



U.S. COMMODITY FUTURES TRADING COMMISSION

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DIVISION OF
TRADING & MARKETS

May 2, 1996

Re: Request for Relief from Commodity Pool Operator
Registration Under Section 4m(1)

Request for Exemption from Requirement to
Maintain Original Books and Records at its Main
Business Office Under Rule 4.7(a)(2)(iv)

Dear :

This is in response to your letters dated February 5, 1996, and March 29, 1996, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by telephone conversations with Division staff. By your letters, you request on behalf of "V" that the Division not recommend that the Commission take any enforcement action against "V" if it fails to register as a commodity pool operator ("CPO") pursuant to section 4m(1) of the Commodity Exchange Act ("Act")^{1/} in connection with its operation of the "S", the "W", and other similar funds^{2/} that may be offered in the future (collectively "Funds").

Based upon the representations made in your letters, as supplemented, and the representations made in your earlier letter regarding "X" and "V" dated July 19, 1995, we understand the facts to be as follows. "X" is a Delaware corporation estab-

^{1/} 7 U.S.C. § 6m(1) (1994).

^{2/} For the purposes of the relief provided below, a "similar fund" is one which accepts only "qualified eligible participants" ("QEPs"), as that term is defined in Rule 4.7(a), and for which "V" supervises and conducts the administrative and management activities and for which "X" serves as the registered CPO and CTA.

Commission rules referred to herein are found at 17 C.F.R. Ch. I (1995).

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lished in May 1995, with its only office located in North Carolina. "X" is registered as a commodity trading advisor ("CTA"). "V" is domiciled in Bermuda and has no offices in the United States. Both "X" and "V" (collectively "Y") are wholly owned by "Z", a Canadian corporation, which in turn is wholly owned by "U" and "T", which also are Canadian corporations.

In response to your July 1995 letter, by letter dated August 25, 1995, the Division granted certain relief to "X" and persons associated therewith.^{3/} Specifically, the Division: (i) exempted "A" and "B", persons associated with "X", from the requirement of Rule 3.12(a) to register as associated persons ("APs"); and (ii) exempted "X" from the Disclosure Document requirement of Rule 4.31. This relief was conditioned, in part, upon your representations that "X" would not solicit or direct any marketing efforts to, or accept any capital from, United States persons. By your February 5, 1996 letter, you indicate that "X" is seeking to remove this condition from the relief granted by the Division.

Since August 1995, several United States investors have approached "Y" and indicated that they wish to invest in the Funds. Each of these potential United States investors is a QEP. Moreover, you have represented that the Funds will accept investments only from QEPs and that they will be operated in accordance with the requirements of Rule 4.7. However, in order to allow the Funds to accept these and other United States investors, you have requested that the Division grant "Y" the relief discussed below.

First, you have requested relief from the requirement that "V" register as a CPO. In support of this request, you have represented that "X" will register as CPO, and as such, will: (1) supervise and manage all investment activity on behalf of the Funds; (2) make all solicitations and related communications with prospective investors; (3) arrange for the preparation of financial statements and annual reports; and (4) maintain duplicates of all books and records for the Funds. "V" will supervise and conduct the administrative and management activities of the Funds ("administrative manager"), and as such, its responsibilities may include: (a) acceptance of subscriptions and receipt of capital contributions originally sent by investors to the Bank of Bermuda Limited, the Funds' transfer agent; (b) payment of the Funds' expenses; (c) making distributions to the Funds' investors as directed by "X"; (d) maintenance of a registry for the ownership and transfer of interests in the Funds; (e) maintenance of the

^{3/} Division of Trading and Markets Interpretative Letter No. 95-73, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,503 (August 24, 1995).

Funds' original books and records; (f) coordination with the Funds' auditors of the audit of the Funds' books and the preparation of its tax returns; (g) preparation and distribution of reports to investors; (h) communications with the Funds' investors (e.g., advising subscribers if their subscription agreement or subscription payment is deficient as to signature, date, or other matters, recording name and address changes and conducting meetings of the Funds' investors according to an agenda preset by "X"); (i) furnishing the offering and redemption prices of interests in the Funds; (j) coordination of the issuance and redemption of interests in the Funds in conjunction with the Bank of Bermuda Limited; and (k) making such filings and keeping such records as are required by Bermuda law.

In light of the foregoing, and consistent with past practice,^{4/} the Division will not recommend that the Commission take any enforcement action against "V" if it fails to register as a CPO pursuant to Section 4m(1) of the Act in connection with its serving as the administrative manager of the Funds. This position is, however, subject to the conditions that: (1) "X" is and remains registered as the CPO of the Funds; (2) "V" will not exercise any discretion, supervision or control over or take part in (a) the solicitation, acceptance or receipt of funds or property from investors to be used for purchasing interests in the Funds, or (b) the investment, use or other disposition of funds or property of the Funds; (3) within thirty days of the date of this letter, "V" and "X" each provide the Division with a signed and dated acknowledgement wherein each accepts joint and several liability with the other for any violations of the Act or the Commission's regulations thereunder applicable to CPOs in connection with "X" and "V" serving as CPOs of the Funds; and (4) any person who acts in the capacity of an AP of "X" must be registered as such, including "B" and "A". Since "X" is no longer prepared to represent that it will not solicit or direct any marketing efforts to, or accept any capital from, United States persons, it cannot comply with one of the conditions to which our July 25, 1995 letter was subject. Accordingly, the relief from AP registration previously granted by that letter no longer obtains.

Second, you request that "X" be exempt from the requirement of Rule 4.7(a)(2)(iv) to maintain the original books and records prepared in connection with "X's" activities as CPO of the Funds at its office in North Carolina. While many of the original books and records are maintained on a computer database which is accessible by both "X" and "V", other original books and records

^{4/} See, e.g., Division of Trading and Markets Interpretative Letter No. 95-31, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,372 (August 26, 1994).

will be maintained offshore at the offices of "V". In the past, the Division has granted CPOs similar exemptions subject to certain conditions.^{5/} Accordingly, pursuant to the authority delegated by Rule 140.93(a)(1), "X" is exempted from the requirement in Rule 4.7(a)(2)(iv) concerning the location of original books and records in connection with the operation of the Funds based upon your representations on behalf of "Y" that: (1) "X" will maintain duplicate books and records at its North Carolina office; (2) the original books and records will be kept offshore to comply with Internal Revenue Service requirements for relief from United States taxation; and (3) upon the request of a Commission or National Futures Association representative, "X" will obtain the original books and records from "V" and provide them to such representative at a place specified by such representative within seventy-two hours after the request is made.

Further, the Division will continue to exempt "X" from the Disclosure Document requirement of Rule 4.31. You have represented that "X" will confine its CTA activities solely to the Funds and thus will not separately act as CTA for United States persons who are not participants in the Funds. While some of the Funds for which "X" may serve as CTA will claim relief under Rule 4.7(a), others may not. For example, an offshore fund with no United States participants may not claim relief under Rule 4.7(a), and consequently, relief under Rule 4.7(b) would not be available with respect to such offshore fund. However, in the Division's August 1995 letter, the Division exempted "X" from the requirements of Rule 4.31. The Division continues to believe that "X" should be exempt from Rule 4.31 in cases where it acts as CTA to a fund which does not have any United States participants but does not operate pursuant to an exemption under Rule 4.7(a). Accordingly, pursuant to the authority delegated by Rule 140.93(a)(1), the Division hereby continues to exempt "X" from Rule 4.31.^{6/}

The relief issued by this letter does not excuse "X" or "V" from compliance with any other applicable requirements contained in the Act, 7 U.S.C. § 1 et seq. (1994), or the Commission's regulations thereunder. For example, each remains subject to the antifraud provisions of Section 40 of the Act, 7 U.S.C. 60 (1994), to the reporting requirements for traders set forth in

^{5/} See, e.g., Division of Trading and Markets Interpretative Letter No. 95-81, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,557 (September 14, 1995).

^{6/} The Division, however, will still require that "X" file a Notice for Claim for Exemption under Rule 4.7(b) for those Funds which operate pursuant to an exemption under Rule 4.7(a).

Parts 15, 18 and 19 of the Commission's regulations and to all other applicable provisions of Part 4.

This letter is based on the representations made in your letter, as supplemented. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this regard, we request that you notify us immediately in the event the operations or activities of "X" or "V" change in any way from those represented to us.

If you have any questions concerning this correspondence, please contact me or Gary L. Goldsholle, an attorney on my staff, at (202) 418-5442.

Very truly yours,

Susan C. Ervin
Chief Counsel