transaction. For example, if an investment adviser causes its investment company client to participate in an aggregated transaction with other affiliated persons of the investment company, but does not also participate in the transaction, the adviser would not necessarily have the material pecuniary incentive to cause the investment company to participate in the transaction.¹⁸ In that case, the concern that the investment company may be overreached by its adviser generally would not be raised and the transaction would not involve the requisite element of combination or profit motive between the investment company and its adviser for Section 17(d) and Rule 17d-1 to apply.¹⁹

We further believe that the mere aggregation of the orders of an investment company and those of its affiliated persons for the purchase or sale of private placement securities would not violate Section 17(d) and Rule 17d-1 when the aggregation does not involve a conflict of interest between the investment company and its affiliated persons (or the negotiation of any of the terms

¹⁷ See Talley, *supra* n.11, 399 F.2d at 404 (noting that the varieties in which participation by an investment company may be “different from or less advantageous than that” of an affiliate are infinite). See also In the Matter of Imperial Financial Services, Inc., Securities Exchange Act Release No. 7684 (Aug. 26, 1965) (“The possibility that the investment company was not disadvantaged does not cure the unlawfulness of proceeding with the joint enterprises without obtaining the prior approval of this Commission as required by Rule 17d-1.”).

¹⁸ If an investment adviser has an interest in another participant in the transaction, however, then the adviser may have a material pecuniary incentive to cause the investment company to participate in the transaction. See, e.g., n.15, *supra*.

¹⁹ We note, however, that under certain circumstances, separate transactions involving the purchase or sale of private placement securities by an investment company and an affiliated person of the investment company may constitute a single joint transaction for purposes of Section 17(d) and Rule 17d-1, such as when an investment adviser causes an investment company client to purchase private placement securities in one transaction so that the investment adviser can participate in a subsequent transaction.

of the securities), provided that the investment company participates on terms no less advantageous than those of any other participant.²⁰

MassMutual proposes to aggregate orders for the purchase and sale of private placement securities on behalf of the Funds, MassMutual, and other Accounts, without first obtaining an order from the Commission under Rule 17d-1. As discussed above, MassMutual's proposal to aggregate its orders with those of the Funds raises the possibility that MassMutual may, in some cases, have a conflict of interest with a Fund with respect to an Aggregated Transaction. You represent that MassMutual will, consistent with its fiduciary duties, disclose to the disinterested trustees of each Fund the existence of, and all of the material facts relating to, any conflicts of interest between MassMutual and the Fund in an Aggregated Transaction to allow the disinterested trustees to approve the Fund's participation in the Aggregated Transaction, before or after the transaction.²¹

Negotiation of Price.

The aggregation of orders involving private placement securities, unlike the aggregation of orders involving publicly traded securities in the secondary market, may entail the negotiation of the terms of the private placement securities. We believe that when the purchase or sale of private placement securities involves the negotiation of any of the terms of the securities by an investment adviser, the aggregation of the orders of an investment company with its affiliates for these securities generally would involve the requisite element of combination or profit motive for

²⁰ You state that certain private placement securities, such as Rule 144A securities of public companies for which there is an active secondary trading market, tend to be offered to qualified institutional buyers on a "take it or leave it" basis. We believe that the mere aggregation of the orders of an investment company and those of its affiliated persons for the purchase or sale of those Rule 144A securities in the secondary market generally would not violate Section 17(d) and Rule 17d-1. See SMC, n.11, supra. Cf. n.22 and accompanying text, infra (when the terms of private placement securities, including Rule 144A securities, are subject to negotiation, however, the aggregation of orders may involve the requisite element of combination or profit motive).

²¹ See Tannenbaum v. Zeller, 552 F.2d 402, 418 (2d Cir. 1977), cert. denied, 434 U.S. 934 (1977) (stating that the investment adviser had a duty to disclose information to the unaffiliated directors of the fund "in every area where there was even a possible conflict of interest" between the interests of the adviser and the interests of the fund).

Section 17(d) and Rule 17d-1 to apply.²² The negotiation of the terms of those securities raises concerns under Section 17(d) and Rule 17d-1 because an investment company that participates in aggregated purchases or sales of such securities could be disadvantaged, regardless of whether it participates on the same terms as those of the other participants.²³ For example, in connection with the purchase of a private placement security, the adviser could negotiate a term of the security, such as the maturity date, to benefit itself or other advisory clients to the disadvantage of the investment company.

MassMutual proposes to negotiate no term (directly or indirectly), other than price, of the private placement securities. You assert that the Funds would not be disadvantaged by their participation in the Aggregated Transactions because: (a) MassMutual will negotiate only the price of Non-negotiated Private Placement Securities and, therefore, will not be able to affect the terms of an offering to favor one client or group of clients over another; (b) all participants will receive the same unit price; and (c) the Procedures (which are substantially similar to those followed in SMC) will mandate fair treatment and written explanations and approvals of any deviations from an Allocation Statement. You state that the interests of all participants in an Aggregated Transaction will be aligned because MassMutual will negotiate only the price of Non-negotiated Private Placement Securities. You argue that price affects all participants equally because every participant will seek to obtain the best price possible.²⁴

Exercise of Ownership Rights.

You state that MassMutual may exercise any ownership rights related to the purchase and sale of the Non-negotiated Private Placement Securities on an aggregated basis, when this exercise is consistent with each participant's investment objectives and policies. You state that these ownership rights may include, for example, the right to exercise a conversion privilege in

²² For instance, you state that the initial terms of certain private placement securities, including Rule 144A securities issued by private companies that have little or no secondary market trading, may be subject to negotiation.

²³ See n.17, supra.

²⁴ As discussed above, you also represent that MassMutual will, among other things, disclose to the disinterested trustees of each Fund the existence of, and all material facts relating to, any conflicts of interest between MassMutual and the Fund in an Aggregated Transaction to allow the disinterested trustees to approve the Fund's participation in the Aggregated Transaction, before or after the transaction.

the case of convertible bonds, debentures, and preferred stock.²⁵ You represent that MassMutual will, consistent with its fiduciary duties, disclose to the disinterested trustees of a Fund the existence of, and all of the material facts relating to, any conflicts of interest between MassMutual and the Fund in the exercise of ownership rights of the Non-negotiated Private Placement Securities to allow the disinterested trustees to approve the exercise of ownership rights, before or after the exercise of those rights.

Conclusion.

Based on the facts and representations in your letter, we would not recommend enforcement action to the Commission under Section 17(d) and Rule 17d-1 thereunder if MassMutual: (1) aggregates orders of the Funds and Accounts (including MassMutual's proprietary account) for the purchase and sale of Non-negotiated Private Placement Securities; or (2) exercises ownership rights of the Non-negotiated Private Placement Securities in the manner you describe in your letter. Our conclusion is based particularly on your representations that MassMutual will: (1) disclose to the disinterested trustees of the Funds the existence of, and all of the material facts relating to, any conflicts of interest to allow the disinterested trustees, in situations in which a conflict exists, to (a) approve the Fund's participation in the Aggregated Transaction, before or after the transaction, and (b) approve the exercise of ownership rights associated with any Non-negotiated Private Placement Securities, before or after the exercise of such rights; and (2) aggregate purchase and sale orders involving Non-negotiated Private Placement Securities consistent with representations 1 through 13 in your letter.²⁶ Any different facts or representations may require a different conclusion.²⁷

²⁵ You represent that MassMutual will not vote Non-negotiated Private Placement Securities on an aggregated basis. Instead, MassMutual will vote each Fund or Account's proxies using MassMutual's current proxy voting policies, in accordance with each Fund's or Account's investment objectives and policies, or as directed by the Funds and the Accounts.

²⁶ Representation 7 in your letter discusses a pro rata method for the allocation of securities and proceeds among participants in the case of a partially filled order. We note that there may be other allocation methods that MassMutual can use consistent with the representations in your letter, but you have not asked for relief, and we do not express a view, as to any allocation method other than a pro rata method.

²⁷ We note that the aggregation of orders for advisory clients, including non-investment company clients, also raises issues under Section 206 of the Advisers Act. You state that MassMutual is not requesting relief under Section 206 of the Advisers Act. You represent that MassMutual understands that when it aggregates client orders, MassMutual

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We note that the Commission has previously granted MassMutual conditional exemptive relief under Sections 6(c) and 17(d) of the Investment Company Act and Rule 17d-1 to allow MassMutual to co-invest in securities acquired in private placements with certain clients for which MassMutual acts as investment adviser.²⁸ You request no-action relief only with respect

has obligations under Section 206 to aggregate the orders in a manner consistent with its duty to seek best execution, to ensure that all clients are treated fairly, and to disclose to its clients its policies with respect to the aggregation of orders. See SMC. You represent that MassMutual will seek to comply with these obligations in connection with the proposed transactions.

You have not asked, and we do not address, whether other provisions of the federal securities laws or state laws may prohibit certain Aggregated Transactions. For example, we do not address whether MassMutual, as a fiduciary, is obligated to put a Fund's trade ahead of its own or those of other Accounts in the case of a partial fill. See Division of Investment Management, Securities and Exchange Commission, Protecting Investors: A Half Century of Investment Company Regulation, 495 (May 1992).

²⁸

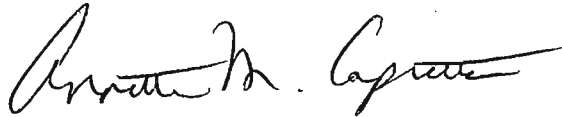
In the Matter of Massachusetts Mutual Life Insurance Company, et al., Investment Company Act Release Nos. 20381 (June 30, 1994) (notice) and 20427 (July 26, 1994) (order). The advisory clients include two closed-end investment companies and an investment fund that is not required to be registered under the Investment Company Act.

The Commission has issued similar orders allowing investment companies and certain affiliates to invest jointly in private placement securities, if a number of conditions are met to ensure that each company's participation is on a basis no less favorable than that of any other participant. The co-investing orders require, among other things, that the investment company and its affiliate purchase the same class of security at the same time and at the same price, and have conditions concerning the disposition of the security. See, e.g., In the Matter of Van Wagoner Funds, Inc., Investment Company Act Release Nos. 23954 (Aug. 19, 1999) (notice) and 24012 (Sept. 14, 1999) (order); In the Matter of Access Capital Strategies Community Investment Fund, Inc., Investment Company Act Release Nos. 21836 (Mar. 20, 1996) (notice) and 21898 (Apr. 16, 1996) (order); In the Matter of The Latin American Investment Fund, Inc., Investment Company Act Release Nos. 19808 (Oct. 21, 1993) (notice) and 19871 (Nov. 16, 1993) (order).

We note that those affiliated persons that have received orders under Rule 17d-1 permitting them to co-invest with registered investment companies in private placement securities may rely on this letter to aggregate orders for the purchase or sale of Non-

(continued ...)

to a subset of the private placement securities currently covered by the Order, i.e., the private placement securities for which MassMutual negotiates no term (directly or indirectly), other than price. Aggregated transactions involving private placement securities that are not Non-negotiated Private Placement Securities would be subject to the application requirement of Rule 17d-1.²⁹



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Senior Counsel

negotiated Private Placement Securities. Alternatively, those affiliated persons may continue to rely on their Rule 17d-1 orders.

²⁹ In addition, aggregated transactions involving Non-negotiated Private Placement Securities in which there are other facts that create an element of jointness or combination, besides the negotiation of price, would be subject to the application requirement of Rule 17d-1.

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June 6, 2000

VIA HAND DELIVERY

Douglas J. Scheidt, Esq.
Associate Director and Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Massachusetts Mutual Life Insurance Company, et al.

Dear Mr. Scheidt:

The purpose of this letter is to request assurance that the Division of Investment Management (the "staff") will not recommend enforcement action to the Securities and Exchange Commission (the "SEC") under Section 17(d) of the Investment Company Act of 1940, as amended (the "1940 Act") and Rule 17d-1 thereunder if open-end and closed-end investment companies for which Massachusetts Mutual Life Insurance Company ("MassMutual")¹ serves as investment adviser aggregate purchase and sale orders with MassMutual and certain private accounts for which MassMutual serves as investment adviser for the purpose of investing in privately placed securities for which MassMutual negotiates no term, other than price ("Aggregated Transactions"). For the reasons discussed below, we do not believe that the proposed transactions should be subject to Section 17(d) and Rule 17d-1. Moreover, they would not raise the types of concerns that these provisions were designed to address.

1 The term MassMutual includes successors and any current or future direct or indirect subsidiary that provide investment advice to clients, including any registered investment company.

Douglas J. Scheidt, Esq.
June 6, 2000
Page 2

A. BACKGROUND

MassMutual is a mutual life insurance company organized under the laws of the Commonwealth of Massachusetts and is an investment adviser registered with the SEC under the Investment Advisers Act of 1940, as amended ("Advisers Act"). MassMutual maintains a general account, which is used to fund its obligations to policyholders, and provides investment management to insurance company and non-insurance company subsidiaries, which are considered proprietary accounts. MassMutual also serves as investment adviser to investment companies ("Funds") registered under the 1940 Act and private accounts, including investment funds excepted from the investment company definition under Section 3(c) of the 1940 Act ("3(c) Funds"). The 3(c) Funds include but are not limited to the following: private funds excepted under Section 3(c)(1); qualified purchaser funds excepted under Section 3(c)(7); pension trusts and collective trust funds excepted under Section 3(c)(11); and insurance company general accounts excepted under Section 3(c)(3). In addition to the foregoing, MassMutual serves as investment adviser to state and municipal pension plans excluded from investment company regulation under Section 2(b) ("2(b) Funds"). (The 3(c) Funds, the 2(b) Funds, private accounts, and MassMutual's proprietary accounts, collectively, are referred to as "Accounts").

B. PROPOSED TRANSACTIONS

MassMutual proposes to aggregate the orders of one or more Funds and one or more Accounts for the purchase or sale of certain private placement securities ("Non-negotiated Private Placement Securities"). The term Non-negotiated Private Placement Securities includes securities, warrants, conversion privileges, and other rights that (1) are exempt from registration under the Securities Act of 1933, as amended ("Securities Act"), or are purchased in transactions exempt from such registration requirements and (2) the terms of which (other than price) have not been, directly or indirectly, negotiated by MassMutual.² While other terms could be negotiated, MassMutual seeks no-action relief only for those transactions in which MassMutual actually has, directly or indirectly, negotiated only the price. Typically, these would involve securities issued in reliance upon Rule 144A, although other exemptions might be available.

MassMutual invests for the Funds and the Accounts in a full range of investments including, among others, fixed-income securities, convertible notes, warrants, preferred stock and common stock, many of which fall within the category of Non-negotiated Private Placement Securities.

² For purposes of this request, the term Non-negotiated Private Placement Securities does not include "traditional" negotiated private placement securities, such as securities exempt under the Securities Act by Section 4(2), Rules 505 or 506 under Regulation D or Rule 144 thereunder.

Douglas J. Scheidt, Esq.
June 6, 2000
Page 3

These investments may be rated or unrated, investment grade or non-investment grade, liquid or illiquid.

Whether an investment in a private placement security ultimately is negotiated or not depends on the terms of each investment, the market for such securities, and how MassMutual exercises its judgment as investment opportunities present themselves. As a result, it may be helpful to the staff's analysis to understand the process by which MassMutual decides when and how to invest in private placement securities, both negotiated and non-negotiated. New investment opportunities are identified by MassMutual in a variety of ways. Most fixed-income investment opportunities are typically identified and analyzed by MassMutual's in-house securities investment staff. Publicly-traded fixed income securities and Rule 144A securities for which there is an active secondary market among qualified investors are typically identified by MassMutual's trading department on the basis of their rating, duration and yield characteristics, among other things. Traditional private placement securities (see note 2 above) and Rule 144A securities for which there is not an active secondary market are identified and analyzed by MassMutual's corporate finance department. The majority of such investments are purchased directly from the issuer or from a financial intermediary (such as a broker-dealer) contemporaneous with, or shortly after, their issuance.

MassMutual's corporate finance staff becomes aware of investment opportunities in many ways including direct solicitation by an issuer, by attending a "road show" conducted by the issuer and its placement agent, or by receiving a private placement memorandum in the mail. While most private placement investments purchased directly from the issuer are, to varying degrees, negotiable by investors and their counsel, this is not always the case. For example, an issuer registered under the Securities Exchange Act of 1934, as amended, may issue private fixed-income securities designed by the issuer and its advisers to "meet the market," such that terms are held out to be non-negotiable. In such cases, investors are asked to invest on a "take it or leave it" basis with only the price being subject to negotiation or "bidding." Occasionally, deals held out as being non-negotiable turn out to be negotiable if the issuer and its advisers misjudge the market and are unable to sell the issue as originally proposed. Rule 144A securities are hybrids in the marketplace and some are negotiable like traditional private placement securities and some are non-negotiable like public securities.

Determining whether, or to what extent, terms of a non-public offering should be negotiated is a matter of judgment for MassMutual and other investors. In some cases, MassMutual may determine that it is in the best interests of the Funds and the Accounts to negotiate certain terms of a proposed investment. In other cases, a judgment may be made not to negotiate terms other than price. For example, MassMutual could determine that an attempt to negotiate terms may result in forfeiting the investment opportunity to other investors willing to take the deal "as is."

Douglas J. Scheidt, Esq.
June 6, 2000
Page 4

The degree to which the terms of private placement securities may be subject to negotiation by institutional investors varies from offering to offering. For example, some of these securities have conversion and maturity provisions, call protections and other financial covenants that can be negotiated. It is not uncommon in Non-negotiated Private Placement Securities offerings for the price to be negotiable depending on the amount of the offering a purchaser is willing to buy. For purposes of this request, Non-negotiated Private Placement Securities include those private placement securities where MassMutual, on behalf of the Funds and the Accounts, only negotiates price and does not, directly or indirectly, negotiate any other terms. The "price" that MassMutual negotiates varies depending on the type of security involved. In the case of a fixed income security, the price MassMutual may negotiate includes the face amount of the instrument plus the yield. In the case of an equity security, the price includes the offering price. In the case of a convertible bond, debenture or preferred stock, the price includes the conversion price. In the case of warrants, the price includes the exercise price.

MassMutual proposes to aggregate purchases in Non-negotiated Private Placement Securities for the Funds and the Accounts. Similarly, MassMutual may sell positions in Non-negotiated Private Placement Securities on an aggregated basis.³ All Aggregated Transactions would be subject to the following procedures.

1. MassMutual's Board of Directors (or the Investment Committee of the Board) will approve a trade aggregation policy statement (the "Policy Statement") designed to ensure that Aggregated Transactions are made in a manner that is fair and equitable to, and in the best interests of, the Funds and the Accounts. The Policy Statement will establish an aggregation committee comprised

- 3 MassMutual also may exercise any ownership rights related to the purchase and sale of the Non-negotiated Private Placement Securities on an aggregated basis, when this exercise is consistent with each participant's investment objectives and policies. These ownership rights may include, for example, the right to exercise a conversion privilege in the case of convertible bonds, debentures and preferred stock. MassMutual will not vote Non-negotiated Private Placement Securities on an aggregated basis. Instead, MassMutual will vote each Fund's or Account's proxies using MassMutual's current proxy voting policies, in accordance with each Fund's or Account's investment objectives and policies, or as directed by the Funds and the Accounts. MassMutual will, consistent with its fiduciary duties, disclose to the disinterested trustees of a Fund the existence of, and all material facts relating to, any conflict of interest between MassMutual and the Fund in the exercise of ownership rights of the Non-negotiated Private Placement Securities to allow the disinterested trustees to approve the exercise of ownership rights, before or after the exercise of those rights.

Douglas J. Scheidt, Esq.
June 6, 2000
Page 5

of senior officers of MassMutual that will be responsible for developing written aggregation procedures ("Procedures") designed to result in fair and equitable participation in Non-negotiated Private Placement Securities offerings or sales of such securities. The Procedures will set out objective criteria designed to take into account each participating Fund's and Account's unique investment objectives, needs, and constraints at any given time. MassMutual has procedures and mechanisms in place that are reasonably designed to implement its aggregation policies.

2. The Procedures for the aggregation of transactions will be fully disclosed in MassMutual's Form ADV and separately to all participating Funds and Accounts.

3. The trustees (including a majority of disinterested trustees) of each Fund will approve the Procedures and any material changes to the Procedures before the Fund may participate in Aggregated Transactions.

4. As an initial step, each portfolio manager of a Fund or Account will review the Fund's or Account's investment objectives, investment restrictions, cash position, need for liquidity, sector concentration, and other objective criteria and determine whether a purchase or sale of a Non-negotiated Private Placement Security is an appropriate transaction for that Fund or Account. Each Fund and Account will receive individualized investment advice and treatment.

5. MassMutual will not engage in an Aggregated Transaction on behalf of a Fund and an Account unless the transaction is consistent with MassMutual's duties to the Fund or the Account, including its duty of best execution, which includes the duty to seek best price, and the terms of its investment advisory agreement with each client for which trades are being aggregated.

6. The Procedures will be used to produce written (on paper or electronically) allocation statements for each proposed Aggregated Transaction (each, an "Allocation Statement"), which will be prepared before or at the time MassMutual indicates to an issuer or a prospective seller or buyer its interest in engaging in an Aggregated Transaction.

7. The Allocation Statement will describe specifically how Non-negotiated Private Placement Securities or proceeds from an aggregated sale of such securities will be allocated among participants. If there is a sufficient amount of Non-negotiated Private Placement Securities, in the case of a purchase, or proceeds, in the case of a sale, to satisfy all participants, the securities or proceeds will be allocated among the participants in accordance with the Allocation Statement. If there is an insufficient amount of Non-negotiated Private Placement Securities or sale proceeds to satisfy all participants, the securities or proceeds will be allocated *pro rata* based on the allocation each Fund and Account would have received if there was a sufficient amount of securities or proceeds and they were allocated according to the Allocation Statement.

Douglas J. Scheidt, Esq.
June 6, 2000
Page 6

8. An Aggregated Transaction may be allocated on a basis different from that specified in the Allocation Statement if all participants receive fair and equitable treatment, and the reason for the deviation is recorded in writing (on paper or electronically) promptly and approved by a member of the aggregation committee in writing (on paper or electronically) at or prior to settlement.⁴

9. MassMutual will review the Procedures at least annually to ensure that they are adequate to prevent any Fund or Account from being systematically disadvantaged as a result of the Aggregated Transactions. If MassMutual discovers that the Procedures are not being followed or that the Procedures do not have the intended results, it will take whatever corrective measures are necessary, including revising the Procedures.⁵

4 There may be many reasons for deviating from the Allocation Statement. For example, from the time the Allocation Statement is completed to the date of settlement, an Account or Fund may no longer have the cash available to purchase a Non-negotiated Private Placement Security. Similarly, during this time period, an Account or a Fund may have met or exceeded concentration limits in the same industry as the Non-negotiated Private Placement Security. If an aggregated order is partially filled on a basis different from that in the Statement, no Account or Fund that is benefitted by that allocation may effect any purchase or sale, for a reasonable period of time following the execution of the order, that would result in the Account or Fund buying or selling more securities than the amount it would have bought or sold had the aggregated order been filled completely. Needing a period of time up to settlement to obtain approval is necessary because a member of the aggregation committee may not be available to approve deviations once any deviation has been identified.

5 The aggregation committee will report to MassMutual's board of directors or Investment Committee annually regarding deviations from *pro rata* allocations and the reasons for these deviations. MassMutual intends to monitor how these Procedures work in practice. If MassMutual observes that these procedures are not meeting their objectives, MassMutual will change the Procedures without further notification to the SEC staff. For example, MassMutual may change the manner in which partial fills are allocated to a rotational system to replace the *pro rata* allocation that is proposed. In a rotational system, MassMutual would allocate small amounts of securities or proceeds received in a partial fill to some of the participants in an aggregated transaction, using a numerical or alphabetical list of all clients. A rotational system treats clients fairly because clients receive an amount of securities that would have a measurable effect upon their account, each client has an opportunity at some point to obtain securities or proceeds equal to the

(continued...)

Douglas J. Scheidt, Esq.
June 6, 2000
Page 7

10. No Fund or Account participating in an Aggregated Transaction will be favored over any other Fund or Account, because each Fund and Account taking part in a transaction will participate at the same unit price. Transaction costs and expenses will be shared by the participants on a *pro rata* basis according to the amount of their participation.

11. MassMutual may receive transaction fees (including break-up or commitment fees, but excluding broker's fees or any other compensation, fee, or other remuneration prohibited by Section 17(e) of the 1940 Act) that are payable to the participants in an Aggregated Transaction when MassMutual is a participant.⁶ MassMutual will receive no additional compensation or remuneration of any kind as a result of an Aggregated Transaction that is not shared *pro rata* with the other participants in the Aggregated Transaction. Any transaction fees payable to the participants of an Aggregated Transaction will be distributed on a *pro rata* basis to the participants in amounts proportionate to their respective investments.

12. Cash and securities of Funds and Accounts participating in an Aggregated Transaction may be deposited in a single account with one or more banks or broker-dealers only so long as reasonably necessary to settle an Aggregated Transaction on a delivery versus payment basis. Cash or securities will be held collectively following settlement only so long as reasonably necessary to deliver the cash or securities to each participant's custodian.

13. MassMutual will maintain written records of each Aggregated Transaction involving a Non-negotiated Private Placement Security of a Fund or Account in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of MassMutual. These records will indicate, for each Fund and Account participating in an Aggregated Transaction, the amount of Non-negotiated Private Placement Securities allocated to or sold from the Fund and the Account, the date the Fund and Account acquired, liquidated or otherwise disposed of the position, and the price paid or received by the Fund and Account each time. MassMutual also will maintain in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of MassMutual, written explanations of deviations from Allocation Statements including written approvals of deviations by a member of the Aggregation Committee; and the Policy Statements, Procedures, and Allocation Statements.

5(...continued)

amount originally desired (*i.e.*, as if the order had been completely filled), and MassMutual would not be able to alter a client's position on the list to favor one client over others.

6 MassMutual is not requesting the staff's views on the applicability of Section 17(e) to its receipt of transaction fees in Aggregated Transactions.

Douglas J. Scheidt, Esq.
June 6, 2000
Page 8

C. ISSUE PRESENTED

Section 17(d) of the 1940 Act makes it unlawful for any affiliated person of, or principal underwriter for, a registered investment company, or any affiliated person of such a person, acting as principal, to effect any transaction in which the registered company is a joint or joint and several participant in contravention of SEC rules and regulations. Rule 17d-1 prohibits any affiliated person of, or principal underwriter for, a registered investment company or any affiliated person of such persons from participating in, or effecting any transaction in connection with, a joint arrangement or profit-sharing plan unless the SEC grants an exemptive order authorizing the arrangement or plan. Rule 17d-1(c) defines "joint enterprise or other joint arrangement or profit-sharing plan" as any plan, contract, authorization, or arrangement, or any practice or understanding concerning an enterprise or undertaking, under which a registered investment company and any of its affiliated persons or affiliated persons of such persons have a joint or joint and several participation in the profits (a "Joint Transaction").

The application of Section 17(d) and Rule 17d-1 to the proposed Aggregated Transactions, therefore, turns on whether (1) the Funds and the Accounts are affiliated persons of one another within the meaning of Section 2(a)(3) of the 1940 Act or affiliated persons of affiliated persons, and (2) whether the transactions are Joint Transactions.

As their investment adviser, MassMutual is an affiliated person of the Funds within the meaning of Section 2(a)(3)(E) of the 1940 Act. MassMutual also could be deemed an affiliated person of the Funds or Accounts under Section 2(a)(3)(C) to the extent it is deemed to control them. In addition, MassMutual would be deemed an affiliated person of those Funds or Accounts 5% or more of whose voting securities it owns under Section 2(a)(3)(B).

In light of the foregoing, the Funds and the Accounts could be affiliated persons of one another under Section 2(a)(3)(C) of the 1940 Act to the extent they are deemed to be under the common control of MassMutual. They also could be deemed affiliated persons of affiliated persons since (1) MassMutual is an affiliated person of the Funds under Section 2(a)(3)(E) and (2) the Accounts could be viewed as affiliated persons of MassMutual under Sections 2(a)(3)(A) or 2(a)(3)(C).

Assuming that the Funds and the Accounts are affiliated persons of each other or affiliated persons of such persons, the SEC or the staff could take the position that the proposed transactions would be Joint Transactions prohibited under Section 17(d) and Rule 17d-1. The SEC historically has taken the position that these provisions apply where an investment company and its affiliated persons or affiliated persons of such persons undertake "at or about the same time to invest in the

Douglas J. Scheidt, Esq.
June 6, 2000
Page 9

same companies at the inducement of or arrangement of the same person.”⁷ Because of this position, MassMutual has obtained exemptive orders from the SEC under Section 17(d) and Rule 17d-1 to engage in Aggregated Transactions involving privately-placed securities.⁸

Certain non-public securities, such as Rule 144A securities of public companies, are traded more like public securities than private placements.⁹ MassMutual, therefore, requests no-action relief under Section 17(d) and Rule 17d-1 to make certain that it is not required to file an exemptive application with regard to the proposed Aggregated Transactions in Non-negotiated Private Placement Securities. For the reasons discussed below, MassMutual believes that the proposed Aggregated Transactions are consistent with the transactions that the staff permitted to be aggregated in two interpretive letters – *SMC Capital, Inc.* (Sept. 5, 1995) (“*SMC*”) and *Pretzel & Stouffer* (Dec. 1, 1995) (“*Pretzel*”).¹⁰

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- 7 *Imperial Financial Services*, Securities Exchange Act Rel. No. 7684 (Aug. 26, 1965).
- 8 *See, e.g., Massachusetts Mutual Life Ins. Company, et al.*, Investment Company Act Rel. Nos. 20381 (June 30, 1994) (notice) and 20427 (July 26, 1994) (order).
- 9 Rule 144A provides a non-exclusive safe harbor exemption from the Securities Act registration requirements for resales of restricted securities to eligible institutions that, when issued, were not of the same class as securities listed on a U.S. securities exchange or quoted on the National Association of Securities Dealers Automated Quotation System (NASDAQ). With the exception of registered broker-dealers, qualified institutional buyers (“QIBs”) eligible to make purchases under Rule 144A must in the aggregate own and invest on a discretionary basis at least \$100 million in securities of unaffiliated issuers. Some Rule 144A securities are issued by public companies and have active secondary trading markets. Others are issued by private companies and have little or no secondary trading. The former tend to be offered to QIBs on a “take it or leave it” basis while the initial terms of the latter are much more likely to be negotiable.
- 10 Unlike in *SMC*, MassMutual is not requesting relief under Section 206 of the Advisers Act to engage in the proposed transactions. The staff stated in *Pretzel* that an “adviser that aggregates client orders must do so in a manner consistent with its duty to seek best execution of the orders, and must ensure that all clients are treated fairly Additionally, an adviser must disclose to its clients its policies with respect to the aggregation of orders.” MassMutual understands these obligations and will seek to comply with them fully in connection with the proposed transactions.

Douglas J. Scheidt, Esq.
June 6, 2000
Page 10

D. DISCUSSION

The staff concluded in *SMC* and reaffirmed in *Pretzel* that “the mere aggregation of orders for advisory clients, including a registered investment company, would not violate Section 17(d), provided that the investment company participates on terms no less advantageous than those of any other participant.” Conversely, the staff stated in *SMC* that where an adviser “allocates trades in such a way as to disadvantage a registered investment company, however, a joint enterprise or joint arrangement raising the concerns Section 17(d) was designed to address may result.”

The staff’s response in *SMC* was based on a number of representations designed to ensure that registered investment companies are not disadvantaged (the “*SMC* Conditions”). The staff further stated, however, that “there may be other allocation methods that advisers can use without violating Section 17(d).” Finally, the staff stated in *SMC* that because the request for interpretive relief did “not request relief with respect to the aggregation of orders involving privately placed securities . . . we express no opinion with respect to the aggregation of such securities.”

The aggregation of orders involving private placement securities may entail the negotiation of terms of the offering. This may raise concerns under Section 17(d) because a registered investment company that participates in aggregated purchases or sales of these securities could be disadvantaged, regardless of whether it participates on the same terms as those of the other participants. For example, an adviser could negotiate terms of the security, such as the maturity date, to benefit itself or other advisory clients to the possible disadvantage of the investment company.

Under the proposed Aggregated Transactions, none of the Funds would participate on terms less advantageous than any of the Accounts, nor would MassMutual favor any participant in an Aggregated Transaction over another participant. Moreover, MassMutual would comply with conditions virtually identical to the *SMC* Conditions, which are designed to ensure that the Funds are not disadvantaged. These conditions are set forth above in Part B of this letter discussing the proposed transactions.

MassMutual believes that the Funds can benefit from participating in Aggregated Transactions. When MassMutual is able to aggregate client purchases, the larger size of the order gives it an advantage in negotiating the price, and in receiving a larger portion of the securities offered on behalf of itself and its clients in the event that its order is not filled completely (“partial fill”). Further, a large purchase in one offering can improve the ability of MassMutual and its clients to participate in future offerings. In addition, because the assets of the Accounts are far greater than the assets of the Funds, the Funds are able to participate in offerings that otherwise might not be available to them. The Funds will benefit from aggregated sales of Non-negotiated Private Placement Securities. The Funds may hold small amounts of Non-negotiated Private Placement

Douglas J. Scheidt, Esq.
June 6, 2000
Page 11

Securities relative to the amounts that the Accounts may hold. Some institutional investors may be unwilling to acquire a small amount of Non-negotiated Private Placement Securities and, as a result, the Funds could benefit from participating in the aggregated sales.¹¹ The Funds also could take advantage of reduced transaction costs in an aggregated sale. The Funds would not be disadvantaged by their participation in Aggregated Transactions because (1) all participants will receive the same unit price, (2) the Procedures will mandate fair treatment and written explanations and approvals of any deviations from an Allocation Statement, and (3) MassMutual will negotiate only the price of Non-negotiated Private Placement Securities and therefore will not be able to affect the terms of an offering to favor one client or group of clients over another. The interests of all participants in an Aggregated Transaction will be aligned because MassMutual will negotiate only the price of Non-negotiated Private Placement Securities. The price affects all participants equally because every participant will seek to obtain the best price possible.

MassMutual acknowledges that, in some circumstances, an adviser and its non-investment company clients could benefit from the participation of an investment company client in an Aggregated Transaction because the investment company's participation could increase the size of the order and enhance the adviser's ability to negotiate the price and receive a larger portion of the securities offered in the case of a partial fill. This is not the case with MassMutual, however, as the Funds' combined net assets are a fraction of the combined assets of the Accounts. Nevertheless, MassMutual's proposal to aggregate its orders with those of the Funds raises the possibility that MassMutual could, in some cases, have a conflict of interest with a Fund in an Aggregated Transaction. MassMutual will, consistent with its fiduciary duties, disclose to the disinterested trustees of each Fund the existence of, and all of the material facts relating to, any conflicts of interests between MassMutual and the Fund in an Aggregated Transaction to allow the disinterested trustees to approve the Fund's participation in the Aggregated Transaction, before or after the transaction. For the reasons set out above, we believe the staff should grant the requested relief under Section 17(d) and Rule 17d-1.

We recognize that *SMC* specifically stated that it did not address the aggregation of orders involving private placement securities. However, we do not see any meaningful distinction between transactions involving Non-negotiated Private Placement Securities where no term is negotiated other than price and transactions involving publicly traded securities. The SEC issued a report in 1996 stating that "[w]hat used to be thought of as public offerings are being done privately under Rule 144A. Bearing close resemblance to public offerings, Rule 144A placements often are facilitated by investment banking firms and accompanied by detailed offering circulars

11 Aggregated sales of private placement securities generally do not involve the negotiation of any terms of the securities, although the price at which a sale is effected may be negotiated.

Douglas J. Scheidt, Esq.
June 6, 2000
Page 12

....¹² In recognition of this fact, the SEC specifically amended Rule 10f-3 under the 1940 Act to permit funds to purchase securities in eligible Rule 144A offerings.¹³ The term "Eligible Rule 144A Offering" is defined in Rule 10f-3 as any offering of securities which, among other things, is exempt from registration under Section 4(2) of the Securities Act of 1933, Rule 144A thereunder, or Regulation D. The same conclusion should apply to commercial paper that is exempt from the Securities Act by Section 3(a)(3) thereunder.

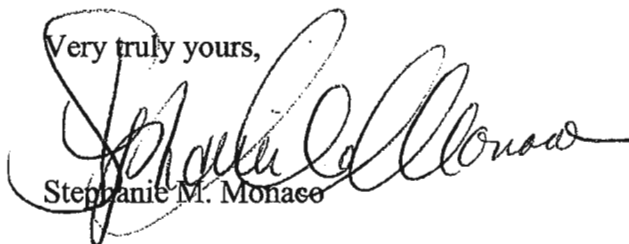
In any event, regardless of whether Non-negotiable Private Placement Securities are similar to public securities, the ultimate question under Section 17(d) and Rule 17d-1 thereunder is whether the Funds would participate in the proposed transactions on terms no less advantageous than those of the other Accounts. For the reasons discussed above, we believe that they will. In fact, we believe that each Fund could benefit from aggregating transactions in Non-negotiated Private Placement Securities with the Accounts to the extent that the ability to engage in large Aggregated Transactions typically will result in more buying power which may enable each Fund and Account to obtain better prices.

E. - CONCLUSION

For these reasons, we believe that the proposed Aggregated Transactions should not be deemed subject to Section 17(d) and Rule 17d-1. Therefore, we request confirmation that the staff will not recommend enforcement action to the SEC under Section 17(d) or Rule 17d-1 if the Funds and the Accounts aggregate trades and invest in Non-negotiated Private Placement Securities under the circumstances set forth above.

We would very much appreciate your prompt attention to this matter. Please contact me at (202) 467-7192, or Monica Parry at (202) 467-7692, if you have any questions.

Very truly yours,



Stephanie M. Monaco

12 *Advisory Report of the Advisory Committee on the Capital Formation and Regulatory Processes*, Appendix A, pages 41-42 (July 24, 1996).

13 Investment Company Act Release No. 22775 (July 31, 1997) (adopting Rule 10f-3 amendments).



DIVISION OF
INVESTMENT MANAGEMENT

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

July 28, 2000

ACT ICA
SECTION 17(d)
RULE 17d-1
PUBLIC
AVAILABILITY 7/28/00

Stephanie M. Monaco, Esq.
Morgan, Lewis & Bockius LLP
1800 M Street, N.W.
Washington, D.C. 20036-5869

Dear Ms. Monaco:

On June 7, 2000, we issued a no-action letter to Massachusetts Mutual Life Insurance Company ("MassMutual") under Section 17(d) of the Investment Company Act of 1940 and Rule 17d-1 thereunder with respect to MassMutual's proposed aggregation of orders, on behalf of its proprietary account and registered investment companies ("funds") and certain private accounts for which it serves as investment adviser, for the purchase and sale of private placement securities for which it negotiates no term other than price. Since the issuance of the letter, we have received a number of inquiries regarding the scope of the no-action relief granted to MassMutual. We are writing to clarify that MassMutual did not request no-action relief, and we did not express our views, with respect to aggregated transactions in which a fund's investment adviser: (1) does not participate or have a material pecuniary interest in an entity that does participate; but (2) negotiates the terms of the private placement securities on behalf of the fund and other participants in the aggregated transaction which are affiliated with the fund. If we are requested to do so, we will address this issue separately.

Sincerely,

Annette M. Capretta
Senior Counsel