

**CFTC letter No. 03-05**  
**January 23, 2003**  
**Interpretation**  
**Division of Clearing and Intermediary Oversight**

Re: Section 4m(1) of the Act -- Request for CPO and CTA Registration No-Action Position for a State-Regulated Insurance Company

Dear:

This is in response to your letter dated August 23, 2002, to the Division of Clearing and Intermediary Oversight (the "Division")<sup>[1]</sup> of the Commodity Futures Trading Commission (the "Commission"), as supplemented by your letters dated September 18, 2002 and January 16, 2003 and by telephone conversations with Division staff. By your correspondence, you request certain relief on behalf of "U", a state-regulated insurance company "U". Specifically, you request confirmation that the Division will not recommend that the Commission commence any enforcement action against "U", based upon "U's" failure to register under Section 4m(1) of the Commodity Exchange Act (the "Act")<sup>[2]</sup> as a commodity pool operator ("CPO") or as a commodity trading advisor ("CTA") in connection with the operation of one or more insurance company separate accounts (each a "Separate Account") established to invest the proceeds of certain life insurance policies (each a "Policy") issued by "U" where "U" will invest such proceeds in a commodity pool operated by a registered CPO and advised by a registered CTA (the "Fund").<sup>[3]</sup> You also request CPO and CTA registration relief for "U" in connection with the future operation of any separate account that is substantially similar to the Separate Accounts, as discussed below. Accordingly, the term "Separate Account" as used in this letter refers to any "U" separate account, presently existing or formed in the future, operated in connection with the Policies.

Preliminarily the Division notes that "U" has previously filed a notice of eligibility under Rule 4.5 in connection with the operation of other separate accounts and, accordingly, it is excluded from the CPO definition in connection with its operation of those separate accounts. However, as discussed below, although the Separate Accounts described in your correspondence would be "qualifying entities" as defined in Rule 4.5, "U" would not be able to represent that the Separate Accounts will use commodity interests as specified in Rule 4.5(c)(2) and "U" would be a CPO in connection with their operation. Therefore, you are making this request for relief.

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

"U"

"U" is a [state] life insurance company formed in 1960. "U" is licensed in 47 states and the District of Columbia to conduct insurance business with persons residing in those jurisdictions. "U" has designed

the insurance features of the Policies, and it will not engage in any commodity interest-related activities with respect to the Policies. None of the officers or directors of “U” is subject to statutory disqualification under Section 8a(2) or 8a(3) of the Act.<sup>[4]</sup>

### *The Policies*

Each Policy provides for life insurance coverage on the named insured and has characteristics typically associated with conventional life insurance. Every Policy is variable in that the value of the Separate Account associated with it increases or decreases monthly, depending upon the investment experience of the assets held and maintained in the Separate Account. Each Policy is structured with a view to providing tax benefits to owners and beneficiaries. After deducting fees and expenses, Policy premium payments are credited to a Separate Account.

The Policies will be offered and sold exclusively to persons who are both “qualified purchasers,” as defined in the Investment Company Act of 1940 (the “ICA”),<sup>[5]</sup> and “qualified eligible persons,” as defined in Commission Rule 4.7.<sup>[6]</sup> Minimum initial premium payment will be \$500,000. The Policies will be sold exclusively by broker-dealers registered with the Securities and Exchange Commission (“SEC”) in private placement transactions exempt from registration pursuant to Regulation D<sup>[7]</sup> under the Securities Act of 1933.<sup>[8]</sup> Each prospective purchaser will receive a written memorandum that includes a description of the Policy (terms, risk of loss, fees and charges, and tax considerations) and a copy of the private placement memorandum for the Fund, describing the possible investments the Fund may make, and the material risks associated therewith.

### *The Fund*

The Fund’s managing member and investment manager is “V”, a registered CPO and CTA “V”.<sup>[9]</sup> “V” and a wholly-owned subsidiary, “W”, also a registered CTA, act jointly as investment managers to the Fund. “U” has not and will not participate in the management of any commodity interest-related transactions with respect to the Fund.

In the future, “U” intends to invest Separate Account assets in other commodity pools. Any such other pool would be operated by a registered CPO and in any case where the advisor for such a pool was not the CPO, the advisor would be a registered CTA. Each such CPO or CTA would function in a manner comparable to, and provide comparable services to those provided by, “V” and “W”.

### *Analysis*

Absent relief, “U” would be required to register as a CPO in connection with operating the Separate Accounts in the manner you have described. You refer to several previous Commission Staff Letters in

support of your request, including Staff Letter 02-89. [\[10\]](#)

The Division considers a number of factors in determining whether relief from CPO registration is appropriate. In the case of “U”, the Division believes that the following factors support granting CPO registration relief: (1) the Fund is operated by a registered CPO and advised by registered CTAs, and the same will be true of any other commodity pool “U” selects for the investment of Separate Account assets; (2) “U”, as a state-regulated life insurance company, is subject to regulation under state insurance law and the registered broker-dealers who will be selling the Policies are subject to regulation under the federal securities laws; (3) “U” will design the insurance features of the proposed program and will not participate in the commodity interest-related activities; (4) a Separate Account will not invest directly in commodity interests but will only invest through limited liability trading vehicles; and (5) purchasers of the Policies will be limited to persons who are “qualified purchasers” and, therefore, QEPs.

With respect to your request for relief from CTA registration, the Division notes that pursuant to Commission rules, a CPO that advises only the pool or pools for which it is registered, or for which it is exempt from registration, as a CPO is not required to register as a CTA. *See* Rules 4.14(a)(4) and 4.14(a)(5). If “U” is not required to register as a CPO here, the Division believes it is appropriate to provide relief from the requirement to register as a CTA.

### *Conclusion*

In light of the foregoing, it appears that granting the requested relief would not be contrary to the public interest or the purposes of the Act and Commission rules. Accordingly, the Division will not recommend that the Commission take any enforcement action under Section 4m(1) of the Act against “U” based upon the failure of “U” to register as a CPO or as a CTA in connection with the operation of the Separate Accounts, provided that any commodity pool selected to receive Separate Account assets will be operated by a registered CPO, and will be advised by a registered CTA (if the advisor is other than the pool’s CPO). The Division further confirms that in light of the representations upon which it has based this no-action relief, “U” may continue to claim relief under Rule 4.5 with respect to its separate accounts that do meet the criteria of Rule 4.5.

The no-action position taken in this letter does not excuse “U” from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder. For example, “U” remains subject to all antifraud provisions of the Act [\[11\]](#) and the Commission’s regulations, the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission’s regulations, and to all applicable provisions of Part 4. Moreover, this letter is applicable to “U” solely in connection with the operation of the Separate Accounts, as described above.

This letter, and the no-action position taken herein, are based upon the representations that have been made to the Division. Any different, changed or omitted material facts or circumstances might render this position void. You must notify the Division immediately in the event that the operations or activities of “U”, “V”, “W” or any Separate Account change in any respect from those as represented to us.

Further, the no-action position taken in this letter represents the position of this Division only and does not necessarily represent the position of the Commission or of any other Office or Division of the Commission. Finally, the Division is expressing no opinion with respect to the application or effect of relevant tax, securities or insurance law provisions or requirements.

If you have any questions concerning this correspondence, please contact me or Christopher W. Cummings, Special Counsel, at (202) 418-5445.

Very truly yours,

Jane Kang Thorpe  
Director

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<sup>[1]</sup> As of July 1, 2002, a reorganization of Commission staff became effective. For purposes of this letter, the term “Division” includes the Division of Clearing and Intermediary Oversight and its predecessor, the Division of Trading and Markets, as the context requires.

<sup>[2]</sup> 7 U.S.C. §6m(1) (2000).

<sup>[3]</sup> The Fund, “X”, will, in turn, invest substantially all of its assets in another commodity pool, “Y”, which is operated and advised by the same registered CPO and CTA

<sup>[4]</sup> 7 U.S.C. §12a(2) or 12a(3) (2000).

<sup>[5]</sup> 15 U.S.C. §80a-1 *et seq.* (2000).

<sup>[6]</sup> Commission rules referred to herein are found at 17 C.F.R. Ch. I (2002).

<sup>[7]</sup> 17 C.F.R. §230.501 *et seq.* (2002)

<sup>[8]</sup> 15 U.S.C. §77a *et seq.* (2000).

<sup>[9]</sup> Except for a minimum investment by “V” as managing member, investment in the Fund is limited to separate accounts of life insurance companies (such as the Separate Accounts), and under limited circumstances, assets of insurance company general accounts.

<sup>[10]</sup> CFTC Staff Letter 02-89 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶29,126 (May 16).

2002). Staff Letter 02-89 provided CPO and CTA registration no-action relief for a state-regulated insurance company in connection with its operation of one or more separate accounts, the assets of which would be invested in investment funds, including commodity pools (each such pool to be operated by a registered CPO). The investment manager allocating separate account assets would be a registered CTA. The insurance product would be sold only by SEC-registered broker-dealers and only to QEPs, and the insurance company would design only the insurance features of the product, and would not participate in managing the commodity interest- related investments.

[\[11\]](#)

*See, e.g.,* Sections 4b and 4o, 7 U.S.C. §§ 6b and 6o (2000).