

CFTC Letter No. 00-95**October 3, 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

Dear :

This is in response to your letter to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission") dated February 9, 1999, as supplemented by your facsimile transmissions dated September 1, 1999, November 10, 1999, and January 12, 2000, and by telephone conversations with Division staff. By your correspondence, you request on behalf of the United States directors ("United States Directors") of the "V" Fund, "W", and "X" relief from the registration requirements of Section 4m(1) of the Commodity Exchange Act (the "Act").¹ You seek this relief to permit: (1) the United States Directors to operate the Funds without registering as commodity pool operators ("CPOs"); and (2) "W" and "X" to provide commodity interest advisory services to the "V" Fund and its underlying portfolio funds (the "Portfolio Funds") (collectively the "Funds") without registering as commodity trading advisors ("CTAs")²

Based upon the representations made in your correspondence, we understand the facts to be as follows. The "V" Fund is an investment company incorporated in "E" and regulated by "Z". The "V" Fund encompasses twelve Portfolio Funds, each of which is a separate class of shares having distinct investment objectives and policies and consisting of a separate portfolio of assets. The Funds are not registered under the Investment Company Act of 1940 (the "'40 Act"), and, because they are organized in a foreign jurisdiction, they cannot, absent an exemption from the Securities and Exchange Commission ("SEC"), register under the '40 Act.³ The Funds were not organized outside of the United States for the purpose of avoiding CPO registration by the United States Directors.

The "V" Fund has six directors, four of whom are United States persons⁴ ("United States Directors").⁵ The United States Directors are all affiliated with "W", "X", or both. None of the United States Directors is subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Act.⁶ As operators of the Funds, the United States Directors would be required, absent relief, to register as CPOs.

“W” and “X” are both corporations registered with the SEC as investment advisers under the Investment Advisers Act of 1940 (“Advisers Act”). “W” wholly owns “X”. “W” and “X” are responsible for providing investment management and advisory services to the Funds, including advice on commodity interests. Thus, “W” and “X”, absent relief, would be required to register as CTAs. Neither “W” nor “X” is subject to a statutory disqualification under Section 8a(2) of the Act, and “X” also is not subject to a statutory disqualification under Section 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 ’40 Act. Because the Funds are not registered as investment companies under the ’40 Act, Rule 4.5 is not available to the United States Directors. 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 Funds are not registered as investment companies under the ’40 Act, “W” and “X” do not qualify for the Rule 4.14 exemption. Therefore, the United States Directors, “W”, and “X” have requested that the Division issue a no-action position with respect to their acting as CPOs and CTAs to the Funds without their registering as such.

In support of your request, you represent that each Portfolio Fund will trade commodity interests in a manner consistent with the requirements of Rule 4.5(c)(2), and that “W” and “X” will comply with the requirements of Rule 4.14(a)(8) with respect to the manner in which they provide commodity interest trading advice to the Funds. Further, shares in the Funds will not be sold or marketed to any person who, subject to an exception for sales to “W” and certain of its management employees, is a United States person.⁸ Thus, subject to the exception for sales to “W” and certain of its management employees, no United States person will participate directly or indirectly in the Funds; no funds or capital have been or will be contributed to the Funds directly or indirectly from United States persons; and no person affiliated with the Funds has undertaken or will undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect, of soliciting participation from United States persons.

Based upon the representations made in your correspondence, and subject to the conditions set forth below, the Division will not recommend that the Commission commence any enforcement action against “W” or “X”⁹ based solely upon their failure to register with the Commission as CTAs or against the United States Directors based solely upon their failure to register as CPOs in connection with their activities with respect to the Funds.

The Division’s position in regard to CPO registration relief for the United States Directors is based on your representations, among other things, that: (1) the Funds are organized outside of the United States; (2) the Funds were not organized outside of the United States for the purpose of avoiding CPO registration by the United States Directors; (3) no United States person will participate directly or indirectly in the Funds, with the exceptions that “W” and certain management employees will have voting rights in the “V” Fund and that “W” contributed a small amount of seed capital to some of the Portfolio Funds; (4) no funds or capital have been or will be contributed to the Funds, directly or indirectly, from United States sources, with the exceptions that “W” and certain management employees who are United States persons collectively own seven Subscriber Shares in the “V” Fund and that “W”

contributed seed capital to some of the Portfolio Funds; (5) no person affiliated with the Funds has undertaken or will undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect, of soliciting participation from United States persons; (6) no marketing activities in connection with the Funds will be conducted within the United States; (7) the Funds will be operated in a manner consistent with Rule 4.5(c)(2); and (8) the United States Directors 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 "W" and "X" is based on the foregoing representations and your further representations, among others, that: (1) "W" and "X" are registered as investment advisers under the Advisers Act; and (2) "W" and "X" will comply with the requirements of Rule 4.14(a)(8) with respect to the manner in which they provide commodity interest trading advice to the Funds.^{[10](#)}

The foregoing positions are subject to the condition that, at the Division's request, the United States Directors, "W", and "X" will provide the Division with information demonstrating their compliance with the terms and conditions of the applicable position. In this regard, the Division notes that "Z" has certified to the Division that it is authorized to collect and share with the Commission information concerning any activities conducted by the United States Directors pursuant to any no-action relief provided by the Division. Additionally, "Z" will collect and share such information with the Commission, upon request, to the extent allowed under its laws.^{[11](#)}

This letter does not excuse the United States Directors, "W", or "X" from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, the United States Directors, "W", and "X" remain subject to all of the antifraud provisions of the Act and the Commission's regulations issued thereunder, 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.

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 United States Directors, "W", or "X" 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 Associate Chief Counsel Lawrence B. Patent at (202) 418-5439.

Very
truly
yours,

John C. Lawton
Acting Director

1 7 U.S.C. § 6m(1) (1994).

2 You also request on behalf of: (1) “W” and “X” relief from the CPO registration requirement of
Section 4m(1); and (2) “Y” relief from the CTA and CPO registration requirements of Section 4m(1).

In connection with the adoption of Rule 4.5, discussed below, the Commission stated:

The Commission does not believe that the activities in which such persons [as a registered investment company’s sponsor, underwriter, or investment adviser] typically engage are, without more, the activities in which a CPO typically engages. Rather, the Commission believes that such persons are outside the CPO definition... 50 Fed. Reg. 15868 at 15871 (April 23, 1985).

Because this statement concerns itself with persons involved with an investment company, and not with the registration status of the investment company itself, the Division believes that it is applicable in the context of unregistered investment companies - - *e.g.*, the Funds. Accordingly, it is unnecessary for the Division to act upon your requests that “W”, “X” and “Y” be relieved from CPO registration and that “Y” be relieved from CTA registration.

Although you have not sought relief from CPO registration for the non-United States person directors of the “V” Fund, it is the Division’s long-standing position to recommend no enforcement action where such persons are operating a pool that accepts no United States participants and no funds from United States sources. *See* CFTC Staff Letter No. 76-21, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,222 (August 15, 1976).

Commission rules referred to herein are found at 17 C.F.R. Ch. I (2000).

3 15 U.S.C. § 80a-7(d) (1994).

4 For the purposes of this letter, the term “United States person” has the same meaning as that set forth
in Rule 4.7.

5 The four United States Directors are “A”, “B”, “C”, and “D”.

6 7 U.S.C. § 12a(2) or (3) (1994).

7 In January, 1997, the SEC censured “W” and ordered it to pay a civil penalty of \$25,000 for failing

reasonably to supervise a portfolio manager who breached his fiduciary duty to a registered mutual fund advised by “W” by taking for himself an investment opportunity without disclosing the opportunity to, and obtaining the prior consent of, the fund. Thus, “W” could be subject to a statutory disqualification from registration under Section 8a(3)(C) of the Act. Since the SEC did not condition, suspend, or revoke “W’s” registration as an investment adviser, however, the Division believes that “W” should not be denied CTA registration no-action relief solely on the basis of this January 1997 SEC censure.

8 “W” and certain management employees who are United States persons collectively own seven Subscriber Shares in the “V” Fund. In this regard, you explain that, to maintain its limited liability status under Irish law, the “V” Fund must have seven Subscriber Shares issued and outstanding at all times. Holders of Subscriber Shares in the “V” Fund do not participate in the profit or loss of the Portfolio Funds, but they do have voting rights in the “V” Fund. Thus, “W” and the management employees will have voting rights in the “V” Fund but they will not participate in the Portfolio Funds’ investment performance. Additionally, “W” contributed a small amount of seed capital to seven of the Portfolio Funds, as follows: (1) \$100,000 to five of the Portfolio Funds, representing an ownership interest of approximately one percent or less of these funds; (2) \$800,000 to one Portfolio Fund, representing 4.39 percent of that fund; and (3) \$15,000 to another Portfolio Fund, representing 0.07 percent ownership of that fund. Consistent with the Division’s long-standing positions in this area, the Division does not believe that “W” or the management employees should be treated as participants in the Funds for the purpose 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).

9 The relief issued herein to “X” applies to “X” Successor, as defined in your correspondence, provided that “X” Successor complies with the representations and conditions listed in this letter applicable to “X”, with the exception that “X” Successor will be located in the United Kingdom and registered with the Investment Management Regulatory Organisation Limited rather than with the SEC.

10 The Division previously has granted CTA registration relief to “W” under similar circumstances in connection with “W’s” provision of investment advisory services to foreign funds. CFTC Staff Letter No. 97-05, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,972 (Feb. 12, 1997); CFTC Staff Letter No. 97-88, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,190 (October 10, 1997); CFTC Staff Letter No. 99-56, 2 Comm. Fut. L. Rep. (CCH) ¶27,954 (December 6, 1999).

11 Letter dated September 19, 2000, from “Z” to John C. Lawton, Acting Director of the Division.