95-71

COMMODITY FUTURES TRADING COMMISSION
2033 K Street, NW, Washington, DC 20581
(202) 254 - 8955
(202) 254 - 8010 Facsimile

DIVISION OF
TRADING AND MARKETS

July 19, 1995

Re: Conditions for Relief from Introducing Broker Registration -- Section 4d of the Act

Dear :

This is in response to your letter dated April 28, 1995. In your letter, you requested that the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission") amend certain conditions that were set forth in a letter dated April 6, 1995, to you from the Division, in connection with the activities of "X" (the "Company") and "A". The conditions were imposed in order for the Company to obtain relief from registering as an introducing broker ("IB") pursuant to Section 4d of the Commodity Exchange Act ("Act").[1/] You requested that the Division grant such relief in a letter dated March 21, 1995.[2/]

The Division granted the relief from registration in its letter dated April 6, 1995, subject to certain conditions which certain parties were to address in a letter to the Division and the NFA. Specifically, the relief[3/] was granted:

1/ 7 U.S.C. § 6d (1994). The Act is found at 7 U.S.C. §§ 1 et seq. (1994). Commission rules referred to herein are found at 17 C.F.R. Ch. I (1994).

2/ As fully discussed in the March 21, 1995 letter, "A" is registered as an associated person ("AP") of the Company, a registered commodity trading advisor ("CTA"); employed as an AP of "Y", an "W" corporation and a registered introducing broker ("IB"); and registered and engaged in business as a sole proprietorship CTA.

3/ We note that the legal issues raised and addressed by the Division's letter of April 6, 1995 do not include an analysis under federal, state and various local statutes and ordinances relating to the treatment for taxation purposes of such monies as income

(continued...)

> subject to the condition that the Company file with the Division and the National Futures Association a letter, signed by "A" and "B" in their individual capacities and by a duly authorized officer of the Company, "X" and "Y", stating that (1) with respect to any actions taken by "A", or omitted by "A", in connection with "A's" employment as an AP of "X", the Company and "X" shall be jointly and severally liable, and (2) with respect to any action taken by "A", or omitted by "A", in connection with "A's" actions as an individually registered CTA, the Company and "A" shall be jointly and severally liable.[4/]

In your letter dated April 28, 1995, you requested that "X" and "Y" be eliminated as required signatories to such a letter.

The representations to be stated in the letter were imposed as a basis for granting relief from otherwise applicable regulatory requirements. A person who chooses to engage in futures activities that include the receipt of customer funds must meet minimum financial requirements in addition to meeting minimum fitness requirements. In addition, generally parties are subject to registration requirements, and their activities for this purpose are analyzed, in accordance with their actual business practices and activities, instead of their de jure classification. As with other types of legal persons, a corporate person generally does not receive compensation for services it has not performed. This factor, together with the general legal principle that a corporation generally is not liable for the debts of its stockholders, serves as the basis for the discussion and conclusions that follow.

First, in the case of "A" as an employee of "Y", income (or assets) that should be paid to him as an employee for activities performed as an AP of "Y", an IB, according to your representations, will instead flow directly to and be held in the name of the Company. The amount of payments to the Company attributable to "A's" unrelated services as an AP performed for a different business may be very large relative to the actual business activities performed by the Company. If one of "Y's" clients were

---

3/ (...continued)
attributable to a corporation when, in fact, such income was either earned as an employee of a second corporation or by a sole proprietorship.

4/ The Company is wholly owned by "Z". "A" and "B" each own fifty percent of the stock of "Z".

to sue "Y" and "A" for an act of fraud or other wrongdoing and "A" were found liable, monies held in the corporate accounts of the Company, including monies that may be directly attributable to payments from the defrauded client to "Y" for services performed by "A" as an "Y" AP, could be attempted to be shielded, as Company assets, from assets that could be used to satisfy the judgment. For this reason, if "A" wishes to direct to the Company income derived from his activities as an AP of "Y", "Y" and the Company must agree in writing to be jointly and severally liable with "A" for all the activities in which either the Company or "A" as an AP engage, in order that wronged parties, if any, may have a reasonable chance of obtaining a recovery. Persons associated with more than one registrant have in the past been permitted, in some circumstances, to do so, subject to the condition that both sponsoring entities acknowledge joint and several liability for the acts or omissions of the sponsored persons. Thus, the condition imposed upon the various entities with whom "A" is associated was designed to provide a protection against unfair use of the arrangement proposed in your letter that is less onerous than compliance with otherwise applicable requirements and consistent with relevant precedent.

Second, in the scenario you contemplate, in the case of "A" as a sole proprietorship, income (or assets) that should be held in his name for activities as a CTA performed in his name as a sole proprietor instead shall flow directly to and be held in the name of the Company. For the same reasons stated above with respect to "A's" stream of income attributable to his "Y" employee activities, if "A" wishes to direct to the Company the income derived from his activities as a sole proprietor CTA, the Company must agree in writing to be jointly and severally liable with "A" for all the activities in which either the Company or "A" engage, in order that wronged parties, if any, may have a reasonable chance of obtaining a recovery.

The Division does agree, however, that in lieu of "Z" being a signatory to the letter acknowledging the joint and several liability of various parties as a condition to the relief set forth in the Division's letter dated April 6, 1995, "Z" may acknowledge its agreement to the conditional relief, by providing a shareholder resolution (if signed by both "A" and "B" as shareholders) whereby "Z" authorizes the President of the Company to execute the letter on behalf of the Company ("Shareholder Resolution"). The Division agrees to the above, provided that the Shareholder Resolution is expressly incorporated by reference into the letter as Exhibit A thereto and in fact is so attached.

Finally, the terms of this letter do not apply to any relief previously afforded to any other person. If you have any questions concerning the foregoing, please contact me or Sharon Zackula, a member of my staff, at (202) 254-8955.

Very truly yours,

Susan C. Ervin
Chief Counsel