CFTC Letter No. 00-98

May 22, 2000

Interpretation

Division of Trading & Markets

Re: Rule 4.10(d)(1): -- Request for Interpretation that Family Limited Partnerships are not Commodity Pools

Section 4m(1) of the Act: -- Request for Interpretation that General Partners of Family Limited Partnerships are not CPOs or CTAs

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Dear :

This is in response to your letter dated November 30, 1999 to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your electronic mail message dated February 7, 2000 and letters dated March 20, 2000 and April 4, 2000. By your correspondence, you request confirmation of your views that: (1) "N", "O", "P", "Q", "R" and "S" (collectively, the "Partnerships") are not commodity "pools" within the meaning and intent of Rule 4.10(d)(1);[1] and (2) each of "T", "W", "U", and "V" as a general partner of one or more of the Partnerships (collectively, the "General Partners"), is not required to register as a commodity pool operator ("CPO") or a commodity trading advisor ("CTA") under Section 4m(1) of the Commodity Exchange Act ("Act"), [2] respectively, as a result of their operating and advising the Partnerships.

Facts

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

"N"

"N" is a family limited partnership whose general partners are "T" and a limited liability company, "W",[3] which is owned by "T", his wife, and trusts for the benefit of "T's" children. The limited partners of "N" are four trusts for the various benefit of "T's" children, the issue of "T's" children, "T's" mother and his sister. Thus, "N" is a private investment vehicle solely for "T's" family. "T", as the sole managing partner of "N", will have the authority to make all investment decisions for "N". "N" currently reimburses "T" and "W" solely for expenses incurred with respect to its operations. However,

for estate planning and tax and other considerations, and to reflect "T's" role as the managing general partner of "N", "N" would like to make a profit allocation of 1 percent of the net asset value and 10 percent of net profits to "T" in addition to his pro rata allocation of profits from "N".

The assets of "N" have a value in excess of $$. Although "N" does not currently hold any commodity interest positions, the investment advisors and investment funds that "N" selects may, in certain instances, trade commodity interests.

"O"

"O" is a family limited partnership whose general partner is "U", a corporation wholly-owned by "T". The limited partners of "O" are themselves limited partnerships whose general partner also is "U". The limited partners of these limited partnerships are seven trusts for the various benefit of the children of "T's" cousins, "A" and "B",[4] and the issue of those children. Each of "A" and "B's" children (the ""A" Children" and the "B" Children," respectively) has attained majority age and has investment assets with a value in excess of $$.[5] Thus, "O" is a private investment vehicle solely for the "A" Children and the "B" Children and their issue, as well as for "T", to the extent of his investment through "U". "O" generally invests in three ways: through managed account arrangements with third parties; through investment funds managed by third parties; or directly, through investment decisions made by "U". "U" does not receive any compensation from "O" in connection with its operation of that fund.

The assets of "O" have a value in excess of $$. "O" currently trades commodity interests.

"P"

"P" is a family limited partnership whose general partner is "U". The limited partners of "P" are three trusts for the benefit of the "A" Children. Thus, similar to "O", "P" is a private investment vehicle solely for the benefit of the "A" Children and for "T", to the extent of his investment through "U". Like "O", "P" also generally invests in three ways: through managed account arrangements with third parties; through investment funds managed by third parties; or directly, through investment decisions made by "U". In connection with the management services it renders to "P", "U" receives an annual fee of $$, or less than 0.1 percent of "P's" current assets.

The assets of "P" have a value in excess of $$ million. "P" currently invests only in securities but may in the future seek to trade commodity interests.

"QRS Partnerships"

The general partner of each of "Q", "R" and "S" (collectively, "QRS Partnerships") is "V", which is owned by the "A" Children and managed by "U". The "A" Children are the limited partners of both "Q" and "R". The limited partners of "S" are four trusts for the benefit of the issue of the "A" Children.

Thus, each of the QRS Partnerships is a private investment vehicle for the "A" Children and, in the case of "S", their issue. Like "O" and "P", the QRS Partnerships generally invest in three ways: through managed account arrangements with third parties; through investment funds managed by third parties; or directly, through investment decisions made by "V". Neither "V" nor "U" receive any compensation in connection with their operation of the QRS Partnerships.

The assets of "Q" and "R" have a value in excess of $$ in the aggregate and the assets of "S" have a value in excess of $$. The QRS Partnerships currently invest only in securities but may in the future seek to trade commodity interests.

Representations in Support of your Request

In support of your request, you represent that: (1) none of the General Partners is subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Act;[6] (2) none of the General Partners solicits the public with respect to investments in the Partnerships, nor makes the activities of the Partnerships a matter of public interest; (3) interests in the Partnerships are generally not transferable[7] and there are no plans to admit any other partners, except that additional trusts for the benefit of the issue of "T" may in the future become limited partners of "N"; (4) none of the General Partners operate, nor provide financial and investment management services to, any person or entity other than the Partnerships; and (5) "T", the "A" Children and the "B" Children are financially astute investors, have invested together for more than ten years, and previously jointly operated "XX", a family-owned multi-billion dollar specialty magazine publishing company, as well as "YY", a trade-show business, and "ZZ", an online publishing company.

Discussion

The term commodity "pool" is not defined in the Act. Rather, it was taken from the language of the term "commodity pool operator" in Section 1a(4) of the Act.[8] In adding the CPO and CTA definitions to the Act, and the corresponding registration requirement in Section 4m(1) of the Act, Congress intended to establish the foundation for eliminating certain undesirable practices by unscrupulous operators and advisors who had "enticed unsuspecting traders into the markets with, far too often, substantial loss of funds."[9] Congress, however, vested discretion in the Commission "to exempt from registration those persons who would otherwise meet the criteria for registration . . . if, in the opinion of the Commission, there is no substantial public interest served by such registration."[10]

In light of this discretion, and in connection with its adoption of Rule 4.10(d), the Commission stated that "[w]hether a particular entity is operated 'for the purpose' of trading commodity interests, and thus is a pool within the scope of Rule 4.10(d), depends on an evaluation of all the facts relevant to the entity's operation."[11] The Commission then recognized that in the past its staff had issued interpretations of the Part 4 rules and, consistent with that practice, the Commission invited interested

persons "to seek such staff interpretations of Rule 4.10(d) and of all the other Part 4 rules."[12]

Based upon your representations, among others, that: (1) each member of the Partnerships, including the General Partners, is a member of the same extended family (*i.e.*, the "T's", the "A's" and the "B's"), or trusts for their benefit or the benefit of their issue; (2) the primary purpose of each of the Partnerships is to invest the assets of the family; (3) none of the General Partners operate, nor provide financial and investment management services to, any person or entity other than the Partnerships; and (4) each of "T", the "A" Children and the "B" Children are financially astute investors and have invested together for many years, including previously jointly operating a multi-billion dollar family business, it appears that the operation of the Partnerships is not the kind of activity Congress and the Commission intended to regulate in adopting the CPO and pool definitions, respectively. Accordingly, the Division concurs in your view that none of the Partnerships would be a "pool" within the meaning and intent of Rule 4.10(d) if it traded commodity interests and, consequently, that the General Partners of the Partnerships would not be CPOs thereof.[13]

The Division further concludes that none of the General Partners will be required to register as CTAs of the Partnerships, but on various grounds. First, the Division finds that "T" and "W" will become CTAs as defined in Section 1a(5) of the Act[14] should "N" trade commodity interests in the future because they will be providing advice to others about the advisability of trading commodity interests for compensation or profit. However, in advising "N", "T" and "W" may rely upon the exemption from CTA registration set forth in Section 4m(1) of the Act[15] based upon your representations that: (1) "T" and "W" will not hold themselves out to the public as CTAs; and (2) they will providing advice to less than fifteen persons, *i.e.*, four family trusts.[16]

Similarly, because "U" receives an annual fee from "P" for its management services, the Division believes that "U" would become a CTA as defined in Section 1a(5) of the Act should "P" trade commodity interests in the future. Nevertheless, in advising "P", "U" may rely upon the exemption from CTA registration set forth in Section 4m(1) of the Act based upon your representations that: (1) "U" will not hold itself out to the public as a CTA; and (2) it will be providing advice to less than fifteen persons, *i.e.*, three family trusts.

However, because "U" does not receive compensation or profit from "O" in connection with its advising that fund, it is not a CTA of "O" as defined in Section 1a(5) of the Act. Similarly, neither "U" nor "V" would become CTAs of the QRS Partnerships should those funds trade commodity interests in the future because they do not receive compensation or profit in connection with their advising the funds.

This letter does not excuse the Partnerships or the General Partners from compliance with any otherwise applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, each remains subject to all applicable antifraud provisions of the Act and the Commission's regulations and to the reporting requirements for traders set forth in Parts 15, 18, and 19 of the regulations. Moreover, this letter is applicable to the General Partners solely in connection with their

operating and advising the Partnerships.

This letter, and the interpretations provided herein, are based upon the representations that have been made to the Division. Any different, changed, or omitted material facts or circumstances, including the composition of any of the Partnerships, might render this letter void. You must notify the Division immediately in the event the operations or activities of the Partnerships or the General Partners change in any material way from those represented to us. Further, the interpretations provided herein represent the positions of the Division only. They do not necessarily reflect the views of the Commission or any office or other division of the Commission.

If you have any questions concerning this correspondence, please contact Ky Tran-Trong, an attorney on my staff, at (202) 418-5450.

Very truly yours,

John C. Lawton
Acting Director

1 Commission rules referred to herein are found at 17 C.F.R. Ch. I (1999).

2 7 U.S.C. § 6m(1) (1994).

3 "W" is in the process of changing its name to "Y". This letter is applicable to this entity under either name.

4 "A" and "B" are brother and sister.

5 The "A" Children are "C", "D" and "E". The "B" Children are "F", "G" and "H". "B" also has a daughter, "I", who does not invest with the "A" Children or her brothers.

6 7 U.S.C. § 12a(2) or 12a(3) (1994).

7 Transfers of interests in "N" must be approved by its general partners, *i.e.*, "T" and "W", and 50% of the non-transferring limited partners. On death, transfers are permitted to family members of the decedent or trusts for their benefit. A general partner cannot generally transfer its interest without the consent of all the other partners.

Transfers of interests in "O" and "P" are permitted only with the consent of all partners in the respective partnership.

Transfers of interests in the QRS Partnerships generally require the consent of a majority of the non-transferring partners. In limited circumstances, transfers of interests can be made between existing

partners.

In this regard, by your April 4, 2000 letter you stated that: "As noted in previous communications, all of the partnerships are family-related. There is no plan to open any of the partnerships to the general public."

8 7 U.S.C. § 1a(4) (1994).

9 H.R. No. 93-975, 93d Cong., 2d Sess. 79 (1974).

10 *Id.* at 29.

11 46 Fed. Reg. 26004, 26006 (May 8, 1981). The Commission was responding to arguments that, for example, limited partnerships registered as broker-dealers would not be pools if they occasionally traded commodity interests, committed a limited amount of assets to such trading, and traded commodity interests for hedging as opposed to speculative purposes.

12 *Id.*

13 *See, e.g.,* CFTC Staff Letter 97-78, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶45,519 (Sept. 24, 1997) (confirming that family investment vehicles were not pools and that the operators were not CPOs thereof); CFTC Staff Letter No. 86-10, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,016 (Apr. 24, 1986) (same).

14 7 U.S.C. § 1a(5) (1994).

15 This Section provides an exemption from CTA registration to any person who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than 15 persons and who does not hold himself out generally to the public as a CTA.

16 For the purpose of calculating the total number of clients a CTA advises, where the client is other than a natural person, the Division generally "looks through" the client and counts the individual participants therein. *See, e.g.,* CFTC Staff Letter No. 96-43, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,713 (May 15, 1996); CFTC Staff Letter No. 95-39, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,189 (Dec. 30, 1991). However, the Division previously has concluded that where each of the limited partners of each limited partner in a collective investment vehicle was essentially a family trust, each of the "first-level" limited partners should be counted as one person for the purposes of Section 4m(1). *See* CFTC Staff Letter No. 86-10, at ¶23,016 n.9.