

**CFTC Letter No. 01-62**

**June 13, 2001**

**No-Action; Interpretation**

**Division of Trading and Markets**

Re: Section 4m(1) – Request for CPO registration no-action position for Cayman Islands bank acting as trustee of a Cayman Islands investment trust in which solely Japanese investors may participate

Section 4m(1) – Request for CTA registration no-action position for SEC-registered investment adviser with offices in the U.S. who provides services to the Cayman Islands investment trust

Rule 4.14(a)(8) – Request for confirmation of continued eligibility of the SEC-registered investment adviser if the Cayman Islands investment trust trades commodity interests.

Dear :

This is in response to your letter dated April 30, 2001, to the Division of Trading and Markets (the “Division”) of the Commodity Futures Trading Commission (the “Commission”), as supplemented by your e-mail message dated May 21, 2001 and by telephone conversations with Division staff. By your correspondence, you request relief on behalf of “X” and “Y” in connection with advising and operating “Z”, a trust established under Cayman Islands law (the “Cayman Trust”). Specifically, you request that the Division confirm: (1) that it will not recommend that the Commission commence any enforcement action against “Y” for failure to register as a commodity pool operator (“CPO”) under Section 4m(1)<sup>[1]</sup> of the Commodity Exchange Act (the “Act”);<sup>[2]</sup> (2) that it will not recommend that the Commission commence any enforcement action against “X” for failure to register as a commodity trading advisor (“CTA”) under Section 4m(1) of the Act; and (3) that “X” may claim the CTA registration exemption provided by Commission Rule 4.14(a)(8).<sup>[3]</sup>

Based upon the representations made in your correspondence, we understand the facts to be as follows. “X” is organized under the laws of England and has its principal office in England and a branch office in Maryland. It is an investment adviser registered as such with the U.S. Securities and Exchange Commission (“SEC”) under the Investment Advisers Act of 1940. “Y” is a bank chartered under the laws of the Cayman Islands. None of the directors of “Y” is a U.S. person.<sup>[4]</sup> Neither “X”, “Y” nor the Cayman Trust was organized outside the U.S. for the purpose of avoiding registration requirements under the Act. None of the directors or officers of “Y” or “X” is subject to a statutory disqualification under Section 8a(2) or 8(a)(3) of the Act.<sup>[5]</sup>

The Cayman Trust is one of a number of investment trusts and funds advised by “X” in which interests are sold exclusively to Japanese investors. The trustee of the Cayman Trust is “Y”. The sole investor in the Cayman Trust is “W” (the “Japanese Trust” and collectively with the Cayman Trust, the “Trusts”), a private investment trust established under the laws of Japan. The Trustee of the Japanese Trust is “V”. While the Cayman Trust has not previously engaged in commodity interest trading, it now intends to engage in such trading. You represent that the Cayman Trust will be operated in a manner consistent with the requirements of Rule 4.5(c)(2).

In support of a CPO registration no-action position for “Y” you further represent that: (1) beneficial interests in the Japanese Trust will be offered and sold exclusively to Japanese nationals; (2) only Non-United States Persons (as defined in Rule 4.7(a)(1)(iv)) will participate, directly or indirectly, in (either of) the Trusts; (3) no funds or other capital will be contributed to the Trusts, directly or indirectly, from U.S. persons; (4) no person affiliated with the Trusts has undertaken or will undertake any marketing activity for the purpose of, or that could reasonably have the effect of, soliciting participation from U.S. persons; and (5) no marketing activities in connection with the Trusts will be conducted from the United States.

In support of a CTA registration no-action position for “X”, you further represent that: (1) The provision of commodity interest trading advice by “X” to the Cayman Trust will be solely incidental to the provision of securities trading advice to the Cayman Trust; (2) “X” will provide commodity interest trading advice to the Cayman Trust in a manner consistent with eligibility status under Rule 4.5; (3) “X” will not otherwise hold itself out as a CTA; and (4) with the exception that the Cayman Trust is neither an entity excluded from the definition of “pool” under Rule 4.5 nor a qualifying entity under Rule 4.5 for which a notice of eligibility has been filed, “X” will otherwise meet the criteria of Rule 4.14(a)(8).

Based upon the representations made in your correspondence and consistent with prior practice,<sup>[6]</sup> the Division will not recommend that the Commission commence any enforcement action: (1) against “Y” based solely upon the failure of “Y” to register as a CPO under Section 4m(1) of the Act; or (2) against “X” based solely upon the failure of “X” to register as a CTA under Section 4m(1) of the Act in connection with providing commodity interest trading advice to the Cayman Trust in the manner described. Moreover, the Division does not believe that CTA registration no-action position taken herein should, in itself, render “X” ineligible to claim exemption from CTA registration under Rule 4.14(a)(8) in a situation in which “X” would meet all of the criteria for exemption under Rule 4.14(a)(8) but for the fact that it was advising the Cayman Trust pursuant to this letter.<sup>[7]</sup>

This letter does not excuse “X” or “Y” from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder. For example, each remains subject to the antifraud provisions of Sections 4b and 4o of the Act,<sup>[8]</sup> to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission’s rules, and to all otherwise applicable provisions of Part 4.

This letter, and the no-action positions taken herein, are based upon the representations made to us. Any different, changed or omitted facts or circumstances might render these positions void. In this connection, we request that you notify us immediately in the event that the operations or activities of “X” or “Y” change in any respect from those as represented to us. Further, this letter represents the views of this Division only and does not necessarily represent the views of the Commission or of any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact me or Christopher W. Cummings, an attorney on my staff, at (202) 418-5445.

Very truly yours,  
John C. Lawton  
Acting Director

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<sup>[1]</sup> 7 U.S.C. § 6m(1) (1994).

<sup>[2]</sup> 7 U.S.C. § 1 *et seq.* (1994), as amended by the Commodity Futures Modernization Act of 2000 (“CFMA”), Pub. L. No. 106-554, 114 Stat. 2763 (to be codified as amended in scattered sections of 7 U.S.C.).

<sup>[3]</sup> Commission rules referred to herein are found at 17 C.F.R. Ch. I (2001).

<sup>[4]</sup> For the purpose of this letter, the term “U.S. person” shall mean a person who is not a Non-United States Person as defined in Rule 4.7(a)(1)(iv).

<sup>[5]</sup> 7. U.S.C. § 12a(2) or 12(a)(3).

<sup>[6]</sup> *See, e.g.*, CFTC Staff Letter 76-21 [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,222 (August 15, 1976) (CPO registration not required where a pool operator is outside the U.S., confines its CPO activities to areas outside the U.S. has no U.S. participants in its pools and none of the funds or capital contributed to the pools is from U.S. sources). *See also* CFTC Staff Letter 00-95 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,287 (October 3, 2000); CFTC Staff Letter 00-96 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,288 (October 4, 2000); CFTC Staff Letter 00-61 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,141 (May 12, 2000) (in each case, CTA registration not required where the adviser was a registered investment adviser advising a non-U.S. investment fund in accordance with the requirements of Rule 4.14(a)(8) except that the advised funds were neither entities excluded from the definition of “pool” under Rule 4.5 nor qualifying entities under

Rule 4.5 for which a notice of eligibility had been filed).

<sup>[7]</sup> See CFTC Staff Letter 97-05 [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,972 (February 12, 1997) (no-action position permitting a registered investment adviser advising several companies pursuant to claim of CTA registration exemption under Rule 4.14(a)(8) to also provide commodity interest trading advice to an offshore pool without registering as a CTA).

<sup>[8]</sup> 7 U.S.C. § 6b and 6c (1994).