
BRENDAN C. FOX

brendan.fox@dechert.com
+1 202 261 3381 Direct
+1 202 261 3081 Fax

March 8, 2017

VIA FEDERAL EXPRESS

Douglas J. Scheidt, Esq.
Associate Director and Chief Counsel
Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Request for No-Action Assurances under Sections 12(d)(1)(A) and (B) of the Investment Company Act of 1940 (the "1940 Act")

Dear Mr. Scheidt:

We request that you advise us that the staff of the Division of Investment Management (the "Staff") will not recommend that the Securities and Exchange Commission (the "SEC" or "Commission") take enforcement action under Sections 12(d)(1)(A) or (B) of the 1940 Act against: (i) a foreign investment company that is not registered under the 1940 Act (a "Foreign Feeder Fund"), if the Foreign Feeder Fund acquires (1) securities of a single U.S. open-end investment company registered under the 1940 Act (a "U.S. Master Fund") in excess of the limitations of Section 12(d)(1)(A) of the 1940 Act and, for certain Foreign Feeder Funds, (2) Foreign Currency Instruments (as defined below); and (ii) the U.S. Master Fund and its principal underwriter and any broker or dealer for selling such securities in excess of the limitations of Section 12(d)(1)(B) of the 1940 Act (the "Proposed Structure"). Except as provided below, the Proposed Structure would comply with Section 12(d)(1)(E) of the 1940 Act. As described in further detail below, we believe that the Proposed Structure does not raise the concerns Congress sought to address in adopting Sections 12(d)(1)(A) and (B) of the 1940 Act.

I. BACKGROUND

We represent a number of global investment managers and sponsors with investment operations and distribution channels throughout the world. We have been requested to seek guidance from the Staff to permit the Proposed Structure based on the facts and representations set forth herein. The Proposed Structure would permit a global investment manager or sponsor to efficiently offer an investment product across several foreign jurisdictions using a "master-feeder" arrangement.

The Proposed Structure is intended to provide foreign investors with the opportunity to invest in the securities of a foreign investment vehicle (*i.e.*, a Foreign Feeder Fund) that would, in turn, invest in the securities of a *single* U.S. registered open-end management investment company (*i.e.*, a U.S. Master Fund). In addition to investing in the securities of a single U.S. Master Fund, certain Foreign Feeder Funds would invest in foreign currency and foreign currency-related instruments, which may include foreign currency futures contracts, options on foreign currency futures contracts, forward foreign currency contracts, options on foreign currency and foreign currency swap agreements (“Foreign Currency Instruments”), to mitigate the effects of currency fluctuations between or among the currency of the foreign jurisdiction in which securities of the Foreign Feeder Fund are primarily offered and sold (the “Designated Currency”¹) and the U.S. Dollar and/or other foreign currencies.

The scope of a Foreign Feeder Fund’s currency hedging would be limited as follows:

- (i) for all Foreign Feeder Funds, a Foreign Feeder Fund could seek to hedge the performance of the applicable U.S. Master Fund, as measured in U.S. Dollars, back to its Designated Currency. This currency hedging would enable the security holders of the Foreign Feeder Fund to achieve a return on their investment, as measured in the Designated Currency, similar to that of the security holders of the U.S. Master Fund, as measured in U.S. Dollars, by reducing the impact of currency fluctuations between the Designated Currency and the U.S. Dollar; or
- (ii) for Foreign Feeder Funds that seek to approximate the returns of an index, a Foreign Feeder Fund could seek to hedge the U.S. Dollar and/or foreign currency exposure associated with the applicable U.S. Master Fund’s portfolio holdings back to its Designated Currency, provided that: (1) the U.S. Master Fund seeks to approximate the returns of an index; (2) the U.S. Master Fund’s currency exposure does not materially deviate from the currency exposure of the index (whether through sampling or otherwise); (3) the provider of the index whose returns the U.S. Master Fund seeks to approximate is not an “affiliated person”² (or an affiliated person of an affiliated person) of the U.S. Master Fund (or any promotor or investment sub-adviser of the U.S. Master Fund), Master Fund Adviser or Master Fund Principal Underwriter (each, as defined below); and (4) the investment objectives of the Foreign Feeder Fund and the U.S. Master Fund are substantially the same (except to the extent necessary to permit any currency hedging as described herein). This currency hedging would enable the security holders of the Foreign Feeder Fund to achieve a return on their investment, as measured in the Designated Currency, similar to that of the index whose returns the U.S. Master Fund seeks to

¹ A Foreign Feeder Fund’s securities (or a class of a Foreign Feeder Fund) may also be U.S. Dollar denominated.

² For purposes of this letter, the term “affiliated person” means “affiliated person” as defined in Section 2(a)(3) of the 1940 Act.

approximate, by reducing the impact of currency fluctuations between or among the Designated Currency and the U.S. Dollar or other foreign currency exposure of the index.

The scope of currency hedging described in (i) and (ii) differs in that, under (i), the *performance* of the U.S. Master Fund is hedged to the Foreign Feeder Fund's Designated Currency. Conversely, under (ii), the currency exposure associated with the U.S. Master Fund's *portfolio holdings* is hedged to the Foreign Feeder Fund's Designated Currency. Moreover, the currency hedging described in (ii) will only be available to Foreign Feeder Funds that seek to approximate the returns of an index.

To provide foreign investors with exposure to a single U.S. Master Fund while mitigating the effects of currency fluctuations, a Foreign Feeder Fund would invest its assets solely in: (i) securities of the U.S. Master Fund; (ii) Foreign Currency Instruments; and/or (iii) cash and other assets that are not "investment securities."³ A Foreign Feeder Fund that does not engage in any currency hedging would not invest in Foreign Currency Instruments.

A Foreign Feeder Fund would purchase Foreign Currency Instruments, if at all, for the hedging purposes described above and not for speculative purposes (*i.e.*, for the purpose of generating excess investment returns).⁴ Foreign Currency Instruments may be denominated in the Designated Currency, or in other currencies whose exchange rates are correlated with the Designated Currency.⁵

The U.S. Master Funds would be U.S. open-end management investment companies registered under the 1940 Act. Accordingly, a U.S. Master Fund would be managed by an investment adviser registered with the SEC under the Investment Advisers Act of 1940 (the "Advisers Act") (each, a "Master Fund Adviser") and its securities would be distributed by a broker-dealer registered with the SEC under the Securities Exchange Act of 1934 (the "1934 Act") (each, a "Master Fund Principal Underwriter").

³ We are not requesting relief on what constitutes "investment securities" for purposes of Section 12(d)(1)(E)(ii).

⁴ This would not preclude the possibility that, through effective selection of Foreign Currency Instruments or timing of transactions in Foreign Currency Instruments, a Foreign Feeder Fund would realize gains from its foreign currency trading activities. Moreover, such investments in Foreign Currency Instruments could also be used to manage a Foreign Feeder Fund's foreign currency requirements and facilitate monetary transfers between foreign investors and a Foreign Feeder Fund (or its agents, if any) in the applicable foreign jurisdiction, allowing the Foreign Feeder Fund to: (i) accept the Designated Currency to satisfy purchase orders; and (ii) pay redemption proceeds in the Designated Currency.

⁵ For example, to achieve its hedging strategy, a Foreign Feeder Fund may deem it necessary to trade pairs of currencies (*e.g.*, Japanese Yen to the U.S. Dollar, U.S. Dollar to the Designated Currency).

The Foreign Feeder Funds, which would be limited to foreign publicly-offered investment vehicles whose securities are generally redeemable upon demand to the fund (*i.e.*, foreign mutual funds) or foreign publicly-traded investment vehicles whose securities are listed on one or more foreign securities exchanges (*i.e.*, foreign exchange-traded funds and foreign closed-end funds), would be investment companies as defined in Section 3(a)(1)(A) of the 1940 Act. These Foreign Feeder Funds would be the foreign equivalent of U.S. registered investment companies, namely: (i) U.S. registered mutual funds and (ii) U.S. registered closed-end funds and U.S. registered exchange-traded funds whose securities are listed on one or more securities exchanges. However, the Foreign Feeder Funds would be organized outside the United States and would not be permitted to publicly offer their securities in the United States under Section 7(d) of the 1940 Act.⁶

The Foreign Feeder Funds will not offer or sell, either publicly or privately, their securities in the United States⁷ or sell their securities to any U.S. Persons.⁸ Instead, securities of a Foreign Feeder Fund would be offered through distribution channels in foreign jurisdictions. However, over time, the Foreign Feeder Funds may include investors that are U.S. Persons due to the independent actions of security holders (*e.g.*, relocation of security holders to the United States, secondary market transactions, etc.), consistent with Section 7(d) of the 1940 Act and SEC and Staff guidance thereunder.⁹

The Foreign Feeder Funds would be organized in, and regulated under the laws of, a Permitted Foreign Jurisdiction (as defined below). A Permitted Foreign Jurisdiction is a jurisdiction whose securities regulator has entered into a cooperative arrangement with the SEC to facilitate consultation and cooperation between the SEC and the foreign securities regulator. The Permitted Foreign Jurisdictions are listed in *Exhibit A*.

⁶ In particular, the Foreign Feeder Funds would not be registered under the 1940 Act consistent with Section 7(d) of the 1940 Act and prior SEC and Staff guidance thereunder. *See, e.g.*, Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than \$150 Million in Assets Under Management, and Foreign Private Advisers, Investment Advisers Act Release No. 3222 (Jun. 22, 2011) [76 FR 39646] (Jul. 6, 2011), at n.294.

⁷ The Foreign Feeder Funds' transactions with their security holders would be consistent with the definition of "offshore transactions" as defined in Regulation S under the Securities Act of 1933 ("1933 Act"). Moreover, no Foreign Feeder Fund, Feeder Fund Adviser (as defined below) or Feeder Fund Principal Underwriter (as defined below), as applicable, or any affiliated person of the foregoing or person acting on behalf of the foregoing, will engage in any "directed selling efforts" (as defined in Rule 902(c) of Regulation S) with respect to securities of the Foreign Feeder Fund in the United States.

⁸ For purposes of this letter, we define "U.S. Person" to include all persons enumerated in Rule 902(k) under Regulation S.

⁹ *See, e.g.*, Investment Funds Institute of Canada, SEC No-Action Letter (pub. avail. Mar. 4, 1996); Goodwin, Procter & Hoar, SEC No-Action Letter (pub. avail. Feb. 28, 1997).

Under the Proposed Structure, a Foreign Feeder Fund would either be managed by: (i) a Master Fund Adviser or (ii) an investment adviser not registered with the SEC under the Advisers Act that controls, is controlled by, or is under common “control”¹⁰ with (a “Control Affiliate”), the Master Fund Adviser and Master Fund Principal Underwriter (each, a “Feeder Fund Adviser”). To the extent a Foreign Feeder Fund has a “principal underwriter,”¹¹ that principal underwriter would be a Control Affiliate of the Feeder Fund Adviser, Master Fund Adviser and Master Fund Principal Underwriter (each, a “Feeder Fund Principal Underwriter”). Each Feeder Fund Adviser would also be a Control Affiliate of the Feeder Fund Principal Underwriter (as applicable), Master Fund Adviser and Master Fund Principal Underwriter. The Master Fund Adviser(s), Master Fund Principal Underwriter(s), Feeder Fund Adviser(s) and Feeder Fund Principal Underwriter(s), as applicable, would therefore be affiliated persons of each other.

II. BASIS FOR NO-ACTION POSITION

We are requesting the Staff’s assurances that it would not recommend that the SEC take enforcement action under Sections 12(d)(1)(A) and (B) to permit the Proposed Structure, subject to the facts and representations set forth herein. Although the Proposed Structure may, in some instances, differ from the typical “master-feeder” arrangement, we believe that the Proposed Structure, subject to the facts and representations set forth herein, does not present the potential for harm to U.S. investors that Congress sought to address in Sections 12(d)(1)(A) and (B). We also believe that the Proposed Structure would be beneficial to the U.S. mutual fund industry and could potentially attract significant assets to the U.S. and create significant scale to the benefit of investors in U.S. Master Funds.

III. RELEVANT LAW

A. Sections 12(d)(1)(A) and (B)

Section 12(d)(1)(A) of the 1940 Act, in relevant part, places limitations on investments by any registered or unregistered investment company (a “fund”) in the securities of a registered fund. Specifically, Section 12(d)(1)(A) of the 1940 Act prohibits a fund (the “acquiring fund”) and any companies controlled by such acquiring fund from purchasing or otherwise acquiring any security issued by a registered fund (the “acquired fund”) if, immediately after the purchase or acquisition, the acquiring fund and any companies controlled by such acquiring fund own in the aggregate: (i) more than 3% of the outstanding voting securities of the acquired fund; (ii) securities issued by the acquired fund having an aggregate value in excess of 5% of the value of the total assets of the acquiring fund; or (iii) securities (other than treasury stock of the acquiring fund) issued by

¹⁰ For purposes of this letter, “control” means “control” as defined in Section 2(a)(9) of the 1940 Act.

¹¹ For purposes of this letter, “principal underwriter” means “principal underwriter” as defined in Section 2(a)(29) of the 1940 Act.

acquired funds having an aggregate value in excess of 10% of the value of the total assets of the acquiring fund.

Section 12(d)(1)(B) of the 1940 Act prohibits a registered open-end fund, its principal underwriter and any broker or dealer registered under the 1934 Act, from knowingly selling its securities to any acquiring fund and any companies controlled by such acquiring fund if, immediately after the sale: (i) more than 3% of the acquired fund's outstanding voting securities would be owned by the acquiring fund or companies controlled by it; or (ii) more than 10% of the acquired fund's outstanding voting securities would be owned by the acquiring fund and other funds and companies controlled by them.

The language of Section 12(d)(1) applies to all "investment companies." However, as originally enacted, Section 12(d)(1) applied only to U.S. registered funds. Because foreign funds were not registered, there was no limitation on their ability to invest in shares of a U.S. fund. In 1970, Congress amended Section 12(d)(1) to further limit the "pyramiding" of funds and to apply new limitations on investments by foreign funds.¹² The Staff had expressed the following concerns: (i) a foreign fund may, by virtue of a large ownership interest in a U.S. fund, improperly influence fund management through the threat of large scale redemptions and the concomitant loss of advisory fees received by fund management; (ii) the pyramiding of voting control in the hands of persons that owned only a nominal stake in the acquired fund; (iii) the difficulty of investors appraising the true value of their investments due to the complex structures involved; and (iv) the layering of sales charges, advisory fees and administrative costs.¹³ Specifically with respect to foreign funds investing in U.S. funds, it was also noted that "redemptions could be unduly escalated by the instability of certain foreign economies, political upheaval, currency reform, or other factors which are not really relevant to investment in domestic mutual funds."¹⁴

¹² See Investment Company Amendments Act of 1970, Pub. L. No. 91-547, §7, 84 Stat. 1417 (codified at 15 U.S.C. 80a-12(d)(1)(a)). See also Investment Company Amendments Act of 1970, H.R. Report No. 1382, 91st Cong., 2d Sess. (1970).

¹³ See Public Policy Implications of Investment Company Growth, H.R. Report No. 2337, 89th Cong., 2d Sess., at 311-324 (1966) (the "PPI Report").

¹⁴ See *id.*, at 318.

B. Section 12(d)(1)(E)

Section 12(d)(1)(E) of the 1940 Act permits a fund to invest in the securities of another fund in a “master-feeder” arrangement, under which the “feeder” fund generally invests all of its assets in the securities of the “master” fund. Specifically, Section 12(d)(1)(E) generally provides that the limitations of Section 12(d)(1)(A) and (B) shall not apply to a security purchased or acquired by a fund if:

- (i) the principal underwriter for such fund is a broker or dealer registered under the 1934 Act, or a person controlled by such a broker or dealer;
- (ii) such security is the only investment security held by such fund; and
- (iii) the purchase or acquisition is made pursuant to an arrangement with the issuer of, or principal underwriter for, the security whereby such fund is obligated: (1) either to seek instructions from its security holders with regard to the voting of all proxies with respect to such security and to vote such proxies only in accordance with such instructions, or to vote the shares held by it in the same proportion as the vote of all other holders of such security; and (2) in the event that such fund is not a registered fund, to refrain from substituting such security unless the SEC shall have approved such substitution in the manner provided in Section 26 of the 1940 Act.

C. Prior Staff No-Action Letters**1. Currency Hedging by Feeder Funds**

In *PIMCO Funds*, the Staff provided no-action assurances under Section 12(d)(1)(E) of the 1940 Act to permit the operation of a master-feeder arrangement, under which a U.S. registered investment company (an “Investing Fund”) would invest in the securities of another U.S. registered investment company (an “Underlying Fund”).¹⁵ In *PIMCO Funds*, an Investing Fund could also invest in Foreign Currency Instruments for the purposes of hedging an Investing Fund’s assets against the risk of fluctuations between the U.S. Dollar and the currency of the foreign jurisdiction in which securities of the Investing Fund would be offered and sold.¹⁶

The issue presented in *PIMCO Funds* was whether the Foreign Currency Instruments would be deemed “investment securities” for purposes of 12(d)(1)(E), thereby making Section 12(d)(1)(E) potentially unavailable. Although the Staff declined to concur with the applicant’s view that,

¹⁵ See *PIMCO Funds*, SEC No-Action Letter (pub. avail. July 9, 2002).

¹⁶ We note that, for a Foreign Feeder Fund that seeks to hedge the performance of the applicable U.S. Master Fund, as measured in U.S. Dollars, back to its Designated Currency, this currency hedging is similar to the currency hedging addressed in *PIMCO Funds*.

solely for purposes of Section 12(d)(1)(E), the term “investment security” does not include the Foreign Currency Instruments under the circumstances described in the incoming letter, the Staff took the position that “the Investing Fund’s proposed use of the [Foreign Currency Instruments], under the circumstances described in [the incoming] letter, would be consistent with the purposes underlying Section 12(d)(1) of the [1940] Act.” Moreover, the Staff was “persuaded by [the applicant’s] arguments that the Investing Fund’s proposed use of the [Foreign Currency Instruments] *would not create any incentive to exercise any improper influence over the Underlying Fund because the same investment adviser advises both of these funds*, and would not create a complex pyramidal structure.”¹⁷ The Staff’s relief was subject to several conditions.¹⁸

2. *Application of Section 12(d)(1) to Foreign Investment Companies*

In *Dechert LLP*, the Staff provided no-action assurances under Section 12(d)(1)(A)(ii) and (iii) of the 1940 Act to permit foreign investment companies to purchase shares issued by U.S. registered investment companies in excess of the limitations imposed by Sections 12(d)(1)(A)(ii) and (iii).¹⁹ This relief was based, in part, on the recognition that the limitations in Section 12(d)(1)(A)(ii) and (iii) were designed to protect an *acquiring* fund and its security holders from duplicative fees and unnecessary complexity, and that the SEC has no significant U.S. regulatory interest in protecting *foreign* acquiring funds and their security holders. The Staff’s relief was subject to several conditions.²⁰

¹⁷ See PIMCO Funds, *supra* note 15 (emphasis added).

¹⁸ These conditions were: (i) the board of trustees of the Investing Fund, including a majority of the independent trustees, will: (1) authorize the Investing Fund to enter into the Foreign Currency Instruments only for the purposes described above; and (2) review at least annually the continuing appropriateness of this authorization; (ii) the same entity will be the investment adviser for the Investing Fund and the Underlying Fund; (iii) the Underlying Fund will not acquire the securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the 1940 Act; (iv) the board of trustees of the Investing Fund will not authorize the payment of any investment advisory fee by the Investing Fund to its investment adviser unless it is based on the provision of services that are in addition to, rather than duplicative of, the services that the investment adviser provides to the Underlying Fund; and (v) the Investing Funds will comply with all of the provisions of Section 12(d)(1)(E), except for Section 12(d)(1)(E)(ii).

¹⁹ See *Dechert LLP*, SEC No-Action Letter (pub. avail. Aug. 4, 2009).

²⁰ These conditions were: (i) each foreign investment company will comply with the restrictions of Section 12(d)(1)(A)(i) of the 1940 Act; (ii) each foreign investment company will not offer or sell securities in the United States or to any U.S. person; (iii) each foreign investment company’s transactions with its shareholders will be consistent with the definition of “offshore transactions” in Regulation S under the 1933 Act; and (iv) each U.S. registered investment company will comply with the restrictions of Section 12(d)(1)(B) of the 1940 Act.

IV. DISCUSSION

As recognized by the Staff, the SEC has no significant U.S. regulatory interest in protecting *foreign* acquiring funds and their security holders from certain potential abuses that Sections 12(d)(1)(A) and (B) were designed to address (*e.g.*, duplicative fees and unnecessary complexity).²¹ Moreover, we believe that investors in the Foreign Feeder Funds have no expectation of protection from the U.S. federal securities laws. Such investors would reasonably expect that any restriction applicable to the fees and expenses of a Foreign Feeder Fund or the permitted use of the Foreign Currency Instruments by a Foreign Feeder Fund would be governed by the laws of the foreign jurisdiction in which securities of the Foreign Feeder Fund are primarily offered and sold, not the United States.

On this basis, we are requesting the Staff's assurances that it would not recommend that the SEC take enforcement action under Sections 12(d)(1)(A) and (B) to permit the Proposed Structure. Instead, we believe that the Proposed Structure should be permitted, subject to the facts and representations set forth herein, which include a condition that each Foreign Feeder Fund will: (i) not offer or sell its securities in the United States, either publicly or privately, or sell its securities to any U.S. Person; and (ii) comply with Section 12(d)(1)(E) (except as provided below). Although the Proposed Structure may, in some instances, differ from the typical master-feeder arrangement, we believe that the Proposed Structure, subject to the facts and representations set forth herein, does not present the potential for harm to U.S. investors that Congress sought to address in Sections 12(d)(1)(A) and (B). We also believe that the Proposed Structure would be beneficial to the U.S. mutual fund industry and could potentially attract significant assets to the U.S. and create significant scale to the benefit of investors in U.S. Master Funds.

A. *Compliance with Section 12(d)(1)(E)*

Under the Proposed Structure, a Foreign Feeder Fund may not be able to comply with certain provisions of Section 12(d)(1)(E) because of its structure and the laws and/or market practices of the foreign jurisdiction in which it operates. For example, the structure of a Foreign Feeder Fund or the laws and/or market practices of the foreign jurisdiction in which the Foreign Feeder Fund operates: (i) may not require the Foreign Feeder Fund to distribute its securities through a principal underwriter, or, for that matter, a principal underwriter that is, or that is controlled by, a broker-dealer registered under the 1934 Act, which would preclude compliance with Section 12(d)(1)(E)(i); or (ii) may prohibit the Foreign Feeder Fund from directly voting the shares of the applicable U.S. Master Fund, which could be viewed as precluding compliance with the "pass

²¹ See Dechert LLP, *supra* note 19. The Commission and Staff have recognized this principle in other contexts. For example, the Staff has acknowledged that the Commission would have limited U.S. regulatory interest in the activities of a U.S. registered foreign investment adviser with respect to its foreign clients, provided those activities do not have effects in the United States with respect to its U.S. clients. See *Protecting Investors: A Half Century of Investment Company Regulation*, SEC Div. Inv. Mgmt. (May 1992).

through” or “echo” voting requirements of Section 12(d)(1)(A)(iii)(aa). We address each of the conditions of Section 12(d)(1)(E), as well as the potential novelty and benefits of the Proposed Structure, below.

1. Section 12(d)(1)(E)(i) – Principal Underwriter of Feeder Funds and Commission Jurisdiction Over the Proposed Structure

Under Section 12(d)(1)(E)(i), the depositor of, or principal underwriter for, a “feeder” fund must be a broker-dealer registered under the 1934 Act, or a person controlled by such a broker-dealer. Section 12(d)(1)(E)(i) appears designed to ensure that the SEC has sufficient jurisdiction to monitor and pursue claims against a principal underwriter with respect to its activities in connection with a “feeder” fund. The PPI Report to Congress described the Staff’s concerns about the rapid growth and abusive practices of “fund holding companies,” including The Fund of Funds, Ltd., an unregistered open-end investment company incorporated in Ontario, Canada and operated in Geneva, Switzerland, which was marketed to members of the U.S. military stationed overseas and had controlling interests in U.S. registered funds.²² In 1966, the SEC instituted administrative proceedings under the 1934 Act against two U.S. registered broker-dealers that allegedly violated, among other things, the registration provisions under Section 5 of the 1933 Act and Section 7 of the 1940 Act with respect to the offer and sale of unregistered interests in The Fund of Funds, Ltd.²³ Although this matter was ultimately settled,²⁴ the PPI Report makes note of the fact that the Commission’s jurisdiction under the 1934 Act was originally challenged in federal district court by the sponsor of The Fund of Funds, Ltd.²⁵

We recognize the substantial U.S. regulatory interest in maintaining sufficient jurisdiction over those persons whose conduct outside the United States has an effect inside the United States or on U.S. Persons. However, the Foreign Feeder Funds may or may not have a principal underwriter that is, or that is controlled by, a broker-dealer registered under the 1934 Act, or, for that matter, may not have *any* principal underwriter at all.²⁶ We believe that in these circumstances there is

²² See PPI Report, *supra* note 13, at 312-324.

²³ See Exchange Act Rel. No. 7816 (Feb. 7, 1966).

²⁴ See Exchange Act Rel. No. 8083 (May 23, 1967).

²⁵ See PPI Report, *supra* note 13, at note 21 and accompanying text. It should be noted, however, that the District Court dismissed the defendant’s challenge and held that the SEC did have jurisdiction in that instance. See *Fontaine and Investors Overseas Services v. SEC*, 259 F.Supp. 880 (D.P.R. 1966).

²⁶ This problem is particularly acute for closed-end investment companies, which normally operate without a principal underwriter. In *The Carter Group, Inc.*, the incoming request letter concluded that this requirement should be read to *only* apply to an investment company that *actually* has a depositor or principal underwriter. This reading was based, in part, on the observation that the Congressional record does not provide any indication that the exemption is not available to “the typical closed-end investment company, which does not have a depositor or principal underwriter.”

very little incentive to unduly influence a U.S. Master Fund or engage in other improper conduct because of the affiliation among the parties. To be sure, in the PPI Report to Congress, the Commission stated that the concern of undue influence and control is simply *not* present where the acquiring funds and acquired funds are managed by entities under common control. In the SEC's view, these arrangements "present *no threat of control* because [acquiring funds and acquired funds] are organized, operated by, and under the control of, the same management."²⁷ The Proposed Structure contains the same inherent protections against undue influence and other improper conduct.²⁸

Despite the apparent lack of incentive to improperly influence a U.S. Master Fund or engage in other improper conduct given the affiliation among the parties, the Proposed Structure would be subject to the following conditions, which were designed to ensure that the SEC has sufficient jurisdiction over, and the ability to pursue sufficient administrative recourse against, the relevant parties:

- (i) To the extent a Foreign Feeder Fund *has* a Feeder Fund Principal Underwriter, that Feeder Fund Principal Underwriter would be a Control Affiliate of the Feeder Fund Adviser, Master Fund Adviser and Master Fund Principal Underwriter and would:
 - (1) be a broker-dealer registered under the 1934 Act or a person controlled, directly or indirectly, by such a broker-dealer (this would satisfy Section 12(d)(1)(E)(i)); *or*
 - (2) (a) designate the Master Fund Adviser as agent in the United States for service of process in any suit, action or proceeding before the SEC or any appropriate court with

Although the Staff provided no-action relief, the Staff did not expressly endorse this position. *See* The Carter Group, Inc., SEC No-Action Letter (Sept. 17, 1971).

²⁷ *See* PPI Report, *supra* note 13, at note 43 ("One unique type of foreign based unregistered fund holding company presents none of the problems discussed [in the PPI Report] and should not necessarily be prohibited. The sponsors of several registered mutual funds have organized foreign unregistered unit trusts for the accumulation of shares of such funds in order to provide foreign investors with a vehicle for the purchase of such funds without any U.S. estate tax problem. ... *Although the structure of such foreign unit trusts is nothing more than a fund on a fund, they present no threat of control because both are organized, operated by, and under the control of, the same management.* Accordingly, to the extent that such trusts do not involve a significant layering of costs and do serve to attract foreign investment in the underlying funds, the reasons which require prohibition of fund holding companies generally are not applicable here.") (emphasis added).

²⁸ This concept was more recently recognized by the Staff in *PIMCO Funds*, which noted that such an arrangement "would not create any incentive to exercise any improper influence over the [acquired fund] because the same investment adviser advises both [the acquiring fund and acquired fund]" *See* *PIMCO Funds*, *supra* note 15.

respect to the Foreign Feeder Fund and consent to the jurisdiction of the U.S. courts and the SEC with respect to its activities in connection with the Foreign Feeder Fund;

(b) promptly, upon receipt of an administrative subpoena, demand or a request for voluntary cooperation made during a routine or special inspection or otherwise with respect to the activities of the Foreign Feeder Fund, provide to the SEC and its Staff copies of its books and records with respect to the activities of the Foreign Feeder Fund (and, to the extent it is prohibited by applicable law from doing so, it will use its best efforts to secure permission to do so). To the extent any books and records are not kept in English, the Feeder Fund Principal Underwriter would cause such books and records to be translated into English upon reasonable advance notice by the SEC or its Staff; and

(c) file with the Commission a written representation, signed by a duly authorized officer, that agrees to these conditions; *and*

(ii) To the extent the Feeder Fund Adviser is not registered under the Advisers Act, the Feeder Fund Adviser would (unless the Feeder Fund Principal Underwriter, if any, is a broker-dealer registered under the 1934 Act or a person controlled, directly or indirectly, by such a broker-dealer):

(1) designate the Master Fund Adviser as agent in the United States for service of process in any suit, action or proceeding before the SEC or any appropriate court with respect to the Foreign Feeder Fund and consent to the jurisdiction of the U.S. courts and the SEC with respect to its activities in connection with the Foreign Feeder Fund;

(2) promptly, upon receipt of an administrative subpoena, demand or a request for voluntary cooperation made during a routine or special inspection or otherwise with respect to the activities of the Foreign Feeder Fund, provide to the SEC and its Staff copies of its books and records with respect to the activities of the Foreign Feeder Fund (and, to the extent it is prohibited by applicable law from doing so, it will use its best efforts to secure permission to do so). To the extent any books and records are not kept in English, the Feeder Fund Adviser would cause such books and records to be translated into English upon reasonable advance notice by the SEC or its Staff; and

(3) file with the Commission a written representation, signed by a duly authorized officer, that agrees to these conditions.

We believe that the Commission's existing, direct jurisdiction over the Master Fund Principal Underwriter(s) and the Master Fund Adviser(s) (and their associated persons) under the 1934 Act and Advisers Act, respectively, as well as the SEC's jurisdiction over the Feeder Fund Adviser(s), and/or Feeder Fund Principal Underwriter(s) (as applicable) pursuant to the conditions listed immediately above, provide the Commission with comparable jurisdiction and recourse to that which the SEC would have had over the Proposed Structure if a registered broker-dealer (or a

person controlled by such broker-dealer) served as the principal underwriter of the Foreign Feeder Funds.

We also believe that, by requiring the Foreign Feeder Funds to be organized in, and regulated under the laws of, the Permitted Foreign Jurisdictions, the Commission would have clear mechanisms to facilitate: (i) the exchange of information; (ii) the ability of the SEC and its foreign counterparts to assist one another in investigations and prosecutions of cross-border securities fraud; and (iii) consultation, cooperation and the exchange of supervisory information.²⁹

Although a Foreign Feeder Fund may not have a principal underwriter that is subject to examinations and recordkeeping requirements under the 1934 Act,³⁰ Sections 15(b)(4) and 15(b)(6) of the 1934 Act would authorize the SEC to institute administrative proceedings against any Master Fund Principal Underwriter, as well as its associated persons, including a Feeder Fund Adviser, based on the conduct of such associated persons. Specifically, Section 15(b)(4) of the 1934 Act permits the SEC to institute various administrative proceedings against a registered broker-dealer (*e.g.*, a Master Fund Principal Underwriter) if the broker-dealer, *or a person associated with such broker-dealer*, has engaged in one of the activities prohibited by Section 15(b)(4), including engaging in certain fraudulent activities, being convicted of certain felonies, willfully violating (or willfully aiding and abetting the violation of) the federal securities laws (including the 1940 Act), or being found by a foreign financial regulatory authority to have engaged in similar activities.³¹ In addition, Section 15(b)(6) permits the SEC to institute administrative proceedings *directly* against the *associated person* of a registered broker-dealer (*e.g.*, a Master Fund Principal Underwriter) if that associated person has engaged in one of the

²⁹ See Securities and Exchange Commission, *Office of International Affairs: SEC's Cooperative Arrangements with Foreign Regulators*, www.sec.gov/about/offices/oia/oia_coopfactsheet.htm (retrieved Mar. 8, 2017) (describing the multilateral and bilateral information sharing arrangements between and among the SEC and its foreign counterparts).

³⁰ Broker-dealers that are registered with the SEC under the 1934 Act are subject to the direct examination authority of the SEC under the 1934 Act. Section 17 of the 1934 Act authorizes the SEC to carry out “reasonable periodic, special, or other examinations,” of “all records” maintained by the broker-dealer “at any time, or from time to time” as the SEC deems necessary or appropriate. See Section 17(b) of the 1934 Act. In order to facilitate such examinations, the 1934 Act authorizes the SEC to require broker-dealers to maintain certain prescribed books and records. Pursuant to this authority, the SEC adopted, among other rules, Rules 17a-3 and 17a-4 under the 1934 Act, which specifies the books and records that registered broker-dealers are required to maintain. These records must be furnished “promptly” to the SEC upon request. See Rule 17a-4(j) under the 1934 Act.

³¹ These administrative proceedings include censoring, placing limitations on or revoking the registration of the Master Fund Principal Underwriter. See Section 15(b)(4) of the 1934 Act.

activities described above.³² As an “associated person” includes “any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer,”³³ Sections 15(b)(4) and 15(b)(6) would ensure that the SEC would be able to exercise jurisdiction over and pursue administrative recourse against a Feeder Fund Adviser and/or Feeder Fund Principal Underwriter (as applicable).

Similarly, Sections 203(e) and 203(f) of the Advisers Act would authorize the SEC to institute administrative proceedings against a Master Fund Adviser, as well as its associated persons, based on the conduct of such associated persons. Specifically, Section 203(e) of the Advisers Act permits the SEC to institute various administrative proceedings against a registered investment adviser (e.g., a Master Fund Adviser) if the adviser, *or a person associated with such adviser*, has engaged in one of the activities prohibited by Section 203(e), including engaging in certain fraudulent activities, being convicted of certain felonies, willfully violating (or willfully aiding and abetting the violation of) the federal securities laws (including the 1940 Act), or being found by a foreign financial regulatory authority to have engaged in similar activities.³⁴ In addition, Section 203(f) permits the SEC to institute administrative proceedings *directly* against the *associated person* of a registered investment adviser (e.g., a Master Fund Adviser) if that associated person has engaged in one of the activities described above.³⁵ As a “person associated with an investment adviser” includes “any person directly or indirectly controlling or controlled by such investment adviser,”³⁶ Sections 203(e) and 203(f) of the Advisers Act would generally ensure that the SEC would be able to exercise jurisdiction over and pursue administrative recourse against a Feeder Fund Adviser and/or Feeder Fund Principal Underwriter (as applicable).³⁷

Moreover, Section 21 of the 1934 Act and Section 209 of the Advisers Act also empower the SEC to investigate any violation or potential violation of the 1934 Act or Advisers Act, respectively, or

³² These administrative proceedings include censoring or placing limitations on the associated person or barring the associated person from being associated with the Master Fund Principal Underwriter. *See* Section 15(b)(6) of the 1934 Act.

³³ *See* Section 3(a)(18) of the 1934 Act.

³⁴ These administrative proceedings include censoring, placing limitations on or revoking the registration of the Master Fund Adviser. *See* Section 203(e) of the Advisers Act.

³⁵ These administrative proceedings include censoring or placing limitations on the associated person or barring the associated person from being associated with the Master Fund Adviser. *See* Section 203(f) of the Advisers Act.

³⁶ *See* Section 202(a)(17) of the Advisers Act.

³⁷ As the definition of “person associated with an investment adviser” does not include a person under common control with such investment adviser, Sections 203(e) and 203(f) of the Advisers Act would not apply in cases where there is only common control between the Master Fund Adviser and the Feeder Fund Adviser or Feeder Fund Principal Underwriter (as applicable).

any of the rules adopted thereunder.³⁸ This authority extends to violations or potential violations by “any person” and therefore is not limited solely to registered broker-dealers or registered investment advisers.

To the extent a Master Fund Adviser serves as an investment adviser to a Foreign Feeder Fund, the SEC would have direct examination authority over and recourse against that Master Fund Adviser (as an investment adviser registered with and regulated by the SEC), and this jurisdiction and recourse, for all intents and purposes, would be identical to that which the SEC would have had if a registered broker-dealer served as the principal underwriter of the Foreign Feeder Fund.³⁹

We also propose that a Feeder Fund Adviser and/or Feeder Fund Principal Underwriter (as applicable) will promptly provide, upon receipt of an administrative subpoena, demand or a request for voluntary cooperation made during a routine or special inspection or otherwise with respect to the activities of a Foreign Feeder Fund, to the SEC and its Staff copies of its books and records with respect to the activities of the Foreign Feeder Fund (and, to the extent it is prohibited by applicable law from doing so, it will use its best efforts to secure permission to do so).⁴⁰ This condition would greatly enhance the SEC’s investigative resources regarding the Proposed Structure and ensure that the SEC retains the authority to adequately monitor the Proposed Structure.

In addition, we recognize that, absent a specific appointment of an agent for service of process and consent to the jurisdiction of the SEC and the U.S. courts, the SEC’s investigative and enforcement tools could be limited. For these reasons, we propose that a Feeder Fund Adviser and/or Feeder Fund Principal Underwriter (as applicable): (i) designate the Master Fund Adviser as agent in the United States for service of process in any suit, action or proceeding before the SEC or any

³⁸ See Section 21(a)(1) of the 1934 Act and Section 209(a) of the Advisers Act. Under these sections, the SEC may, among other things, require a target of an investigation to produce such documents and other information as the SEC deems relevant or material to its inquiry and subpoena witnesses. See Section 21(b) of the 1934 Act and Section 209(b) of the Advisers Act.

³⁹ Section 204 of the Advisers Act authorizes the SEC to carry out “reasonable periodic, special, or other examinations,” of “all records” maintained by investment advisers “at any time, or from time to time” as the SEC deems necessary or appropriate. See Section 204(a) of the Advisers Act. In order to facilitate such examinations, the Advisers Act authorizes the SEC to require investment advisers to maintain certain prescribed books and records. Pursuant to this authority, the SEC adopted Rule 204-2 under the Advisers Act, which specifies the books and records that registered investment advisers are required to maintain.

⁴⁰ To the extent that any books and records are not kept in English, the applicable entity will cause such books and records to be translated into English upon reasonable advance notice by the SEC or its Staff.

appropriate court with respect to a Foreign Feeder Fund; and (ii) consent to the jurisdiction of the U.S. courts and the SEC (with respect to its activities in connection with a Foreign Feeder Fund).⁴¹

Lastly, the SEC would have the authority to institute administrative proceedings against a Master Fund Adviser and Master Fund Principal Underwriter, as well as their associated persons, including a Feeder Fund Adviser and/or Feeder Fund Principal Underwriter (as applicable), based on the conduct of such associated persons. Together with the conditions listed above, these safeguards would ensure that the SEC would have ample recourse against a person – whether a Feeder Fund Adviser and/or Feeder Fund Principal Underwriter (as applicable) – that unduly influenced a U.S. Master Fund or engaged in other improper conduct.

In sum, we believe that the presence of a Master Fund Adviser and Master Fund Principal Underwriter in the Proposed Structure, as well as the safeguards afforded by the facts and representations set forth herein and the foreign jurisdictions in which the Foreign Feeder Funds are organized and regulated (*i.e.*, the Permitted Foreign Jurisdictions), provide the Commission with comparable jurisdiction and recourse to that which the SEC would have had over the Proposed Structure if a registered broker-dealer (or a person controlled by such broker-dealer) served as the principal underwriter of the Foreign Feeder Funds. We also believe that, given the affiliation among the parties and the lack of incentive to unduly influence a U.S. Master Fund or engage in other improper conduct, the Commission's jurisdiction over and recourse against the Proposed Structure is sufficient.

2. Section 12(d)(1)(E)(ii) – Currency Hedging of the Foreign Feeder Funds and Potential Novelty and Benefits of the Proposed Structure

Under Section 12(d)(1)(E)(ii), the securities of the “master” fund must be the only “investment securities” held by a “feeder” fund. As discussed above, in *PIMCO Funds*, although the Staff declined to concur with the applicant's view that, solely for purposes of Section 12(d)(1)(E), the term “investment security” does not include the Foreign Currency Instruments under the circumstances described in the incoming letter, the Staff took the position that “the Investing Fund's proposed use of the [Foreign Currency Instruments], under the circumstances described in [the incoming] letter, would be consistent with the purposes underlying Section 12(d)(1) of the [1940] Act.” The Staff was “persuaded by [the applicant's] arguments that the Investing Fund's proposed use of the [Foreign Currency Instruments] *would not create any incentive to exercise any improper influence over the Underlying Fund because the same investment adviser advises both of these funds*, and would not create a complex pyramidal structure.”⁴² We believe that, for similar

⁴¹ The Staff was satisfied with a similar condition in similar circumstances. *See, e.g.*, Man-Glenwood Lexington TEI, LLC and Man-Glenwood Lexington TEI, LDC, SEC No-Action Letter (pub. avail. April 30, 2004).

⁴² *See* PIMCO Funds, *supra* note 15 (emphasis added).

reasons, the Staff should permit a Foreign Feeder Fund to invest in Foreign Currency Instruments under the facts and representations set forth herein.

The benefits and efficiencies of the Proposed Structure are illustrated by the following hypothetical offering: a global investment manager could offer the securities of two Foreign Feeder Funds in two separate jurisdictions (“Foreign Feeder Fund 1” and “Foreign Feeder Fund 2,” respectively). Each of Foreign Feeder Fund 1 and Foreign Feeder Fund 2 could seek to approximate the returns of an index (hedged to their respective Designated Currencies). To efficiently accomplish this offering, each of Foreign Feeder Fund 1 and Foreign Feeder Fund 2 could: (i) invest their assets in the securities of a single U.S. Master Fund that seeks to approximate the returns of the same index (except it would be *unhedged* to the U.S. Dollar); and (ii) hedge the U.S. Dollar or other foreign currency exposure of the index back to its respective Designated Currency. This currency hedging would enable the security holders of a Foreign Feeder Fund to achieve a return on their investment, as measured in the Designated Currency, similar to that of the index whose returns the U.S. Master Fund seeks to approximate, by reducing the impact of currency fluctuations between or among the Designated Currency and the U.S. Dollar or other foreign currency exposure of the index.⁴³

In correspondence to Congress describing the Staff’s comfort with “hub-and-spoke funds,” the Staff stated that these arrangements “may also enable the United States’ mutual fund industry to clear many of the regulatory hurdles involved in selling mutual funds overseas, by organizing an off-shore spoke to comply with the tax and regulatory requirements of the host country while managing the assets in a hub in the United States.”⁴⁴ Similarly, the Proposed Structure would permit a global investment manager or sponsor to efficiently offer an investment product across several foreign jurisdictions.

Although the Proposed Structure may, in some instances, differ from the typical master-feeder arrangement – *i.e.*, where a feeder fund invests all of its assets in a single master fund and the feeder fund’s performance is approximately the same as that of the master fund – we believe that

⁴³ The economics of the above example could be accomplished in a manner identical to the currency hedging addressed in *PIMCO Funds* if the U.S. Master Fund in which Foreign Feeder Fund 1 and Foreign Feeder Fund 2 invested sought to approximate the returns of a U.S. Dollar *hedged* version of the same index. Foreign Feeder Fund 1 and Foreign Feeder Fund 2 would then use Foreign Currency Instruments to hedge the foreign currency exposure between their Designated Currencies and the U.S. Dollar. This is a distinction without a difference and could unnecessarily add costs by requiring a Master Fund Adviser to offer similar investment products without a clear benefit. Moreover, with respect to a Foreign Feeder Fund that seeks to hedge the performance of the applicable U.S. Master Fund, as measured in U.S. Dollars, back to its Designated Currency, we note that such hedging is similar to the currency hedging addressed in *PIMCO Funds*.

⁴⁴ See Letter to Congressman John D. Dingell from Richard C. Breeden, Chairman, SEC (April 15, 1992) (providing report on “hub-and-spoke funds” prepared by the Division of Investment Management) (the “Dingell Letter”).

the Proposed Structure does not present the potential for harm to U.S. investors that Congress sought to address in Sections 12(d)(1)(A) and (B). We also believe that the Proposed Structure would be beneficial to the U.S. mutual fund industry and could potentially attract significant assets to the U.S. and create significant scale to the benefit of investors in U.S. Master Funds.

We note that, as currently permitted by Section 12(d)(1)(E)(ii), the securities of the master fund must be the only “investment securities” held by a feeder fund. A feeder fund is therefore currently permitted to hold cash and other assets that are not “investment securities” and, under certain circumstances, the feeder fund’s performance may not be approximately the same as that of the master fund. The Proposed Structure would actually resemble the typical master-feeder arrangement more than an arrangement where the feeder fund invests a significant portion of its assets in securities that are not “investment securities” because under the Proposed Structure, with respect to a Foreign Feeder Fund that seeks to hedge the U.S. Dollar and/or foreign currency exposure associated with the applicable U.S. Master Fund’s portfolio holdings back to its Designated Currency, the investment objectives of the Foreign Feeder Fund and U.S. Master Fund must be substantially the same. The primary difference is currency hedging, which would be used for the limited purposes described herein and not for speculative purposes (*i.e.*, for the purpose of generating excess investment returns).

Moreover, limiting the Foreign Feeder Funds that may rely on any no-action relief granted by the Staff hereunder⁴⁵ and the scope of hedging as outlined above should eliminate any concerns of potential overreaching and the potential to harm U.S. investors. Although we acknowledge that there is a potential for improper influence and a potential conflict of interest between the U.S. Master Fund and the Foreign Feeder Fund if the Foreign Feeder Fund seeks to hedge the U.S. Dollar and/or foreign currency exposure associated with the U.S. Master Fund’s portfolio holdings back to its Designated Currency,⁴⁶ we believe that the conditions of this currency hedging discussed herein, together with the affiliation among the parties, provides an important safeguard

⁴⁵ A Foreign Feeder Fund may only rely on no-action relief granted by the Staff hereunder if it is: (i) a foreign publicly-offered investment vehicle whose securities are generally redeemable upon demand to the fund or foreign publicly-traded investment vehicle whose securities are listed on one or more foreign securities exchanges (*i.e.*, the foreign equivalent of U.S. registered investment companies, namely: (a) U.S. registered mutual funds and (b) U.S. registered closed-end funds and U.S. registered exchange-traded funds whose securities are listed on one or more securities exchanges); and (ii) organized in, and regulated under the laws of, a Permitted Foreign Jurisdiction.

⁴⁶ For example, as a Foreign Feeder Fund seeks to hedge the currency exposure of the U.S. Master Fund’s portfolio holdings to the Foreign Feeder Fund’s Designated Currency, the investment interests of the Foreign Feeder Fund and the U.S. Master Fund could diverge because the Foreign Feeder Fund might be more or less affected by the currency exposure of the U.S. Master Fund’s portfolio holdings. A Foreign Feeder Fund might seek to influence the U.S. Master Fund’s choice of currency exposure for its own interest, to the potential detriment of the U.S. Master Fund and its other shareholders.

against any incentive to unduly influence a U.S. Master Fund or engage in other improper conduct.⁴⁷

Lastly, we believe that reliance on Section 12(d)(1)(E) has evolved since its adoption in 1970. This was recognized by the Staff in the Dingell Letter, where the Staff said that the “organization of mutual funds in hub-and-spoke arrangements is an important evolution in the mutual fund industry.”⁴⁸ The SEC also recognized the benefit of attracting foreign investments in U.S. mutual funds. On this basis, in the PPI Report, the SEC originally did not believe that the restrictions under Section 12(d)(1) should apply to similar arrangements. Accordingly, we believe that the manner in which Foreign Currency Instruments would be used by the Foreign Feeder Funds under the Proposed Structure could represent the next step in the evolution of the hub-and-spoke arrangement. We therefore believe that public policy supports this relief (subject to the facts and representations set forth herein).

3. *Section 12(d)(1)(E)(iii)(aa) – Foreign Feeder Fund Voting*

Under Section 12(d)(1)(E)(iii)(aa), a “feeder” fund is required to either: (i) seek instructions from its security holders with regard to the voting of all proxies with respect to the securities of the “master” fund and to vote such proxies only in accordance with such instructions (*i.e.*, “pass through” voting); or (ii) vote the securities held by it in the same proportion as the vote of all other holders of such security (*i.e.*, “echo” voting). The “pass through” or “echo” voting requirements were intended to address an abuse recognized by the Staff, namely the pyramiding of voting control in the hands of persons that own only a nominal stake in the acquired fund.⁴⁹

We understand that, under the laws of certain foreign jurisdictions in which a Foreign Feeder Fund may operate, the Foreign Feeder Fund may not be able to comply with the “pass through” or

⁴⁷ This view is consistent with PPI Report, in which the SEC stated that the concern of undue influence and control is simply not present where the acquiring funds and acquired funds are managed by entities under common control. Moreover, the regulatory and fiduciary obligations of each Master Fund Adviser require the adviser to act in the best interests of the applicable U.S. Master Fund and would preclude an adviser from allowing the interests of one shareholder to influence the management of the U.S. Master Fund. The risk that any large shareholder may seek to influence a U.S. Master Fund is mitigated by the fact that each U.S. Master Fund has its own stated investment objective and policies, and will continue to be required to act in a manner consistent with its investment mandate and public disclosure (*i.e.*, to seek to approximate the returns of the applicable index). In the case of a U.S. Master Fund that seeks to approximate the returns of an index, the U.S. Master Fund at all times would be bound by its investment objectives and policies to approximate the returns of the index and subject to the oversight of its Board of Directors/Trustees.

⁴⁸ See Dingell Letter, *supra* 44,

⁴⁹ See PPI Report, *supra* note 13, at 314-315.

“echo” voting requirements under Section 12(d)(1)(E)(iii)(aa).⁵⁰ However, for the reasons discussed above, we believe there is very little incentive to unduly influence a U.S. Master Fund under the Proposed Structure.

In any event, to the extent the laws and/or market practices of a foreign jurisdiction in which a Foreign Feeder Fund operates preclude compliance (or could be interpreted to preclude compliance) with the “pass through” or “echo” voting requirements, a Foreign Feeder Fund would either abstain from voting or withhold voting.⁵¹ These alternative voting methods provide the same safeguards against the potential for undue influence as the “pass through” or “echo” voting requirements under Section 12(d)(1)(E)(iii)(aa) because the Feeder Fund Adviser would not have the authority to vote such securities and are designed to limit the ability of the Feeder Fund Adviser to impact the outcome of a shareholder vote.

4. Section 12(d)(1)(E)(iii)(bb) – Substitution Orders

Under Section 12(d)(1)(E)(iii)(bb), an unregistered “feeder” fund is required to refrain from substituting the securities of one “master” fund for another “master” fund (*i.e.*, a complete redemption of the securities of one master fund and subsequent purchase of securities of another master fund), unless the SEC has approved of the substitution in the manner provided by Section 26 of the 1940 Act. A Foreign Feeder Fund would comply with this requirement by refraining from substituting its investment in the U.S. Master Fund unless the Commission shall have approved such substitution by order issued to the Foreign Feeder Fund.

⁵⁰ For example, in certain foreign jurisdictions, a manager to a feeder fund that invests in a master fund managed by that manager (or an affiliate of that manager), may not *directly* vote the securities of the master fund, *irrespective of whether the manager first solicits its security holders for instructions*.

⁵¹ See Securities and Exchange Commission, *Spotlight on Proxy Matters — The Mechanics of Voting*, https://www.sec.gov/spotlight/proxymatters/voting_mechanics.shtml (retrieved Mar. 8, 2017) (describing the differences between “abstain” and “withhold”).

For the avoidance of doubt, if the laws and/or market practices of a foreign jurisdiction in which a Foreign Feeder Fund operates permit “pass through” or “echo” voting as set forth in Section 12(d)(1)(E)(iii)(aa), the Foreign Feeder Fund would first seek to comply with such voting requirements. However, if these voting methods are unavailable, a Foreign Feeder Fund would either abstain from voting or withhold voting. In choosing whether to abstain from voting or withhold voting, the Foreign Feeder Fund will take the action believed to be necessary to obtain a quorum. Otherwise, if a quorum is reasonably expected to be achieved without any action by the Foreign Feeder Fund, the Foreign Feeder Fund may refrain from voting.

V. CONCLUSION

Subject to the facts and representations set forth herein, we respectfully request that the Staff not recommend enforcement action against the Foreign Feeder Funds or U.S. Master Funds (and their principal underwriters and any broker or dealer) and grant no-action relief from the application of Sections 12(d)(1)(A) and (B) as proposed.

* * *

If you have any questions or comments regarding this letter, please do not hesitate to call me at (202) 261-3381 or Brenden P. Carroll at (202) 261-3458. We appreciate your assistance in this matter.

Very truly yours,



Brendan C. Fox

Exhibit A – Permitted Foreign Jurisdictions

Europe

France
Germany
Ireland
Luxembourg
Switzerland
United Kingdom

North America

Canada
Mexico

South America

Brazil

Australia

Asia

Hong Kong
Japan
Singapore

Africa

South Africa