CFTC Letter No. 00-96

October 4, 2000

No-Action

Division of Trading & Markets

Re: Section 4m(1): -- Request for CPO Registration No-Action Position
Section 4m(1): -- Request for CTA Registration No-Action Position

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Dear :

This letter is in response to your letter dated February 11, 1999, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your letter dated December 10, 1999, your electronic mail correspondence sent March 7, 2000 and March 17, 2000, and telephone conversations with Division staff. By your correspondence, you request relief on behalf of "Management Company" and "Adviser" from the requirement to register as a commodity pool operator ("CPO") and commodity trading advisor ("CTA"), respectively, under Section 4m(1) of the Commodity Exchange Act ("Act")[1] in connection with the Management Company's operation of, and the Adviser's provision of commodity interest trading advice to, the "Fund".[2]

Based upon the representations made in your correspondence, we understand the facts to be as follows. The Fund is organized under the laws of the Grand Duchy of Luxembourg as a mutual fund, which is referred to in Luxembourg as a *fonds commun de placement*, and is qualified as an Undertaking for Collective Investment in Transferable Securities. Since the Fund is organized in a foreign jurisdiction, it cannot, absent an exemption from the Securities and Exchange Commission, register as an investment company under the Investment Company Act of 1940 ("ICA").[3] Neither the Fund nor the Management Company was organized outside of the United States to avoid CPO registration requirements under the Act.

The Fund is managed on a contractual basis by the Management Company for the benefit of the Fund's shareholders pursuant to the Fund's management regulations.[4] The Management Company is incorporated under Luxembourg law as a limited liability company, which is referred to in Luxembourg as a *societe anonyme*, and maintains its registered office in Luxembourg. The Management Company is owned by "P", a Delaware limited partnership, and "Q", a Delaware corporation. "Q" is the general partner of "P".[5] The Management Company will act principally through its custodian, "S", its paying agent, "T", its transfer agent, "U", and its distributor, "V", all of which are located in Luxembourg or Italy.

The Management Company's sole function is the management of the Fund. The Management Company is

operated by a board of directors, all of whom are United States persons. The directors are "A", "B" and "C". "A" is the President and "B" and "C" are the Executive Vice Presidents of each of the Management Company, the Adviser, "P", "Q" and "R".[6]

The Management Company has delegated to the Adviser the management of the Fund's assets. The Adviser is organized under the laws of the state of Delaware and is owned by "A" and four members of his family. The Adviser is registered under the Advisers Act and currently serves as the investment adviser to the Fund, two United States registered mutual funds and one Cayman Islands registered mutual fund. The Adviser also is registered as a CTA but has never engaged in any activity that would require such registration. Accordingly, the Adviser has applied for withdrawal from registration as a CTA, subject to the condition that the Commission grant the CTA registration no-action relief requested by the Adviser. Neither the Management Company, the Adviser, nor the directors are subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Act.[7]

Rule 4.5 provides an exclusion from the CPO definition for persons who, among other things, operate as investment companies registered under the ICA.[8] Because the Fund is not registered as an investment company under the ICA, Rule 4.5 is not available to the Management Company. Rule 4.14(a)(8) exempts from CTA registration persons who, among other things, advise only entities that are excluded from the CPO definition under Rule 4.5. Because the Fund is not registered as an investment company under the ICA, the Adviser does not qualify for the Rule 4.14(a)(8) exemption. Therefore, the Management Company and the Adviser have requested that the Division issue a no-action position with respect to their acting, respectively, as the CPO and the CTA of the Fund without their registering as such.

In support of your request, you represent that the Fund's primary strategy will be investments in securities, although the Fund may trade certain commodity interest contracts in a manner consistent with Rule 4.5(c)(2). Initially, investments in the Fund will be offered and sold solely in Italy and, subsequently, may be offered and sold in other member countries of the European Union. No "United States person," as that term is defined in Rule 4.7(a)(1)(iv), will directly or indirectly participate in the Fund. No funds or other capital may be contributed to the Fund directly or indirectly from United States persons, with the exception that the Management Company may reinvest in the Fund some or all of the fees it receives from the Fund.[9] No person affiliated with the Fund has undertaken or will undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect of, soliciting participations from United States persons. Moreover, no marketing activities in connection with the Fund will be conducted within the United States.

Based upon the representations made in your correspondence, and subject to the condition set forth below, it appears that granting the requested relief would not be contrary to the public interest or the purposes of Section 4m(1) of the Act. Accordingly, the Division will not recommend that the Commission commence any enforcement action under Section 4m(1) against the Management Company based solely upon its failure to register as a CPO in connection with its operation of the Fund or against the Adviser based solely upon its failure to register as a CTA in connection with its provision of commodity interest trading advice to the Fund.

The Division's position in regard to CPO registration relief is based upon your representations, among other things, that: (1) the Fund and the Management Company are organized outside of the United States; (2) the Fund and the Management Company were not organized outside of the United States for the purpose of avoiding CPO registration requirements under the Act; (3) no United States person will participate directly or indirectly in the Fund; (4) no funds or capital have been or will be contributed to the Fund, directly or indirectly, from United States persons, with the exception that the Management Company may reinvest in the Fund some or all of the fees it receives from the Fund; (5) no person affiliated with the Fund has undertaken or will undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect of, soliciting participations from United States persons; (6) no marketing activities in connection with the Fund will be conducted within the United States; (7) the Fund will be operated in a manner consistent with Rule 4.5(c)(2); and (8) the Management Company will not engage in any other activities that would require registration with the Commission.

The Division's position in regard to CTA registration relief for the Adviser is based upon the foregoing representations and your further representations, among others, that: (1) the Adviser is registered as an investment adviser under the Advisers Act; and (2) the Adviser will comply with the requirements of Rule 4.14(a)(8) with respect to the manner in which it provides commodity interest trading advice to the Fund.

The foregoing positions are subject to the condition that, at the Division's request, the Management Company and the Adviser will provide the Division with information demonstrating their compliance with the terms and conditions of the relief granted in this letter. In this regard, the Division notes that the Commission de Surveillance du Secteur Financier ("CSSF") has certified to the Division that it is authorized to collect and share with the Commission information concerning any activities by the Management Company in connection with its management of the Fund. Additionally, the CSSF will collect and share such information with the Commission, upon request, to the extent allowed under its laws.[10]

This letter does not excuse the Management Company or the Adviser from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, the Management Company and the Adviser remain subject to all antifraud provisions of the Act and the Commission's regulations, to the reporting requirements for traders set forth in Parts 15, 18, and 19 of the regulations and to all other provisions of Part 4. Moreover, this letter is applicable to the Management Company and the Adviser solely in connection with their respective operation of and provision of advice to the Fund.

This letter, and the no-action positions issued herein, are based upon the representations that you have made to us and are subject to compliance with the condition set forth above. Any different, changed, or omitted material facts or circumstances might render these positions void. You must notify us immediately in the event that the operations or activities of the Fund, the Management Company or the Adviser change in any material way from those represented to us. Further, this letter represents the position of the Division only. It does not necessarily reflect the views of the Commission or any other division or office of the Commission.

If you have any questions concerning this correspondence, please contact Barbara S. Gold, Assistant Chief

Counsel, at (202) 418-5450.

Very
truly
yours,

John C.
Lawton
Acting
Director

1 7 U.S.C. § 6m(1) (1994).

2 By letter dated February 9, 1999, the Management Company's Luxembourg counsel, "F", provided background information in support of the request.

3 *See* 15 U.S.C. § 80a-7(d) (1994).

4 Under Luxembourg law, the Fund acts through the Management Company.

5 "P", among other things, serves as the investment adviser to various United States and non-United States investment limited partnerships. "P" is registered under the Securities Exchange Act of 1934 ("Exchange Act") as a broker-dealer, under the Investment Advisers Act of 1940 ("Advisers Act") as an investment adviser, and under the Act as a CPO and a CTA.

6 "A" is listed as a principal and registered as an associated person of "R" and "P". "B" and "C" are listed as principals of "P" and the Adviser.

7 7 U.S.C. § 12a(2) or 12a(3) (1994).

8 The Commission recently amended Rules 4.5 and 4.7. *See* 65 Fed. Reg. 241127 (April 25, 2000) and 65 Fed. Reg. 47848 (August 4, 2000), respectively. All other Commission rules referred to herein are found at 17 C.F.R. Ch. I. (2000).

9 Consistent with the Division's long-standing position in this area, the Division does not believe that the Management Company should be treated as a participant in the Fund for the purposes of your request. *See, e.g.*, CFTC Staff Letter No. 85-18, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,786 (October 16, 1985).

10 Letter dated September 6, 2000 from Simone Delcourt, Conseiller de Direction 1re classe, and Jean-Nicolas Schaus, Directeur General, of the Commission de Surveillance du Secteur Financier to John C. Lawton, Acting Director of the Division.