



# U.S. COMMODITY FUTURES TRADING COMMISSION

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RECORDS SECTION

DIVISION OF  
TRADING & MARKETS

95-95

October 30, 1995

RE: Employee  
Affiliate 1  
Affiliate 2  
Affiliate 3 -- Request for Relief From Registration As  
CPOs

and

Employee  
Affiliate 4 -- Request for Relief From Registration of  
Employee As an AP

Dear :

This is in response to your two letters dated December 13, 1994, and a third dated March 24, 1995 (respectively, "Letter One," "Letter Two," and "Letter Three," and, collectively, "Letters"), as supplemented by telephone conversations with the staff of the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission").

Employee, an employee of "Affiliate 1" and other "Corp." affiliates, has decided to acquire a residence in the United States and reside there for part of the year, while also maintaining a residence in "W". This proposed action has triggered certain questions relating to "Employee" and various "Corp." affiliates and commodity pools for which "Employee" and the "Corp." affiliates provide services. First, in Letter One, you requested that the Division not recommend that the Commission take any enforcement action against any of the following persons for failure to register as commodity pool operators ("CPOs") pursuant to §4m(1) of the Commodity Exchange Act, as amended (the "Act")<sup>1/</sup>: (1) "Employee"; (2) "Affiliate 1"; (3) "Affiliate

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<sup>1/</sup> 7 U.S.C. § 6m(1) (1994). The Act is found at 7 U.S.C. §§ 1 et seq. (1994). Unless otherwise noted, Commission rules referred to hereinafter are found at 17 C.F.R. Ch. I (1995).

2"; and (4) "Affiliate 3"<sup>2/</sup> Second, in Letters Two and Three, you requested that the Division not recommend that the Commission take any enforcement action against "Affiliate 4", a registered CPO,<sup>3/</sup> or "Employee", if "Employee" fails to register as an associated person ("AP") of "Affiliate 4", pursuant to Section 4k(2) of the Act<sup>4/</sup> and Rule 3.12. Third, in Letters One and Three, you requested, alternatively, that, with respect to certain funds, if "Affiliate 4" were deemed to be a CPO of such funds, that the Division grant exemptive relief from Commission Rules 4.21,<sup>5/</sup> 4.22 and 4.23 (a)(10) and (a)(11).<sup>6/</sup> Finally, in Letters One and Three, you requested, alternatively, with respect to certain funds, if "Affiliate 4" were deemed to be a CPO of such funds, that the Division grant exemptive relief from the requirement in Rule 4.23<sup>7/</sup> that the original books and records of such funds be kept at "Affiliate 4".

In your Letters, as supplemented, we understand the relevant facts to be as follows regarding: (i) the three categories of futures investment funds (the sixteen Sponsor Funds, the Two Caymans Funds and the two "Affiliate 4" Offshore Funds, all as defined and described below), and (ii) the activities of the various "Corp." affiliates and "Employee" in connection therewith.

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<sup>2/</sup> "Affiliate 2" is a "A Corp." and is wholly owned by "Corp.", a Delaware corporation, and the ultimate parent of all the entities set forth in this note. "Affiliate 2", a corporation organized and existing under the laws of the Cayman Islands ("Caymans"), is wholly owned by "Affiliate 6", a Delaware corporation, which in turn is wholly owned by "Affiliate 1". "Affiliate 3" is organized and existing as a corporation under the laws of "G", and is wholly owned by "Corp."

<sup>3/</sup> "Affiliate 4", a Delaware corporation, is wholly owned by "Affiliate 1".

<sup>4/</sup> 7 U.S.C. § 6k(2) (1994).

<sup>5/</sup> 17 C.F.R. § 4.21 (1995), as amended by 60 Fed. Reg. 38146 (July 25, 1995) (to be codified at 17 C.F.R. §§ 4.21, 4.24 and 4.26).

<sup>6/</sup> 17 C.F.R. § 4.23 (1995), as amended by 60 Fed. Reg. 38146 (July 25, 1995) (to be codified at 17 C.F.R. § 4.23).

<sup>7/</sup> Id.

THE FUNDS

The Sixteen Sponsor Funds

"Employee", as an employee of two "Corp." affiliates, "Affiliate 1" and "Affiliate 2", provides various financial, technical and administrative services to ten "W" companies ("Sponsors") that sponsored the establishment of sixteen commodity pools ("Sponsor Funds"). Also, pursuant to the proposed arrangement described in greater detail below, "Employee" will provide certain services to the Sponsor Funds as an employee of "Affiliate 4". The pools are described below.

"Sponsor 1" sponsored "SF1", a Caymans limited partnership ("LP"). "Sponsor 2" is the Sponsor of "SF2", a Bermuda LP, and "SF3", a Caymans LP. "Sponsor 3" also sponsored two funds: "SF4", a Caymans LP, and "SF5", a Caymans LP. "Sponsor 4" sponsored "SF6", a Caymans LP, and "SF7", a Caymans LP. "Sponsor 5" is the full Sponsor of three funds, "SF8", a Caymans LP, "SF9", a Caymans LP, and "SF10", a Caymans LP, and the partial Sponsor of "SF11", a Caymans corporation operated pursuant to identical bilateral contracts between the fund and each investor. The other two Sponsors of "SF11" are "Sponsor 6" and "Sponsor 7". "Sponsor 7" is also the Sponsor of "SF12", a Caymans LP. "Sponsor 8" sponsored "SF13", a Caymans LP, and "SF14", a Caymans LP. "SF15", a Caymans LP, was sponsored by "Sponsor 9", and "SF16", a Caymans LP, by "Sponsor 16".

Sponsor Funds Investors and Structure. The Sponsor Funds do not have United States investors. The terms of their LP agreements preclude sale or assignment of a partnership interest in the United States or to a United States person, as defined in CFTC Interpretative Letter No. 92-3.<sup>8/</sup> Persons are solicited outside the United States.

With one exception, the Sponsor Funds are organized as LPs under the laws of the Caymans or Bermuda. The general partner of each fund ("GP Co."), in each case a Caymans entity,<sup>9/</sup> is either the Sponsor or a company controlled by the Sponsor.<sup>9/</sup> For each

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<sup>8/</sup> [1990-92 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,221 (January 29, 1992).

<sup>9/</sup> You represent that the GP Co. of all fifteen of the Sponsor Funds organized as LPs is controlled by the Sponsor. "Affiliate 2" possesses a limited equity stake in such GP Cos., but one which is insufficient to allow "Affiliate 2" to exercise any control. First, for fourteen of the fifteen Sponsor Funds structured as LPs,  
(continued...)

Sponsor Fund, trading activity is conducted by a wholly-owned subsidiary ("Trading Co."), also, in each case, organized under the laws of the Caymans and wholly owned by the Sponsor Fund.

"SF11", the Sponsor Fund that is not organized as an LP, is a Caymans corporation. It is operated, and its funds are invested, as follows. Each investor and the corporation enter into a bilateral agreement. You represent that these agreements are identical. The agreement provides that the corporation will invest the investor's funds according to a specified program and will return the investment amount to the investor, plus gains or minus losses. This structure is a "W Legal Structure" under the laws of "W".<sup>10/</sup> At the time of organization of "SF11", 50% of the start-up capital was contributed by "Affiliate 2"; the other 50% was contributed by three Sponsors. You represent that all the directors of "SF11" are individuals affiliated with and selected by the three Sponsors. Thus, you represent that "Affiliate 2" exercises no control over "SF11".

The Sponsors are classified by you as being a commercial lease finance company<sup>11/</sup>, a trading company<sup>12/</sup>, or, in two cases, a corporation engaged, in part, in the business of buying and selling futures contracts and so licensed in "W". However,

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<sup>9/</sup> (...continued)

as to the GP Co., "Affiliate 2" owns less than 25% of the class of non-voting shares, with the Sponsor owning all the voting stock and the balance of the non-voting shares. Second, for the remaining Sponsor Fund structured as an LP, "SF16", "Affiliate 2" and the Sponsor each owns 50% of the voting shares of the GP Co. but you represent that the Sponsor exercises control over the GP Co. because the two directors of the GP Co. are employees of the Sponsor. In this regard, you represent that "Affiliate 2" and the Sponsor have agreed that the Sponsor would select the directors of the GP Co. Thus, although the possibility of "Affiliate 2" exercising some control exists as a matter of law, you represent that, by an understanding or an agreement that is not set forth in writing, "Affiliate 2" has agreed to waive its right to exercise such control.

<sup>10/</sup> Notwithstanding the position we are taking below, it appears that in operating "SF11", the Sponsors thereof may be in violation of Rule 4.20. In this regard, we request that you seek further guidance from us.

<sup>11/</sup> "Sponsor 1", "Sponsor 4" and "Sponsor 5".

<sup>12/</sup> "Sponsor 2", "Sponsor 3", "Sponsor 8", "Sponsor 9" and "Sponsor 10".

neither of the latter entities is licensed as a futures commission merchant ("FCM") in the United States.<sup>13/</sup> You indicated that you believe that the Sponsors are "not primarily engaged in establishing investment vehicles." In addition, you stated that you believe that for "each of the Sponsors, except "Sponsor 7", establishment of investment vehicles is an insignificant portion of its overall business."

#### Two Caymans Funds

"Employee", through various "Corp." affiliates ("Affiliate 2", "Affiliate 3" and "Affiliate 4"), is providing or is expected to provide substantial services to two commodity pools: "M Fund" and "C Fund" (collectively, "Two Caymans Funds").<sup>14/</sup> (Each of the pools is organized as a Caymans LP.) Like the Sponsor Funds, the Two Caymans Funds also do not have any United States investors. In addition, the terms of their LP agreements preclude sale or assignment of a partnership interest in the United States or to a United States person, as defined in the Commission's Interpretative Letter No. 92-3. You represent that potential investors are solicited outside the United States.

"M Fund". "M Fund" LP's general partner is "Affiliate 2" You specifically represented in a telephone conversation with Division staff on August 17, 1995 that although "M Fund" is not scheduled to be liquidated in the near future, the pool is a closed fund, and there is no solicitation occurring for interests in "M Fund". At that time, you also represented that "Affiliate 2", although still the general partner of the fund, intended to "retire" as the general partner and instead assume a consulting role, similar to the one "Affiliate 2" has now undertaken with respect to the operation of "C Fund" (renamed as "C Fund"), as described below (see, infra, "Services "Employee" Provides to the Two Caymans Funds").

"C Fund" (renamed as "C Fund"). You represent that "Affiliate 3" was the general partner of "C Fund" until June 30,

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<sup>13/</sup> "Sponsor 7" fully sponsored one fund, "SF12", and is one of three Sponsors of a second fund, "SF11", the "W Legal Structure". "Sponsor 6" is also one of the three Sponsors of "SF11".

<sup>14/</sup> Initially, you asked that the Division consider as part of your request the activities of "Employee" and various "Corp." affiliates in connection with a third commodity pool, "D Fund". During the pendency of your request, however, "D Fund" was liquidated. Therefore, the Division declines to further analyze or discuss activities of persons in connection with the former fund.

1995. However, as of July 1, 1995, a new general partner was named, "CGP", a corporation organized under the laws of the Caymans.<sup>15/</sup> Previously, you represented that "Affiliate 3", as the general partner, had granted the power of attorney to "Employee", in his capacity as a "Affiliate 2" officer and director, for all matters relating to the operation of "C Fund" (renamed as "C Fund"). On August 17, 1995, you represented that the power of attorney that "Employee" possessed with respect to "C Fund" had been terminated, and that his role in directing the operations of "C Fund" (renamed as "C Fund") would be similar to that role described below with respect to "Employee's" provision of services to the sixteen Sponsor Funds (see, infra, "Services "Employee" Provides to the Two Caymans Funds").

You represent that, at the time each person invests in "C Fund" (renamed as "C Fund"), his investment is designated as a separate series. In addition, the pool investor selects into which of the two "Affiliate 4" Offshore Funds (described below) his investment in "C Fund" will be reinvested. Thus, you represent that all of the funds of "C Fund", by reinvestment, flow through and are managed and traded by one of the two "Affiliate 4" Offshore Funds for which "Affiliate 4" acts as the CPO.

Two Other Offshore Funds For Which "Affiliate 4" Acts As CPO

"Affiliate 4", a registered CPO, is the CPO for two commodity pools, "A Fund", and "B Fund", both Caymans corporations (collectively, the "Affiliate 4" Offshore Funds").<sup>16/</sup> You represent that these funds do not have United States investors. You also represent that some of the monies invested in various Sponsor Funds have been invested, by the GP Cos. of the Sponsor Funds, in one or more of the "Affiliate 4" Offshore Funds. You represented that "Employee" was one of the persons soliciting such Sponsor Funds to invest in the "Affiliate 4" Offshore Funds (see, infra, "Services "Employee" Will Provide to the "Affiliate 4" Offshore Funds").

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<sup>15/</sup> The sole shareholder of "C Fund" is "Bank", a bank chartered under the laws of the Caymans ("Bank"), as trustee, for a charitable trust. "Affiliate 3" invited "Bank" to establish the trust, and "Bank" appointed four "Bank" executives to serve as the directors of "CGP". The beneficiaries of the trust have not been selected but, in the future, will be chosen from among the charities that are "qualified charities" under Caymans law.

<sup>16/</sup> You represented that "Affiliate 4" has obtained Rule 4.7 relief for the "Affiliate 4" Offshore Pools.

"Employee"'S DUTIES WITH RESPECT TO EACH OF THE THREE GROUPS OF FUNDS.

"Employee" is a "S" citizen and a Vice President of "Affiliate 1". He is also the sole officer possessing managerial responsibility for "Affiliate 2" and its sole director. You represent that it is planned that he will become an officer of "Affiliate 4". "Employee" has no other position with any other "Corp." affiliate. You represent that "Employee" is not subject to any statutory disqualification pursuant to Section 8a of the Act.<sup>17/</sup>

"Employee" now resides and is domiciled in "W". It is proposed that "Employee", for the time being, establish an additional residence in California. "Employee" will continue to maintain his domicile and a residence in "W". In supplemental conversations with Division staff, you represented that "Employee" will spend approximately four months (approximately 120 days) outside the United States. Therefore, he will spend approximately eight months (approximately 245 days) of the year in the United States.<sup>18/</sup>

In connection with the commodity pools described above, the specific services "Employee" performs, or will perform, on behalf of various "Corp." affiliates, are described below.

Organizational Services Provided to the Sixteen Sponsor Funds. "Employee" is in charge of a business unit of the "Affiliate 1" "Foreign Financial Center" Branch called the "International Group". His business duties with the "International Group" require that he frequently visit and otherwise contact financial service providers in the United States and Europe during the work-day relating to the sixteen Sponsor Funds.

Prior to and at the commencement of operations of a Sponsor Fund, the "International Group" provides the following services to the Sponsor and Sponsor Funds: (i) advising on fund structure; (ii) assisting in drafting a limited partnership agreement and an offering circular; (iii) advising on the negotiation of contracts with potential service providers to the Sponsor Fund; (iv) responding to questions the Sponsor may raise during its review of the trading manager's proposed selection of trading advisors for the Sponsor Fund; and (v) accompanying the Sponsor

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<sup>17/</sup> 7 U.S.C. § 12a (1994).

<sup>18/</sup> You represent that based on the number of days that "Employee" would be in residence in the U.S., for U.S. income tax purposes, "Employee" will be considered a "resident" of the United States.

at meetings outside the United States with potential investors, who are not United States persons, to assist in answering questions posed to the Sponsor by such persons about the Sponsor Fund.

Continuing Operational Services Provided to the Sixteen Sponsor Funds. Following the commencement of operations of a Sponsor Fund, the Sponsor Fund is provided technical and consulting assistance through a second "Corp." affiliate, "Affiliate 2" "Employee" is the sole director of "Affiliate 2" and, as you indicated in telephone conversations with Division staff, provides such services, or relies on personnel located at the "Affiliate 1" "Foreign Financial Center" Branch to assist him in providing such services. For "Affiliate 2", "Employee" visits and otherwise contacts United States and European financial service providers for a variety of reasons. In several cases, "Employee" provides assistance to executives within various Sponsors in their dealings with United States service providers to assure that technical information has been properly transmitted and translated in both English and "W" with total accuracy.

Under the terms of various consulting agreements between "Affiliate 2" and the GP Co. of each Sponsor Fund, the types of services "Affiliate 2" provides are as follows: (i) analyzing all trading results of each Sponsor Fund; (ii) checking the accuracy of commissions and fee calculations made by service providers to the Sponsor Funds; (iii) assisting in drafting communications to the investors; (iv) serving as a communication liaison between various Sponsors and United States service providers; (v) advising various GP Cos. and Trading Cos. concerning proposed amendments of contracts with service providers; and (vi) advising various Sponsor-controlled trading managers, who are registered CTAs, by assisting in the interpretation of information that is presented to the Sponsor Funds.

Impact that "Employee's" Establishment of Residence Will Have On Type of Services Provided to Sixteen Sponsor Funds. According to your representations in supplemental telephone conversations, when "Employee" has established residence in the United States, the following changes will occur in the method by which services are provided by "Affiliate 2" to the Sponsor Funds. "Affiliate 2" will enter into a service contract with "Affiliate 4" to provide certain services to "Affiliate 2" related to the Sponsor Funds ("Service Contract I"). Thus, when "Employee" is physically located in the offices of "Affiliate 4", he will perform those services listed above under the caption "Continuing Operational Services Provided to the Sixteen Funds," ultimately for the benefit of "Affiliate 2", but as an employee of "Affiliate 4" pursuant to Service Contract I, rather than as the director of "Affiliate 2" You represent that these changes



are for the purpose of obtaining certain United States tax treatment of "Affiliate 2."<sup>19/</sup>

Services "Employee" Provides to the Two Caymans Funds. With respect to "M Fund", you represent that "Affiliate 2" generally operates the commodity pool, and that such duties previously included solicitation and directing the investment of the pool funds. "Employee", as virtually the only employee of "Affiliate 2", thus operated as an AP of a CPO. However, prior to "Employee"'s transfer to the United States, all such activities took place offshore in relation to non-U.S. investors. Moreover, as indicated above, you represent that as of at least August 1995, neither "Employee" nor anyone else is engaged currently in soliciting investors to participate in "M Fund".

With respect to "C Fund" (renamed as "C Fund"), "CGP" is the general partner. You represent that the power of attorney that "Employee" previously possessed with respect to "C Fund" has been terminated. "Employee" will instead act in the following role. "CGP", as the general partner, has entered into a consulting agreement with "Affiliate 2" pursuant to which, "Employee", as a director of "Affiliate 2", will provide consulting services to "CGP". These are the same types of services provided, and the legal structure under which such services are so provided, by "Employee", through "Affiliate 2", to the sixteen Sponsor Funds. Upon "Employee"'s move to the U.S. and for the time "Employee" spends onshore, "Affiliate 2" will enter into another service agreement (similar to that entered into between "Affiliate 4" and "Affiliate 2" for each of the sixteen Sponsor Funds) ("Service Contract II") that will transfer the obligation to perform such services to "Affiliate 4" from "Affiliate 2". Thus, while "Employee" is in the U.S., for "C Fund" (renamed as "C Fund"), "Employee" will provide services to "CGP" as an employee of "Affiliate 4" pursuant to Service Contract II, and while offshore, he will provide the same services to "CGP", the general partner of "C Fund", as a director of "Affiliate 2". However, you represent that "Employee" will not engage in any solicitation of potential investors in "C Fund" (renamed as "C Fund") while in the United States.

You represent that although the various "Corp." affiliates would prefer that "Employee's" United States activities be regarded as insubstantial, "Employee" has agreed to be voluntari-

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<sup>19/</sup> In supplemental conversations with Division staff, you explained that "Affiliate 2" wishes to avoid an interpretation by the Internal Revenue Service that "Affiliate 2" is engaged in a U.S. trade or business.

ly listed as a principal of "Affiliate 4", but not to be registered as an AP.

Services "Employee" Will Provide to the "Affiliate 4" Offshore Funds. As noted previously, some of the monies invested in various Sponsor Funds has been invested, by the GP Cos. of the Sponsor Funds, in one or more of the "Affiliate 4" Offshore Funds. You represent that "Employee", acting outside the United States, has directly solicited non-United States persons, such as certain Sponsors of the Sponsor Funds, to place assets in the "Affiliate 4" Offshore Funds. However, you also represent in Letter Two that "Employee", while in the United States, would not communicate with such investors, and in the event that a potential investor attempted to communicate with "Employee" while he was in the United States he would refer the investor to a registered AP of "Affiliate 4". On August 17, 1995, you represented that while on U.S. soil, "Employee" will not enter into communication with such investors by telephone, fax or otherwise. He would continue to participate in meetings with potential investors of the "Affiliate 4" Offshore Funds at offshore locations.

In addition to the duties specifically described, you represent that "Employee" would perform various other administrative duties for "Affiliate 4" while employed there. You represent that "Affiliate 4's" main business is to act as a trading manager and CPO for the "Affiliate 4" Offshore Funds, and that "Employee", while in the United States, would have some involvement in the functioning of the two "Affiliate 4" Offshore Funds, but not as a principal. Although you represent that he will not act as principal, you have offered to list him as a principal, in order that his background may be scrutinized. However, you represent that "Employee's" primary responsibilities, while in the U.S. at "Affiliate 4", will generally be performing as an employee of "Affiliate 4" pursuant to Service Contracts I and II the services that "Affiliate 2" provides to the sixteen Sponsor Funds and the Two Caymans Funds.

REQUESTED RELIEF REGARDING DISCLOSURE, REPORTING AND BOOKS AND RECORDS.

If "Affiliate 4" were required to be listed as the registered CPO with respect to either of the Two Caymans Funds, in Letters One and Three you requested that the Division grant "Affiliate 4" exemptive relief from the disclosure, reporting and certain recordkeeping requirements of Rules 4.21, 4.22 and 4.23 (a)(10) and (a)(11). In support of this request, you have made the representations that the Division requires in connection with issuance of this relief to the United States registered CPOs of

offshore commodity pools that have no United States persons as participants.<sup>20/</sup>

Finally, if "Affiliate 4" were required to be listed as the registered CPO with respect to either of the Two Caymans Funds, in Letters One and Three, you asked that "Affiliate 4" not be required to maintain the original books and records of such funds at its main business office, as required by Rule 4.23. As a basis for seeking such relief under Rule 4.23, you represented that, upon the request of a Commission representative, "Affiliate 4" would obtain the original books and records from the fund's main office for inspection at the place specified by the Commission's representative within one hundred twenty hours after the request is made.

#### ANALYSIS AND RELIEF

In Section 1a(4) of the Act,<sup>21/</sup> a CPO is defined as "any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market, except that the term does not include such persons not within the intent of the definition . . ." In connection with a CPO, an AP is defined in Section 4k(2) of the Act<sup>22/</sup> as "any person to be associated with a commodity pool operator as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves (i) the solicitation of funds, securities, or property for a participation in a commodity pool or (ii) the supervision of any person or persons so engaged . . . ."

1. Based on the activities of "Affiliate 1" and "Employee" with respect to the sixteen Sponsor Funds as represented to the Division, including the limited solicitation activity conducted offshore and the legal structure of the Sponsor Funds, including their GP Cos., the Division will not recommend that the Commission take any enforcement action based solely upon "Affiliate 1"'s failure to register as a CPO in connection with the activi-

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<sup>20/</sup> See, e.g., CFTC Interpretative Letter No. 92-3, supra.

<sup>21/</sup> 7 U.S.C. § 1a(4) (1994).

<sup>22/</sup> 7 U.S.C. § 6k(2) (1994).

ties described above. We note that "Employee"'s "assistance" in answering questions in the course of solicitation of potential investors, if provided in the United States or in connection with the solicitation of United States investors, would alter the Division's position with respect to the issue of whether "Affiliate 1" (or "Employee") is subject to registration as a CPO in connection with the operation of the Sixteen Sponsor Funds.

2. Even with "Employee"'s proposed residence in the United States for a period of approximately eight months a year, for the fifteen Sponsor Funds structured as LPs, "Affiliate 2" does not appear to be engaging in activities that would require it to be registered as a CPO. For the sixteenth Sponsor Fund operated as a "W Legal Structure", the question of whether "Affiliate 2" exercises sufficient control to be deemed a CPO is a closer question. However, in light of your representations that all directors of "Affiliate 2" controlling the "W Legal Structure" activities are persons affiliated with the three Sponsors,<sup>23/</sup> it is not inappropriate for the Division to recommend that the Commission take no enforcement action if "Affiliate 2" does not register as a CPO with respect to its activities in connection with the sixteen Sponsor Funds.

3. With respect to the Two Caymans Funds:

a. "Affiliate 2", as the GP of "M Fund", appears to fall within the definition of a CPO in that it is a "person engaged in a business which is of the nature of an investment trust, . . . and who, in connection therewith, solicits, accepts or receives from others, funds" for the purpose of trading in futures contracts. However, since none of the investors are U.S. investors, it is not inappropriate for the Division to confirm that it will not recommend that the Commission take enforcement action based solely upon "Affiliate 2's" failure to register as a CPO with respect to its activities for "M Fund", as long as "Employee" and any other persons providing the services are not located in the U.S. However, when the locus of service shifts to the United States, because "Employee" has taken up residence in the United States for a substantial part of the year, the services that "Affiliate 2" provides to "M Fund" are provided in the United States. The Division believes that these services are being performed substantially in the United States, rather than off-

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<sup>23/</sup> Because the "W Legal Structure" appears to have such limited contacts with the United States, and does not appear to be managed by a U.S. registered CPO or a person who should be so registered, this letter does not resolve the issue of whether the operation of the Sponsor Fund, if not the subject of specific exemptive relief, would violate Rule 4.20(a), (b) and (c).

shore, because "Employee" is the sole corporate employee involved, in either "Corp." affiliate, "Affiliate 2" or "Affiliate 4", who is charged with the managerial responsibility to perform, or supervise the performance of, all the duties of the CPO. The existence of Service Contract II cannot obscure the fact that all parties to the contracts, and the contract beneficiaries, rely exclusively on "Employee", regardless of which agency cloak he wears on a given day, to perform any and all services.

However, the Division believes that it is appropriate to confirm that it will not recommend that the Commission take enforcement action based solely upon the failure of "Affiliate 2" to register as a CPO in connection with its services to "M Fund", subject to the following conditions: (1) "Affiliate 4" remains registered as a CPO and lists "M Fund" as a pool which it operates; (2) "Employee" registers as an AP of "Affiliate 4"; (3) while in the United States, as represented, "Employee" will not engage in any solicitation activity with respect to "M Fund" (since all solicitation activity has been done under the auspices of "Affiliate 2" and when "Employee" terminates his residence in the United States, such solicitation will continue to be done under the aegis of "Affiliate 2"); and (4) "Affiliate 2" and "Affiliate 4" represent, by filing an affidavit with the Division with respect to "M Fund", that they shall be jointly and severally liable as co-CPOs. (See attached Exhibit A.)

b. With respect to "C Fund" (renamed as "C Fund"), the Division believes that it is appropriate to confirm that it will not recommend that the Commission take enforcement action based solely upon "Affiliate 2"'s failure to register as a CPO in connection with its services to "C Fund" (renamed as "C Fund"), subject to the following conditions: (1) "Affiliate 4" remains registered as a CPO and lists "C Fund" (renamed as "C Fund") as a pool which it operates; (2) "Employee" registers as an AP of "Affiliate 4"; (3) while in the United States, as represented, "Employee" will not engage in any solicitation activity with respect to "C Fund" (renamed as "C Fund") (since all solicitation activity has been done under the auspices of another "Corp." affiliate); and (4) "Affiliate 2" and "Affiliate 4" represent, by filing an affidavit with the Division with respect to "C Fund" (renamed as "C Fund"), that they shall be jointly and severally liable as co-CPOs. (See attached Exhibit B.)

4. With respect to the "Affiliate 4" Offshore Funds, "Employee" has engaged in solicitation for such funds, and, specifically, has solicited on behalf of the Sponsor Funds. This would have required registration as an AP if such activity had occurred within the United States. "Employee" intends to continue to solicit investors and otherwise engage in the administration and operation of the "Affiliate 4" Offshore Funds.

Although you represented that "Employee" intends to engage in solicitation activities only offshore, "Employee's" United States residence, combined with the scope of his domestic activities generally, leads the Division to conclude that "Employee" should not be exempted from becoming registered as an AP of "Affiliate 4" as a result of his U.S.-based activities in connection with the operation of the "Affiliate 4" Offshore Funds.

5. With respect to the Two Caymans Funds, in Letters One and Three, you requested, alternatively, that if "Affiliate 4" were deemed to be a CPO of either of such funds, the Division grant exemptive relief from Rules 4.21, 4.22 and 4.23 (a)(10) and (a)(11). Based upon your representations, such relief appears warranted. However, on July 25, 1995, during the pendency of your request, the Commission adopted several modifications to various Part 4 rules, including Rules 4.21 and 4.23. Accordingly, pursuant to authority delegated by Rule 140.93(a)(1), "Affiliate 4" is hereby exempted from Rule 4.21, as amended, and new Rules 4.24 and 4.26, Rule 4.22, which was not amended, and paragraphs (a)(10) and (a)(11) of Rule 4.23, which were not amended, in connection with its operation of "M Fund" and "C Fund" (renamed as "C Fund").

6. Finally, in Letters One and Three, you requested, alternatively, with respect to either of the Two Caymans Funds, if "Affiliate 4" were deemed to be a CPO of either of such funds, that the Division grant exemptive relief from the requirement in Rule 4.23 that the original books and records of such funds be kept at "Affiliate 4". Pursuant to the authority delegated by Rule 140.93(a)(1), the Division shall exempt "Affiliate 4" from that portion of Rule 4.23, as amended, requiring that "Affiliate 4", at its main offices, maintain the original books and records of "M Fund" and "C Fund" (renamed as "C Fund") and subject to the condition that "Affiliate 4" represents in writing that: (1) duplicates of the books and records of "M Fund" and "C Fund" (renamed as "C Fund") will be kept at "Affiliate 4" in its San Francisco, California offices; (2) "M Fund" and "C Fund" (renamed as "C Fund") must maintain their original books and records offshore to comply with Internal Revenue Service requirements for relief from United States taxation; and (3) within 72 hours after a request of a representative of the Commission or the Department of Justice, "Affiliate 4" will obtain the original books and records from the main office of "M Fund" or "C Fund" (renamed as "C Fund") and provide them for inspection at a place in the United States specified by the representative.

The relief issued by this letter does not excuse "Employee", "Affiliate 1", "Affiliate 2", "Affiliate 3" or "Affiliate 4" from compliance with any other applicable requirements contained in the Act or the Commission's regulations thereunder. For example,

each party seeking relief remains subject to the antifraud provisions of Section 40 of the Act,<sup>24/</sup> 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 not specifically addressed herein. Moreover, the specified relief set forth in this letter is applicable only to:

- (i) "Employee", in connection with his activities and relationships described with respect to "Affiliate 1", "Affiliate 2", "Affiliate 3", "Affiliate 4", the sixteen Sponsor Funds, the Two Caymans Funds and the "Affiliate 4" Offshore Funds;
- (ii) "Affiliate 1", in connection with its activities and relationships described with respect to "Employee", "Affiliate 2", "Affiliate 3", "Affiliate 4", the sixteen Sponsor Funds, the Two Caymans Funds and the "Affiliate 4" Offshore Funds;
- (iii) "Affiliate 2", in connection with its activities and relationships described with respect to "Employee", "Affiliate 1", "Affiliate 3", "Affiliate 4", the sixteen Sponsor Funds, the Two Caymans Funds and the "Affiliate 4" Offshore Funds;
- (iv) "Affiliate 3", in connection with its activities and relationships described with respect to "Employee", "Affiliate 1", "Affiliate 2", "Affiliate 4", the sixteen Sponsor Funds, the Two Caymans Funds and the "Affiliate 4" Offshore Funds; and
- (v) "Affiliate 4", in connection with its activities and relationships described with respect to "Employee", "Affiliate 1", "Affiliate 2", "Affiliate 3", the sixteen Sponsor Funds, the Two Caymans Funds, and the "Affiliate 4" Offshore Funds (except as to the issue of whether "Affiliate 4", as CPO of the "Affiliate 4" Offshore Funds, is eligible for relief from any of the requirements of the Act or the regulations thereunder).

Further, the no-action relief provided herein is prospective only. The Division notes that it is not excusing or in any way limiting the Commission's authority to take action with respect to any past violation of the Act or the Commission's regulations thereunder.

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<sup>24/</sup> 7 U.S.C. §60 (1994).

This letter is based upon the representations you have made to the Division 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 the Division immediately in the event that any of the activities or relationships of any of the persons or funds described above change in any way from those represented to us.

Finally, this letter represents the position of the Division only. It 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 Sharon Zackula, an attorney on my staff.

Very truly yours,

Susan C. Ervin  
Chief Counsel