

CFTC Letter No. 00-99**October 17, 2000****No-Action****Division of Trading & Markets**

Re: Section 4m of the Act: -- Request for CPO Registration No-Action
Position with Respect to Co-Managing Member of a Group of Commodity
Pools for which a Registered CPO is the Other Co-Managing Member

Dear :

This is in response to your letter dated August 16, 2000 to the Division of Trading and Markets (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by your letter dated September 29, 2000 and by telephone conversations with Division staff. By your correspondence, you request on behalf of "V", a Bermuda company ("V"), that the Division will not recommend that the Commission commence any enforcement action against ("V") based solely on its failure to register under Section 4m(1) of the Commodity Exchange Act (the "Act")¹ as a commodity pool operator ("CPO") in connection with "V's" activities as co-managing member of four U.S. investment funds (the "LLC Feeders"),² whose assets will be invested in offshore commodity pools (the "Master Funds").

Based upon the representations made in your correspondence, we understand the relevant facts to be as follows.

The Feeder Funds

"V" is co-managing member of the LLC Feeders with "W", which does business under the name "X". The investors in the LLC Feeders will be exclusively U.S. persons subject to U.S. federal taxation. The LLC Feeders are each paired with offshore pool counterparts which accept only Non-U.S. persons³ and U.S. tax-exempt entities (collectively these offshore pools are referred to as the "Bermuda Feeders"). All U.S. investors in the LLC Feeders and the Bermuda Feeders will be qualified eligible persons ("QEPs") as defined in Commission Rule 4.7. The LLC Feeders and the Bermuda Feeders also will be QEPs for purposes of their investments into the Master Funds.

The Master Funds

The investors in the Master Funds will be the LLC Feeders and the Bermuda Feeders, and the Master Funds will engage primarily in securities trading activities.⁴ “X” will serve as the CPO for each of the Master Funds. Commodity interests will be used by the Master Funds from time to time for hedging purposes as defined in Rule 1.3(z)(1). None of the LLC Feeders will engage directly in commodity interest trading.

“X”

“X” was registered with the Commission as a CPO on _____, and will act as the CPO for each of the LLC Feeders. The operating agreement with each LLC Feeder provides that “X” is exclusively responsible for all functions required to be performed by a CPO under applicable law, notwithstanding that “V” is a co-managing member. Pursuant to a contract between each Bermuda Feeder and “X”, “X” will also be the CPO for each of the Bermuda Feeders. “X” will have exclusive responsibility for any U. S. investor solicitation activities in respect of the LLC Feeders and the Bermuda Feeders. In addition, any decision with respect to the replacement or termination of “Y”, the retention of a new CTA for the Master Funds, or any change or modification to the trading policies of the LLC Feeders or of the Master Funds may not be made without the approval of “X”. You state that in essence, “X” will have veto power over all of these CPO activities to ensure that “X” is able to perform its CPO functions unimpeded by the formalities of corporate structure.

“V”

Pursuant to the agreement between “V” and each Master Fund, “V” has overall responsibility for, among other things, arranging for the settlement and clearing of the Master Fund's securities transactions, facilitating Master Fund borrowings, arranging for valuations of the Master Fund's portfolio of non-commodity interest investments, arranging for the provision of tax and other portfolio data to the Administrator, and the provision of administrative, legal, accounting and other services. For business control and marketing purposes, the parties consider it essential that “V”, whose reputation is now well established in the securities industry, serve along with “X” as co-managing member of the LLC Feeders. Finally, there is a familial relationship between the beneficial owner of “X” (a U.S. person) and the primary beneficiary of “V” (a Non-U.S. person).⁵

The Advisor

“Y”, a United Kingdom corporation (“Y”) is registered with the Commission as a commodity trading advisor (“CTA”) and as a CPO, in addition to being registered with the Securities and Futures Authority in the U.K. “Y” will serve as the CTA of each Master Fund and will be contractually delegated exclusive responsibility for all trading and investment activities for each Master Fund and the LLC Feeders. “V” and “Y” are affiliated entities in that each is 80 percent owned by “P”, a Bermuda holding company that is controlled by the Trust. “A”, “Y's” president and chief operating officer, is also the sole listed principal of “X”.

The Administrator

The day-to-day operational and administrative functions of each Master Fund (*i.e.*, preparation of account documentation, reports to investors, and account statement preparation) will be contractually delegated to an independent and well-known administrator (the "Administrator").⁶ The LLC Feeders will also make use of the Administrator's services. "X", and not "V", will retain ultimate decision-making authority (*i.e.*, consent to all decision and veto power over determinations with which "X" disagrees) as to the selection, retention and termination of the Administrator, as well as supervisory responsibility with respect to the administrative activities performed by the Administrator (including those activities that are obligations of CPOs).

Additional Representations

Neither "V" nor any of its officers, directors or other principals is subject to statutory disqualification under Sections 8a(2) or 8a(3) of the Act.⁷ "V" and "X" each accepts joint and several liability with the other for any violation of the Act and Commission regulations.

Analysis

As noted above, although "V" is co-managing member with "X" of the LLC Feeders, "X" is obligated to perform exclusively all functions of a CPO under the Act and Commission rules, including without limitation, investor solicitation and ongoing administrative and operational responsibilities. Operationally, this is also true at the Master Funds level. All trading activity involving commodity interests will be for hedging purposes consistent with Rule 1.3(z)(1) and will take place in the Master Fund, for which "Y", a registered CTA, will serve as the CTA. Also as noted, there is a family relationship between the beneficial owner of "X" and the primary beneficiary of "V", and none of "V", its officers, directors or other principals is subject to statutory disqualification. Finally, "V" and "X" each acknowledge joint and several liability for any violation of the Act by the other.

Based on the representations made in your correspondence, we believe your request has merit and is consistent with prior positions taken by the Division.⁸ Accordingly, the Division will not recommend that the Commission commence any enforcement action against "V" based solely upon "V's" failure to register under Section 4m(1) of the Act as a CPO in connection with acting as a co-managing member of the LLC Feeders.

This letter, and the no-action position taken herein, are based upon the representations provided to us. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. You must notify us immediately in the event that the operations or activities of "V", "X", the LLC Feeders, the Bermuda Feeders or the Master Funds change in any way from those as represented to us. Further, this letter is applicable to "V" solely in connection with the operation of the LLC Feeders.

We note that this letter does not excuse “V” from compliance with any other applicable requirements contained in the Commodity Exchange Act (the "Act"), 7 U.S.C. §1 *et seq.* (1994), or in the Commission's regulations issued thereunder. For example, “V” remains subject to all antifraud provisions of the Act, and to the reporting requirement for traders set forth in Parts 15, 18 and 19 of the Commission's regulations.

Further, this letter represents the position of the Division of Trading and Markets only. It does not necessarily reflect the views of the Commission or of any other office or division of the Commission. If you have any questions concerning this correspondence, please contact me or Christopher W. Cummings, an attorney on my staff, at (202) 418-5445.

Very
truly
yours,

John C. Lawton
Acting Director

1 7 U.S.C. § 6m(1) (1994).

2 The LLC Feeders are “AA”, “BB”, “CC” and “DD”.

3 For the purpose of this letter, the term "Non-U.S. person" has the same meaning as the term "Non-United States person" in Commission Rule 4.7(a)(1)(iv). *See* 65 Fed. Reg. 47848, 47854 (August 4, 2000). All other Commission rules referred to herein are found at 17 C.F.R. Ch. I (2000).

4 The Master Funds are “EE”, “FF”, “GG” and “HH”.

5 Additionally, we note that each of the four members of “V's” board of directors is a Non-U.S. person.

6 The name and business address of the Administrator for each of the Master Funds is II.

7 7 U.S.C. § 12a(2) or 12a(3) (1994).

8 *See* CFTC Staff Letter No. 99-30, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,731 (July 14, 1999), CFTC Staff Letter No. 97-25, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,025 (March 27, 1997), and CFTC Staff Letter No. 93-49, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,753 (May 21, 1993), in which the Division took no-action positions with respect to the failure of a Co-CPO to register where, as here, performance of CPO activities was restricted to another (registered) Co-CPO, the unregistered Co-CPO was not involved in commodity interest trading,

the Co-CPOs were affiliated and each Co-CPO acknowledged joint and several liability for each other's violations of the Act.