U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5430
Facsimile: (202) 418-5536

95-109

DIVISION OF
TRADING & MARKETS

November 29, 1995

Re: Section 4m(1) of the Commodity Exchange Act ("Act") -- Request for No-Action Position with respect to Failure of United States Investment Advisor, Offshore Investment Management Company and United States Directors of Management Company To Register as a Commodity Pool Operator ("CPO") or as a Commodity Trading Advisor ("CTA") with respect to Offshore Pools

Dear :

This is in response to your letter dated September 1, 1995 to the Division of Trading and Markets (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by a facsimile transmission dated September 11, 1995 from "A" of your office, your facsimile transmissions dated October 16, October 19 and October 26, 1995 and by telephone conversations with Division staff. By your letter, as supplemented, you request relief from: (1) the CPO registration requirements of Section 4m(1) of the Act[1/] on behalf of (the "Adviser"), (the "Management Company"), and the current and future directors of the Management Company; and (2) the CTA registration requirements of Section 4m(1) on behalf of the Adviser and the Management Company, all in connection with the operation of, and the provision of commodity interest trading advice to, three existing funds that are identical except for their respective non-United States investors ("X", "Y" and "Z", referred to collectively herein as the "Funds"), as well as similarly identical funds to be offered in the future (the "New Funds").[2/]

1/ 7 U.S.C. § 6m(1) (1994).

2/ "X" was specifically referred to in your original letter. The two other Funds have been offered subsequent to the date of your original letter. Each of the New Funds will have the same structure, principals, management and investment objectives and policies as the Funds, (e.g., they each will be operated by the

(continued...)

Based upon the representations made in your letter, as supplemented, we understand the relevant facts to be as follows: Each of the Funds is organized as a *fonds commun de placement* ("FCP") under the laws of the Duchy of Luxembourg and has its principal place of business in Luxembourg. As a Luxembourg FCP, the Funds have no directors, but each is managed by a management company (the Management Company). Each Fund is owned by its shareholders. Interests in the Funds will not be held directly or indirectly by any United States person,[3/] and no funds or other capital may be contributed to any of the Funds from United States sources.[4/] The Funds are marketed only outside of the United States, and no marketing efforts will be made that are reasonably likely to result in solicitation of United States persons.[5/] Each Fund will be operated pursuant to the criteria of Commission Rule 4.5(c)(2).[6/] You represent that none of the Funds has engaged in commodity interest trading, and none will do so, absent a favorable response to your relief request.

The Management Company is incorporated under Luxembourg law as a *société anonyme* (limited liability company) with a principal place of business in Luxembourg. It was organized for the sole purpose of managing and operating the Funds (and additional FCPs). The Management Company is owned 99.98% by the Adviser and .02% by one of its directors, "B". The Management Company has appointed "C", a citizen of Luxembourg, to serve as its general manager for an unspecified term, and the Management Company will act principal-

---

2/ (...continued)
Management Company and advised by the Adviser). Like the Funds, the New Funds will be marketed exclusively to (and ownership of interests will be restricted to) non-United States persons.

3/ For the purposes of your request, you use the definitions of "United States" and "United States person" adopted by the Division in Interpretative Letter No. 92-3, [1990-92 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,221 (January 29, 1992).

4/ Indeed, you represent that the Fund's governing documents prohibit ownership of shares of the Fund by United States persons.

5/ You state that the Fund's offering document permits interests to be marketed anywhere outside the United States.

6/ Commission rules referred to in this letter are found at 17 C.F.R. Ch. I (1995), as amended by 60 Fed. Reg. 38146 (July 25, 1995).

ly through the general manager. It is anticipated that any successor general manager will be a non-United States person.[7/]

The board of directors of the Management Company is comprised of five members, three of whom are United States persons ("B", "D", and "E"). In addition to holding an ownership interest in the Management Company, "B" is also Chairman of the Board and Chief Executive Officer of the Adviser, as well as Chairman of the Board, Chief Executive Officer and President of the Adviser's immediate parent "V". "D" is General Counsel, Senior Vice President and Secretary of "V", its subsidiaries and its family of funds. "E" is a member of various committees of "V's" board, and he formerly served as President of "W"[8/] and was a senior officer of "V" and certain of "V's" operating companies.

The non-United States members of the Management Company's board of directors are: (1) "F", an officer of "S", and (2) "G", an employee of "T", the Japanese sponsor and distributor which markets the Funds' shares in Japan. All meetings of the board of directors are conducted outside of the United States.

From time to time, the composition of the Management Company's board of directors and the proportion of United States directors may change. In support of your request, you state that each of the Management Company's United States directors is an officer or director of the Adviser and/or "V" or a wholly-owned subsidiary of "V", and that none of the United States directors: (1) engages or will engage in commodity interest trading; (2) supervises or will supervise any person engaged in commodity interest trading; (3) solicits or will solicit participations in the Funds; (4) is subject to statutory disqualification under Section 8a(2) or 8a(3) of the Act;[9/] or (5) is affiliated with any Commission registrant.

The Adviser, a United States person, is wholly owned by "V". The Adviser is registered with the Securities and Exchange Commission as an investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act"), and it provides investment

---

7/ "C" is an officer of "S", which serves as the Fund's custodian, its paying agent and registrar, and its transfer and administrative agent.

8/ "W" serves as the principal underwriter of "V's" United States funds.

9/ 7 U.S.C. § 12a(2) or 12a(3) (1994).

advisory services to investment companies and private accounts.[10/] The Management Company has appointed the Adviser to serve as the Funds' investment adviser.

The investment objective of the Funds is to seek income while preserving capital through investment in fixed and floating-rate securities issued by United States corporations, mortgage-backed and asset-backed securities, and securities issued by the United States government, its agencies and instrumentalities. The Fund will trade commodity interests within the limits set forth in Rule 4.5(c)(2). They will be operated entirely outside of the United States and they are offered and sold strictly to non-United States persons. Although the majority of the directors of the Management Company are United States persons (and principals of the Adviser and of its parent, "V"), as noted above, none of them engages in commodity interest trading. The Funds' investment and trading activities will be directed by a United States registered investment adviser (the Adviser) that otherwise provides commodity interest trading advice solely to United States registered investment companies pursuant to the exemption provided under Rule 4.14(a)(8).

CPO Registration

The facts presented in your letter, as supplemented, indicate that the Management Company will be functioning as the Funds' CPO.[11/] Based upon the representations you have made to us, it appears that relieving the Management Company from the requirement

---

10/ On September 20, 1988 the Adviser filed with the Commission a notice of exemption pursuant to Rule 4.14(a)(8) with respect to providing commodity interest trading advice to certain domestic registered investment companies. The notice of exemption was filed under the Adviser's previous name "R", which was changed to "P" by charter amendment filed April 7, 1995. The Adviser does not otherwise hold itself out as a CTA.

11/ Although you request CPO registration relief with respect to the Management Company's directors and the Adviser, we do not believe this relief is necessary. The Management Company is acting as the CPO of each of the Funds, and therefore, there is no need to treat the board of directors or any member thereof as a CPO. Neither the Adviser nor any of the Management Company's United States directors is performing functions typically performed by CPOs, e.g., soliciting, accepting or receiving property from others for interests in an investment vehicle that will engage in commodity interest trading, or exercising hiring and firing authority over a Fund's CTA, or selecting a Fund's futures commission merchant.

to register as a CPO would not be contrary to the public interest. Accordingly, the Division will not recommend that the Commission take any enforcement action against the Management Company for failure to register as a CPO under Section 4m(1) of the Act. This position is based upon, among others, your representations that: (1) the Management Company and its general manager will confine all of the activities of the Funds to areas outside the United States; (2) no direct or indirect participant in any of the Funds is or will be a United States Person and no marketing activity will be conducted that is reasonably likely to result in the solicitation of United States persons to purchase interests in any of the Funds; (3) no funds or capital have been or will be contributed to any of the Funds, directly or indirectly, from United States sources; (4) at all times, each of the directors of the Management Company who is a United States person will also be an officer or director of the Adviser and/or "V" or a wholly-owned subsidiary of "V"; (5) none of the directors of the Management Company engages in or will engage in trading commodity interests, or in supervising such trading; (6) none of the directors is subject to statutory disqualification under Section 8a(2) or 8a(3) of the Act; and (7) the Funds will be operated in a manner consistent with Rule 4.5(c)(2). This position is, however, subject to the condition that the Management Company will submit to such special calls as the Division may make of it to assure compliance with the terms of the relief granted herein.

CTA Registration

Further, based upon the representations you have made to us, it appears that granting the requested relief from the requirement to register the Adviser as a CTA would not be contrary to the public interest.[12/] Accordingly, the Division will not recommend that the Commission take any enforcement action against the Adviser for failure to register as a CTA under Section 4m(1) of the Act. This position is based upon, among others, your representations concerning your request for CPO registration relief set forth above, and, further, that: (1) the Adviser is registered as an investment adviser under the Advisers Act; (2) except for those clients with respect to which the Adviser has claimed exemption under Rule 4.14(a)(8), the Adviser will restrict its providing of

---

12/ Although you also request CTA registration relief with respect to the Management Company, we do not believe that its activities would require registration as a CTA. This is because, based upon your representations, it does not appear that the Management Company will be providing commodity interest trading advice within the meaning and intent of the statutory definitions of the term "commodity trading advisor" in Section 1a(5) of the Act, 7 U.S.C. § 1a(5) (1994).

commodity interest trading advice to the Funds, and will employ only such strategies as are consistent with the requirements of Rule 4.5(c)(2); and (3) the Adviser does not otherwise hold itself out as a CTA. This position similarly is subject to the condition that the Adviser will submit to such special calls as the Division may make of it to assure compliance with the terms of the relief granted hereby.

Continued Exemption under Rule 4.14(a)(8)

We note that upon first providing commodity interest trading advice to any of the Funds in the manner described in your letter, as supplemented, the Adviser will no longer be complying with all of the conditions set forth in Rule 4.14(a)(8).[13/] However, we note that the Adviser: (1) will continue to be registered as an investment adviser; (2) will not be holding itself out as a CTA; and (3) will be employing only such trading strategies as are consistent with eligibility status under Rule 4.5. Based upon the foregoing, the Division will not recommend that the Commission take any enforcement action against the Adviser for failure to register as a CTA based solely upon the Adviser's failure to comply with all of the criteria set forth in Rule 4.14(a)(8) in connection with its activities on behalf of the Funds as noted above.

This letter is based on the representations that have been made to us and is subject to compliance with the conditions set forth above. Any different, changed or omitted facts or conditions might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event that the activities of the Adviser, the Management Company, the Funds, or any of the directors of the Management Company change in any way from those as represented in your letter, as supplemented. This letter is applicable to the Management Company and the Adviser solely in connection with the operation of the Funds.[14/]

13/ For example, Rule 4.14(a)(8)(i)(A) restricts the entities to which commodity interest trading advice may be provided to those that have been excluded from the definition of "pool" under Rule 4.5 or qualifying entities under Rule 4.5 for which a notice of eligibility has been filed. The Funds and the New Funds do not fit any of the categories set forth in Rule 4.5.

14/ Your letter, as supplemented, seeks relief with respect to "any other fund operated under circumstances similar to" those set forth in your letter. The Division may extend the coverage of the relief provided by this letter in connection with the operation of one or more New Funds on a fact-specific, case-by-case basis, and we invite you to contact us for guidance at such time as the facts specific to any such New Fund are known.

We note that each of the Management Company, the Adviser and each of the directors of the Management Company remains subject to the antifraud provisions of Section 4o of the Act[15/] and to all otherwise applicable provisions of the Act and the Commission's regulations thereunder, e.g., the reporting requirements for traders set forth in Parts 15, 18 and 19, and to all other provisions of Part 4.

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 of any other division or office of the Commission. If you have any questions concerning this letter, please contact me or Christopher W. Cummings, an attorney on my staff, at (202) 418-5445.

Very truly yours,

Susan C. Ervin
Chief Counsel

15/ 7 U.S.C. § 6o (1994).