

93-108



COMMODITY FUTURES TRADING COMMISSION

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DIVISION OF
TRADING AND MARKETS

November 3, 1993

Re: Request for Relief from Registration as a CTA

Dear :

This is in response to your letter dated August 26, 1993, as supplemented by telephone conversations with staff of the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission") in which you request, on behalf of "W", that the Division not recommend that the Commission take any enforcement action against "W" for failure to register as a commodity trading advisor ("CTA") in connection with "W"'s providing commodity interest trading advice to certain offshore investment companies.

Based upon the representations made in your letter, as supplemented, we understand the relevant facts to be as follows. "W" is a wholly-owned subsidiary of "X", a Massachusetts corporation that is the holding company for a group of financial service companies known as "Z". Specifically, "W" is a trust company whose principal business is providing investment management services to institutional clients. As a trust company, "W" is excluded from the term "investment adviser" under Sections 202(a)(2) and 202(a)(11) of the Investment Advisers Act of 1940.

"Y" is a Bermuda corporation and a part of "Z's" international group. It provides investment management services to foreign-based institutional clients, and in particular, investment companies incorporated under the laws of foreign jurisdictions (the "Foreign Funds"). You represent that shares of each Foreign Fund have not and will not be solicited or offered for sale in the United States. Moreover, each Foreign Fund's prospectus and organizational documents state that its shares may not be sold to United States persons ("U.S. persons").^{1/} In this

^{1/} The term "U.S. Person" as used in the Foreign Funds' organizational documents is modeled after the "U.S. Person" definition set forth in Regulation S under the Securities Act of 1933, 17 C.F.R. 230.902(o) (1992). This definition is similar, although

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regard, the Foreign Funds attempt to prevent sales of their shares to U.S. persons by requiring prospective investors to certify that they are not U.S. persons or purchasing shares on behalf of U.S. persons, and by prohibiting transfers of shares to U.S. persons. In addition, investors are required to notify their respective Foreign Fund if they establish a residence in the United States and the Foreign Funds are authorized to require redemption of shares held by a U.S. person.^{2/}

"Y" has appointed "W" as a sub-adviser to provide investment advice to certain Foreign Funds. In addition to securities trading, each Foreign Fund has been authorized to enter into financial futures contracts and options thereon for hedging and other risk management purposes. You represent that each of the Foreign Funds advised by "W" in its capacity as a sub-adviser for "Y" will be operated in accordance with Commission Rule 4.5(c)(2),^{3/} although because of their foreign nature, the Foreign Funds will not (and absent an exemption from the Securities and Exchange Commission, cannot) register as investment companies under the Investment Company Act of 1940. Thus, the Foreign Funds are not qualifying entities under Rule 4.5(a) and an exemption from CTA registration pursuant to Rule 4.14(a)(8) is unavailable to "W" with respect to the commodity interest trading advice it will render to the Foreign Funds.

^{1/} (...continued)

not identical, to the "United States person" definition adopted by the Division in Interpretative Letter No. 92-3, Comm. Fut. L. Rep. (CCH) ¶ 25,221 (January 29, 1992). Our review of the U.S. Person definition employed by the Foreign Funds and that employed in Interpretative Letter No. 92-3 indicates that the differences between these two definitions are not critical for the purpose of the relief you have requested. Accordingly, the term "United States person" as used herein will have the meaning set forth in your letter.

^{2/} Despite these restrictions, you state that it is possible that the Foreign Funds may have investors who are United States citizens living abroad. "W" estimates, however, that these interests do not exceed five percent of the beneficial interest in any such fund.

^{3/} Commission rules referred to in this letter are found at 17 C.F.R. Ch. I (1993).

Based upon the foregoing, however, and consistent with our prior practice in this area,^{4/} the Division will not recommend that the Commission take any enforcement action against "W" for failure to register as a CTA in connection with its providing commodity interest trading advice to the Foreign Funds. This position is, however subject to the conditions that: (1) the Foreign Funds will not solicit or be marketed to U.S. persons or in enclaves of the United States government; (2) "W" does not otherwise hold itself out as a CTA; and (3) "W" will submit to such special calls as the Division may make of it to demonstrate compliance with the terms and conditions of this "no-action" position.

In selecting "W" to provide, among other things, commodity interest trading advice to a Foreign Fund, "Y" itself could be deemed to be acting as a CTA. In support of a finding that "Y" need not register as a CTA, you have represented that "Y": (1) is incorporated outside the United States; (2) has its offices outside the United States; (3) will perform its services outside the United States; and (4) does not conduct any business in the United States. Accordingly, based upon your representations, the Division will not recommend that the Commission take any enforcement action against "Y" if it fails to register as a CTA in connection with its selecting "W" as a sub-adviser for the Foreign Funds.

The relief issued by this letter does not excuse "W" or "Y" from compliance with any other applicable requirements contained in the Commodity Exchange Act, as amended (the "Act")^{5/} or the Commission's regulations thereunder. For example, each remains subject to the antifraud provisions of Section 40 of the Act, 7 U.S.C. §60, to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations, and to all other provisions of Part 4. Further, this relief is applicable to "W" and "Y" solely in connection with providing advice to the Foreign Funds.

This letter is based on the representations you have made to us and is subject to the conditions stated above. Any different, changed or omitted facts or conditions might require us to reach a different conclusion. In this regard, we request that you notify us immediately in the event the facts change in any way from those represented to us. Finally, this letter represents the position of the Division of Trading and Markets only. It

^{4/} See, e.g., Division of Trading and Markets Interpretative Letter No. 88-5, [1987-90 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,166 (February 2, 1988).

^{5/} 7 U.S.C. § 1 et seq. (1988 & Supp. IV 1992).

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does not necessarily reflect the views of the Commission or any other office or division of the Commission.

If you have any questions regarding this letter, please contact me or Lawrence Eckert, an attorney on my staff, at (202) 254-8955.

Very truly yours,

Susan C. Ervin
Chief Counsel

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cc: Daniel A. Driscoll, National Futures Association