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U.S. COMMODITY FUTURES TRADING COMMISSION

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DIVISION OF
TRADING & MARKETS

April 22, 1996

Re: Section 4m(1) -- Request for Exemption from Registration Requirements In Connection with Role in Offshore Fund.

Request for Relief from Requirement to Provide Disclosure Document in Connection with Advisory Services Provided To Offshore Fund.

Dear :

This is in response to your letter dated February 13, 1996 to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by letters dated February 28, 1996 and March 25, 1996, by which you request on behalf of "X" relief from registration requirements in connection with its serving as the commodity pool operator ("CPO") of the "Fund", an offshore pool formed under the laws of the British Virgin Islands. In addition, you request on behalf of "Y", which will serve as the commodity trading advisor ("CTA") of the Fund, relief from the Disclosure Document requirement of Rule 4.31.^{1/}

(a) General Representations

Based upon the representations made in your letter, as supplemented, we understand the pertinent facts to be as follows. "X" is incorporated under the laws of the British Virgin Islands. All of the voting, non-participating shares of "X" will be owned by "A" (fifty percent) and "B" and "C" (jointly fifty percent).^{2/}

^{1/} Commission rules referred to herein are found at 17 C.F.R. Ch. I (1995), as amended by 60 Fed. Reg. 38,146, (July 25, 1995).

^{2/} "X" will also issue non-voting, participating shares which will be held as follows: "B" and "C", twenty-five percent; "A", twenty percent; "D", "A's" spouse, five percent; and a not-for-profit organization ("NFP"), which is separate and distinct from the NFP that is described later in this letter, fifty percent. The

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"A" is registered as a CTA and CPO,^{3/} as well as an associated person ("AP"), "W" a registered introducing broker. "C" is a registered CTA and does business as the sole proprietor of "Z" and "Y". "B" is a registered AP of "Y".

"X" was formed for the sole purpose of providing marketing and management services to the Fund. Such services include structuring the Fund and contracting for services on behalf of the Fund, including selecting the CTA of the Fund. "X" has chosen "Y", of which "C" is the sole proprietor, to be the sole CTA of the Fund. "X" will own one hundred percent of the voting shares of the Fund.

The Fund is incorporated under the laws of the British Virgin Islands. It will be operated as an offshore fund of funds. "A" and "B" will each be a director of the Fund. All of the other directors of the Fund will be non-United States citizens and residents. The Fund will be organized and operated outside of the United States. Interests in the Fund will not be offered or sold to any United States persons, as that term is defined in Rule 4.7, other than "A" and "B" and "C", nor will the Fund contain capital directly^{4/} or indirectly contributed from sources within the United States.

You represent that "X" will maintain books and records in connection with its operation of the Fund that are equivalent to those required under Rules 4.23(a)(1)-(a)(9) and (b)(1)-(b)(3) and that these records will be made available in the United States for inspection by representatives of the Commission and the National Futures Association ("NFA") within seventy-two hours of receipt of a request for the production of such records. Further, the Fund's Board of Directors will cause to be prepared and distributed to shareholders: (1) an audited annual report and accounts for the Fund and (2) a monthly unaudited report, including income statements and a statement of charges included in the calculation

^{2/} (...continued)

participating shares in "X" held by "D" and the NFP were gifts from "A".

^{3/} "A" terminated his registration as a CPO as of August 30, 1995 but reregistered as a CPO effective November 17, 1995.

^{4/} For the purposes of this letter, the term "United States" has the same meaning as that specified in Rule 4.7. In your initial letter, you indicated that a certain United States NFP would be investing in the Fund. However, in your letter dated February 28, 1996, you indicated that the NFP would not be investing in the Fund. The NFP referred to here is distinct from the organization which will hold participating, non-voting shares of "X".

of the net asset value of the Fund. The annual report will be forwarded to shareholders within five months of the end of the Fund's fiscal year and the monthly report within twenty-five days of the end of the month to which it relates.

(b) Relief with Respect to "X"

In prior letters, the Division has confirmed that it would not recommend that the Commission commence enforcement action for failure to comply with Section 4m(1) of the Commodity Exchange Act ("Act")^{5/} against certain United States citizens serving as directors of an offshore fund based solely upon their failure to register as CPOs of the fund where, among other things: (1) the directors were each registered in some capacity with the Commission; (2) the fund would not undertake any activities within the United States or have any capital contributed directly or indirectly by United States persons; and (3) the directors represented that they would make and keep at their business offices in the United States books and records equivalent to those required by Rules 4.23(a)(1) - (a)(9) and (b)(1) - (b)(3) in connection with their operation of the fund and make such books and records available for inspection by officials of the Commission or the NFA.^{6/} In reaching this conclusion, the Division reasoned that, as Commission registrants, the directors would have undergone fitness and qualifications examinations, and further, if registered as CPOs, the directors could qualify for relief from Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11). Thus, the only additional requirements that the directors would have had to meet if they registered as CPOs and received the relief available to CPOs with respect to qualifying offshore funds would have been the recordkeeping requirements of Rule 4.23. Since the directors represented that they would maintain the equivalent of such records even if they were not registered, the Division granted the requested relief from CPO registration.

You have made representations substantially the same to those outlined above. Accordingly, and based on the reasoning set forth above, the Division will not recommend that the Commission take any enforcement action against "X" pursuant to Section 4m(1) of the Act if it fails to register as CPO of the Fund. This relief is, however, subject to the conditions that: (1) "A" remains registered as an AP of "Y"; (2) "B" remains registered as a CTA; and (3) "A" remains registered as a CPO.

^{5/} 7 U.S.C. § 6m(1) (1994).

^{6/} CFTC Interpretative Letter No. 91-4, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,050 (April 25, 1991).

(c) Relief with Respect to "Y"

You represent that to require "Y" to provide a Disclosure Document to the Fund would in effect be requiring "B" and "C" to disclose information to themselves and "A". The Division agrees with your claim that causing the CTA in this case to supply "X" with a Disclosure Document would not significantly increase the CPO's knowledge or understanding of the CTA's operations. Consequently, pursuant to the authority delegated by Rule 140.93(a)(1), the Division exempts "Y" from compliance with Rule 4.31 in connection with serving as the CTA of the Fund. However, this relief is subject to the condition that "Y" will promptly provide "A" any information required by Rules 4.34 and 4.35 upon his request.

This letter is subject to the conditions that "X", "Y" or any person affiliated therewith will not undertake any marketing activity for the purpose of or that could reasonably be expected to have the effect of soliciting participations in the Fund from United States persons, nor will such persons engage in solicitation activity within the United States, unless such person is duly registered with the Commission.^{7/} Further, this letter is based upon the representations made by you and is subject to compliance with the conditions stated above. Any different, changed or omitted facts and circumstances might require us to reach different conclusions. In this connection, we ask that you notify us immediately in the event that the ownership or operations of "X", "Y" or the Fund change in any way from those represented to us.

The relief granted herein applies to "X" and "Y" only in connection with their activities as CPO and CTA, respectively, to the Fund and does not excuse them or any person affiliated with them from compliance with other applicable requirements contained in the Act^{8/} or the Commission's regulations issued thereunder. For example, they remain subject to the antifraud provisions of Section 40 of the Act,^{9/} to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations and to all other applicable provisions of Part 4.

^{7/} In this regard, we confirm that the registration status of "B" and "C" and "A", as described above, is sufficient to allow them to solicit participation in the Fund from within the United States without violating the conditions of the relief granted herein, provided, as noted, that fund interests are not offered or sold to United States persons.

^{8/} 7 U.S.C. § 1 et seq. (1994).

^{9/} 7 U.S.C. § 60 (1994).

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Further, the CPO registration no-action position taken herein with respect to "X" represents the position of this Division only. It does not necessarily represent the views of the Commission or any other office or division of the Commission. If you have any questions concerning this correspondence, please contact me or Thomas E. Joseph, an attorney on my staff, at (202) 418-5450.

Very truly yours,

Susan C. Ervin
Chief Counsel