



DIVISION OF
TRADING AND MARKETS

COMMODITY FUTURES TRADING COMMISSION

2033 K STREET, N.W., WASHINGTON, D.C. 20581

T&M 88-6

January 28, 1988

Re: Foreign Funds - CPO and CTA Regulation

Dear :

This is in response to your letter dated January 21, 1988, as supplemented by your telephone conversation with Division staff on January 25, 1988, wherein you requested on behalf of certain persons relief from commodity pool operator ("CPO") and commodity trading advisor ("CTA") regulation.

Based upon the representations made in your letter, as supplemented, we understand the facts in general to be as follows: A proposes sponsoring thirteen offshore mutual funds (the "Funds") which will trade in securities and commodity interests. 1/ Three Funds will be organized under the laws of the Grand Duchy of Luxembourg. The other ten Funds will be organized under the laws of the Netherlands Antilles. The organizational documents and prospectus of each Fund will state that shares of the Fund may not be offered for sale or sold, either directly or indirectly, to a United States person. In addition, shareholders will be prohibited from transferring any of their shares to a United States person.

Each Fund will have as its Directors the following four United States citizens or residents: C, D, E, and F. Messrs. C and D are each registered as a CPO. You have represented with respect to Messrs. E and F that while neither is so registered, nor is either subject to a statutory disqualification under Section 8(a)(2) or 8(a)(3) of the Act, 7 U.S.C. 12(a)(2) or 12(a)(3). Each Netherlands Antilles Fund, as required by the laws of that jurisdiction, will also have a "Managing Director," G, which will manage the

1/ Two of the persons for whom you sought relief from CPO registration were A and B. The Commission has stated that a person would come within the statutory definition of the term "commodity pool operator" in Section 2(a)(1)(A) of the Commodity Exchange Act (the "Act"), 7 U.S.C. 2, if it engaged in such activities as promoting a commodity pool and if it had the authority to hire (and to fire) the pool's CTA and to select (and to change) the pool's futures commission merchant. See 49 Fed. Reg. 4778 (February 8, 1984). Accordingly, in light of the facts that A only will be sponsoring the Funds and that, as described more fully below, B only will be assisting each Fund in fulfilling clerical responsibilities, we do not believe that they would come within the CPO definition and, accordingly, no such relief is necessary with respect to them.

business of those Funds under the supervision of the Board. Further, H, a registered CPO domiciled in the United States, will serve as a member of Fund X's Board of Directors. In sum: (1) the Luxembourg Funds will have four Directors; (2) excepting Fund X the Netherlands Antilles Funds will have five Directors; and (3) Fund X will have six Directors. Under these facts, you have made three requests for relief from CPO regulation.

The first is a request for CPO registration "no-action" relief such that Messrs. C and D and, further with respect to Fund X, H, each of whom is registered as a CPO, are the only persons who need to be registered as a CPO in connection with the operation of the Funds and that Messrs. E and F, and, further with respect to the Netherland Antilles Funds, G, need not so register. In this regard, we note that the instant case presents the following facts which similarly were present in cases where Commission staff took a CPO registration "no-action" position: (1) the commodity pool activities of the Fund will be confined to areas outside the territorial United States; (2) none of the participants in the Fund may be a United States resident or citizen; and (3) no funds or other capital may be committed to the Fund from United States sources. 2/ On the other hand, like those cases where staff declined to issue a "no-action" position but provided certain other relief, it presents the fact that certain members of the Fund's Board of Directors may be United States citizens or residents. 3/ Further in this regard, we note that the instant case presents such further facts as: (1) at least 50% of the Directors of each Fund who are citizens or residents of the United States are registered as a CPO; (2) the two United States Directors who are not so registered, Messrs. E and F, are not subject to a statutory disqualification; and (3) the sole non-United States Director of the Netherland Antilles Funds, G, will manage the business of those Funds under the supervision of the Board. Accordingly, based upon the representations you have made to us, the Division will not recommend that the Commission take any enforcement action for failure to register as a CPO against Messrs. E and F in connection with their operation of all of the Funds or against G in connection with its operation of the Netherlands Antilles Funds. 4/

2/ See, e.g., CFTC Staff Interpretative Letter No. 76-21, Comm. Fut. L. Rep. (CCH) ¶20,222 (August 15, 1976).

3/ See, e.g., Division of Trading and Markets Interpretative Letter No. 83-14, Comm. Fut. L. Rep. (CCH) ¶21,967 (June 6, 1983).

4/ Cf. Division of Trading and Markets Interpretative Letter No. 86-7, Comm. Fut. L. Rep. (CCH) ¶23,013 (February 6, 1986), wherein the Division took a CPO registration "no-action" position with respect to each member of the Board of Directors of a foreign commodity pool because of, among other things, the fact that a minority of those members would be United States citizens or residents.

Second, you have requested that each registered CPO of each Fund (Messrs. C and D, and further with respect to Fund X, H, be relieved from the disclosure, reporting and recordkeeping requirements of Rules 4.21, 4.22 and 4.23(a)(10)-(a)(11), respectively. 5/ This would be consistent with our prior practice in similar cases where, as noted above, each Fund's domicile, shareholders and sources of capital will be foreign but its (registered) CPOs are United States citizens or residents. 6/ Accordingly, based upon the representations you have made to us and pursuant to the authority delegated by Rule 140.93(a)(1), each registered CPO of each Fund is hereby exempted from Rules 4.21, 4.22 and 4.23(a)(10)-(a)(11) in connection with its operation of a Fund.

Third, you have requested that each registered CPO of each Fund be relieved from the requirement in Rule 4.23(a) to maintain at its main business office the books and records required by the rule and, in lieu thereof, be allowed to maintain those books and records at the main business office of B. In this regard, we note that B will serve as each Fund's administrator (or sub-administrator) and, in such capacity, specifically will have the responsibility of assisting each Fund (and each CPO thereof) with its clerical responsibilities. We further note, however, that Rule 4.23(a) is intended to ensure that the Commission and pool participants have "meaningful access." 7/ Accordingly, pursuant to Rule 140.93(a)(1), your request for exemption from Rule 4.23(a) is hereby granted subject to compliance with the conditions that: (1) such books and records as will be maintained by B will be made available for audit, inspection and copying by duly authorized Commission representations at all reasonable times; (2) those books and records will be available to each respective Fund's participants for inspection and copying during normal business hours; and (3) each registered CPO remains responsible for compliance with all of the provisions of Rule 4.23(a).

Commodity interest trading decisions will be made by different CTAs for different Funds and, accordingly, you have requested certain CTA registration relief based upon those differences. For the purpose of that relief, and as you have done by your letter, the Funds may be divided into three categories.

First, all but three of the Funds will be advised by certain Foreign Advisors. Each Foreign Advisor is incorporated outside of the United States, has its principal offices outside of the United States and will perform its

5/ Unless otherwise noted, all references to Commission rules may be found at Title 17 of the Code of Federal Regulations.

6/ See Interpretative Letter No. 83-14, supra n. 5.

7/ See, e.g., 45 Fed. Reg. 51600, 51603 (August 4, 1980).

advisory or sub-advisory services outside of the United States. The Board of Directors of each Foreign Advisor consists of a majority of non-United States persons. No United States member of the Board is subject to a statutory disqualification under Section 8(a)(2) or 8(a)(3) of the Act. Under these facts, and as noted above the foreign nature of each Fund, the Division will not recommend that the Commission take any enforcement action for failure to register as a CTA against any Foreign Advisor in connection with its providing commodity interest trading advice to a Fund. 8/

The second category consists of two Funds for which commodity trading decisions will be made by B. In this regard, you have represented that: (1) each Fund will be operated pursuant to the criteria of Rule 4.5(c)(2), although because of its foreign nature the Fund has not (and absent an exemption from the Securities and Exchange Commission cannot be) registered as an investment company under the Investment Company Act of 1940 and therefore the Fund is not an eligible person or qualifying entity under Rule 4.5(a) or (b); (2) B is registered as an investment adviser under the Investment Advisers Act of 1940; and (3) B will comply with the criteria of Rule 4.14(a)(8) in providing commodity trading advice to the Funds. 9/ Based upon the foregoing, and the foreign nature of the Fund, the Division will not recommend that the Commission take any enforcement action for failure to register as a CTA against B in connection with its providing commodity interest trading advice to the Funds. This position is, however, subject to compliance with the condition that B will submit to such special calls as the Division may make of it to demonstrate compliance with the terms and conditions of this "no-action" position.

The third category of Funds consists of Fund X. H, one of the Fund's CPOs, will also serve as its CTA. By this letter we confirm the availability of the exemption from CTA registration in Rule 4.14(a)(4) to H in connection with advising Fund X -- because it is registered as a CPO and its commodity interest trading advice will be directed to a pool for which it is so registered.

We note that this letter does not excuse any person covered hereby from compliance with any other applicable requirements contained in the Act or in the Commission's regulations thereunder. For example, each would remain subject to the anti-fraud provisions of Section 40 of the Act, 7

8/ See Interpretative Letter No. 86-7, supra n. 6.

9/ Rule 4.14(a)(8) makes an exemption from CTA registration available to a registered investment adviser to a Rule 4.5 trading vehicle -- e.g., a registered investment company -- under certain criteria -- e.g., that the advisor will provide commodity trading advice solely incidental to its business of providing securities advice and that it will not otherwise hold itself out as a CTA. 52 Fed. Reg. 41975 (November 2, 1987).

U.S.C. 60 (1982), and to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations. Further, the positions we have taken herein are solely applicable to such persons in connection with their involvement in the activities of the Funds.

This letter is based upon the representations that have been made to us and is subject to compliance with certain 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 the operations of any person subject to this letter or any Fund change in any way from that as represented to us.

Very truly yours,

Andrea M. Corcoran
Director

BSG/mad

cc: Daniel A. Driscoll, National Futures Association