COMMODITY FUTURES TRADING COMMISSION
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94-81

DIVISION OF
TRADING AND MARKETS

June 9, 1994

Re: Request for Interpretative Letter 1a(5) and 4m(1)

Dear :

This is in response to your letter dated September 30, 1993, as supplemented by telephone conversations with staff of the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), which we have treated as a request that the Division provide relief to "T" if, under the circumstances set forth below, "T" does not register with the Commission as a commodity trading advisor ("CTA").[1/]

Based upon the representations made in your letter, as supplemented, we understand the relevant facts to be as follows. "T", a wholly-owned subsidiary of "U", provides investment advice to and manages the investments of certain pension plans and other assets of "U", its wholly-owned subsidiaries and affiliates (including subsidiaries of subsidiaries) (the "U" Entities"). In this regard, "T" is registered with the Securities and Exchange Commission as an investment adviser under the Investment Advisers Act of 1940. Incidental to its investment function, "T" also provides commodity interest trading advice to the "U" Entities.

Specifically, "T" currently provides or is authorized to provide commodity interest trading advice to the following "U" Entities: (1) nine trust accounts, comprised solely of pension plan assets from two "U" pension plans and two pension plans of the "S" Corporation, a wholly-owned subsidiary of "U"; (2) two

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[1/] Your letter sets forth two potential bases for relief: (a) that "T" is not required to register as a CTA because: (1) it does not hold itself out to the public as a CTA; and (2) it will provide commodity interest trading advice to not more than 15 persons, i.e., the entities for which it will provide commodity interest trading advice should be viewed as one person due to their corporate relationship; or (b) that "T" is not a CTA within the meaning and intent of Section 1a(5) of the Commodity Exchange Act, as amended ("Act"). Given our resolution of your request, it has not been necessary for us to separately consider either of these issues.

Canadian pension plans administered by "V", a wholly-owned subsidiary of "U" separately incorporated in Ontario, Canada (collectively, the "Plans"); and (3) "W", an insurance company and a wholly-owned subsidiary of "X", which itself is a wholly-owned subsidiary of "U", and two of "W's" subsidiaries, both of which are insurance companies. Additionally, you state that "T" provides commodity interest trading advice to the "Y". "Y" is a trust established in the United Kingdom comprised of assets of four pension plans sponsored by "U" affiliates and subsidiaries. Further, you state that "T" may be asked in the future to provide commodity interest trading advice to numerous other "U" Entities.

"T's" activities regarding benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA") are subject to the direction of "U's" Pension Investment Committee. The Pension Investment Committee is established by the Finance Committee of the Board of Directors of "U", which also reviews the actions of the Pension Investment Committee periodically. The Pension Investment Committee currently is comprised of the following officers of "U" or its affiliates: (1) "X", Executive Vice-President and Chief Financial Officer; (2) Executive Vice President and Chief Financial Officer; (3) Treasurer; (4) Vice President and Chief Investment Funds Officer; (5) Vice President, Worldwide Economic Market Analysis; (6) Senior Vice President; (7) Vice President, Corporate Personnel; (8) Vice President, Group Executive Finance; and (9) Assistant Treasurer. Moreover, the Chairman of the Pension Investment Committee as well as certain other Pension Investment Committee members serve on "T's" board of directors.

Advice Provided to Domestic and Foreign Pension Plans Sponsored by "U" Entities

As noted above, "T" is authorized to provide commodity interest trading advice to nine trust accounts comprised solely of pension assets from two "U" pension plans and two pension plans of a "U" subsidiary. Three of the pension plans, the "U" Number 1 Plan (the "No. 1 Plan") the "U" Number 2 (the "Number 2 Plan"), and the Number 3 Plan (the "No. 3 Plan") are defined benefit plans.[2/] The No. 2 Plan and the No. 3 Plan are non-contributory defined benefit plans and the No. 2 Plan has both non-contributory and contributory defined portions. You represent that the benefits of the contributory portion are defined benefits unrelated to the performance of the investments made on behalf of the plan. The fourth pension plan, the Number 4 Plan is a non-contributory defined contribution plan.

2/ We note that because "T" is a fiduciary to these three defined benefit plans, all of which are subject to ERISA, "T" would be excluded from the CTA definition with respect to these three plans pursuant to § 1a(5)(B)(v) of the Act.

Similarly, "T" provides commodity interest trading advice to two Plans and "Y". One of the Canadian Plans, the Canadian Number 1 Plan, is a non-contributory defined benefit plan. The second Canadian Plan, the Canadian Number 2 Plan, and each of the four pension plans comprising the assets of "Y" are defined benefit plans with both non-contributory and contributory portions. You represent that the benefits of the contributory portions are unrelated to the performance of the investments into which the contributions are placed.

To summarize, "T" provides commodity interest trading advice to non-contributory plans (both defined benefit and defined contribution) and to contributory defined benefit plans (the benefits of the contributory portions of which are unrelated to the performance of the investments into which the contributions are placed).[3/] The sponsors of these plans are all "U" Entities.

[3/] We note that the Commission, in making its determination that certain pension plans are not "pools" under Rule 4.5, quoted with approval a commenter on the proposed Rule 4.5 who argued that:

> [A] non-contributory plan, i.e., one in which all contributions are solely made by an employer, can never be a commodity pool, because no funds are solicited from participants and only the employer bears the funding responsibility of the plan if there are losses. Similarly, defined benefit plans are not likely to be commodity pools, even if contributions are permitted, because such plans normally require the employer to cover losses and permit the employer to benefit from excess earnings not needed to fund the benefit. (Emphasis in original).

50 Fed. Reg. 15868, 15873 (April 23, 1985). Based in part on this reasoning, the Commission excluded certain pension plans from the "pool" definition for the purposes of Rule 4.5 including: (1) a noncontributory plan covered by ERISA, whether defined benefit or defined contribution; and (2) a contributory defined benefit plan covered under ERISA, provided that with respect to plans where an employee may make voluntary contributions, no portion of such contribution is committed as margin or premiums for futures or options contracts. Further, in Interpretative Letter No. 93-4, the Division concluded that a contributory defined benefit plan covered under ERISA which allows voluntary employee contributions is not a pool, without regard to whether employee contributions are segregated from other contributions and excluded from use as futures margin and options premiums, provided that: (1) all benefits under the plan from both required

(continued...)

Advice Provided to Accounts Comprised Solely of "U" Assets

"T" also provides commodity interest trading advice to three state regulated insurance companies: "W" and two of "W's" subsidiaries, "R" and "Q". You represent that the accounts advised by "T" are composed solely of assets that are the property of these three insurance companies and are not separate accounts where obligations to policyholders under insurance contracts are conditioned on the performance of the accounts.

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As you know, Section 4m(1) of the Act provides, among other things, that a person need not register as a CTA if such person has not furnished commodity trading advice to more than fifteen persons in the preceding twelve months and does not hold himself out generally to the public as a CTA. You have represented that "T" does not hold itself out generally to the public as a CTA and does not presently advise more than fifteen persons. You state, however, that "T" may in the future be asked to provide commodity trading advice to more than fifteen "U" Entities.

Based upon the representations made in your letter and discussed herein, the Division will not recommend that the Commission take enforcement action against "T" should it provide commodity trading advice to more than fifteen "U" Entities and other persons and fail to register as a CTA, provided that: (A) any "U" Entities to whom it provides commodity trading advice are either: (1) state regulated insurance companies with respect to the general accounts thereof;[4/] or (2) pension plans established for "U" and its wholly-owned subsidiaries and affiliates that are regulated either under ERISA or a comparable foreign regulatory structure and are either noncontributory plans or contributory defined benefit plans; (B) "T" provides advice to no more than fourteen persons that are not "U" Entities described in

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3/ (...continued)
and voluntary employee contributions are defined benefits unrelated to the performance of the investments made on behalf of the plan; and (2) all other requirements for exclusion under Rule 4.5 are otherwise met. CFTC Interpretative Letter No. 93-4, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,549 (December 31, 1992). Commission rules referred to in this letter are found at 17 C.F.R. Ch. I (1993).

4/ Thus, in the event that "T" wishes to provide commodity interest trading advice to insurance company separate accounts, "T" may treat such separate accounts as additional persons as described in clause (B) above for the purpose of the relief provided herein, or otherwise would be required to register as a CTA or to claim relief from such registration in accordance with Rule 4.14(a)(8).

(A) above during any twelve month period; and (C) "T" does not hold itself out generally to the public as a CTA.

This letter is based on the representations you have made to us, as 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 activities of "T" change in any way from those represented to us. Further, this letter represents the position of the Division of Trading and Markets only. It does not necessarily reflect the views of the Commission or any other office or division of the Commission.

The relief issued by this letter does not excuse "T" from compliance with any other applicable requirements contained in the Act or the Commission's regulations thereunder. For example, it remains subject to the antifraud provisions of Section 4o of the Act, 7 U.S.C. §6o, 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.

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