

CFTC Letter No. 01-08**August 11, 2000****No-Action****Division of Trading & Markets**

Re: Section 4m(1) -- Request for CPO and CTA Registration No-Action Positions

Dear :

This is in reference to your letter dated August 19, 1999 to the Division of Trading and Markets (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by your letters dated March 31, 2000 and June 19, 2000 and by telephone conversations with Division staff. By your correspondence you request on behalf of "P" assurance that the Division will not recommend that the Commission commence any enforcement action based upon the failure of "P" to register under Section 4m(1) of the Commodity Exchange Act (the "Act")¹ as a commodity pool operator ("CPO") or as a commodity trading advisor ("CTA") in connection with managing an array of pension and retirement plans, an insurance company general account and a group pension trust.

Based upon the representations made in your correspondence, we understand the facts to be as follows. "P" is a direct, wholly-owned subsidiary of "Q", and it is registered with the Securities and Exchange Commission ("SEC") under the Investment Advisers Act of 1940² as an investment adviser. "P" is a named fiduciary or fiduciary (as such terms are defined in the Employee Retirement Income Security Act of 1974 ("ERISA")) of each of the employee benefit plans that participate in the "Group Trust". Each plan in the Group Trust is sponsored by "Q" or a "Q" subsidiary or affiliate, except that on _____ several plan sponsors became unaffiliated with "Q" when "R" was spun-off by "Q".

In addition to the Group Trust, "P" advises and chooses managers for the general account of "S", a state-regulated insurance company. "P" chooses managers for the "T" Trust which contains assets of one ERISA welfare benefit plan. "P" advises two Canadian defined benefit pension plans: (the "Canadian Plans"). "P" advises the "U", a trust established in the United Kingdom, accepting participation by trustees of U.K tax approved pension plans sponsored by current or former "Q" affiliates or subsidiaries. In connection with the advisory services that "P" provides to each of the foregoing entities, it conducts futures and commodity options trading, selects managers to conduct commodity interest trading and/or provides certain commodity interest trading advice.

In the future, you anticipate that plans sponsored by entities unaffiliated with "Q" other than "R" or "R"

affiliates may be included in the Group Trust. You further anticipate that the "T" Trust may hold, in the future, assets of additional employee welfare benefit plans that are subject to the fiduciary responsibility provisions of ERISA (but which may or may not be sponsored by entities affiliated with "Q" or "Q" affiliates).

The Group Trust

Each plan that participates in the Group Trust either is excluded from the definitions of "pool" under Commission Rule 4.5(a)(4)(i)-(iii)³ or is a "qualifying entity" under Rule 4.5(b)(4). The Group Trust has three trustees, each of which acts as trustee for a separate "custodial account." Each custodial account is composed of one or more "manager accounts," and each manager account is managed by a separate investment manager. Those investment managers that are authorized to engage in commodity interest trading activity are registered as CTAs. One of the trustees, "V", has filed a notice of claim of exemption under Rule 4.5 with respect to the Group Trust assets that it maintains, and it operates its custodial account in accordance with the restrictions set forth in Rule 4.5. The other two trustees ("W" and "X") unlike "V" are directed trustees, acting solely upon direction from "P" or another manager engaged by "P" with respect to the assets in their respective custodial accounts (the "W" Account and the "X" Account).

"S"

"S" is a state-regulated insurance company, and it is a wholly-owned subsidiary of a holding company that, in turn, is a wholly-owned subsidiary of "Q". As noted above, "P" may trade commodity interests and choose managers that trade commodity interests for "S's" general account.⁴ In such capacity, "P" is acting as a CTA for a sister company.

"T" Trust

As noted previously, at the present time the "T" Trust contains assets of one employee welfare benefit plan (sponsored and administered by "Q") that is subject to the fiduciary responsibility provisions of ERISA, and that is excluded from the definitions of "pool" under Rule 4.5(a)(4)(iv). The participants and beneficiaries of the plan whose assets are held by the "T" Trust are "Q" employees and former "Q" employees now employed by "R". In the future, you state that assets of other ERISA plans may be held by the "T" Trust.

The Canadian Plans

The Canadian Plans are defined benefit plans sponsored and administered by "Q" of Canada Limited., a wholly-owned subsidiary of "Q" separately incorporated in Canada and having its head office in Ontario. No more than [% of] active participants or beneficiaries of the Canadian Plans are U.S. resident aliens or U.S. citizens permanently residing in Canada. The assets of the Canadian Plans are not

commingled. The Canadian Plans are subject to the Ontario Pension Benefits Act ("PBA").

The "U"

The only permitted participants in the "U" are trustees of U.K. tax approved pension plans sponsored by current or former "Q" affiliates or subsidiaries (the "UK Plans"). The pension plans in the "U" are defined benefit plans. No more than 200 of the 45,541 active participants or beneficiaries of the UK Plans are U.S. resident aliens or U.S. citizens permanently residing in the U.K. The assets of the UK Plans are commingled in the "U" for administrative and investment purposes. The trustee and investment manager for the "U" is authorized by the Investment Management Regulatory Organization Limited ("IMRO"). In addition, any external manager that provides investment advice to the "U" is either authorized by IMRO or exempt from IMRO regulation.

Analysis

Although the plans that participate in the Group Trust are all within the categories of plans for which the trustee, named fiduciary or sponsoring employer would be eligible for exclusionary relief under Rule 4.5 (either by filing a notice under the rule or by relying on exclusion of a plan from the "pool" definition), there is no express provision in the rule for group pension trusts.⁵ Nevertheless, the Division has on a number of occasions, as you note in your correspondence, granted relief in situations involving such trusts.⁶ As noted above, the general account of "S" should not be considered a pool. In the case of the "T" Trust, the pension plan whose assets are held by the "T" Trust is excluded from the "pool" definition under Rule 4.5, even if the trust itself is not.⁷ The fact that the Canadian Plans are subject to the PBA and not to ERISA makes relief under Rule 4.5 unavailable, and the "U" presents an analogous situation involving U.K. pension and trust law *in lieu of* ERISA.⁸ Accordingly, with the exception of "S", "P" has not been able to claim exemption from CPO registration or rely upon a definitional exclusion in connection with the operation of these entities.

Because none of the "W" Account, the "X" Account, "S", the "T" Trust, the Canadian Plans or the "U" is itself an entity excluded from the "pool" definition under Rule 4.5 or a qualifying entity for which a notice of eligibility has been filed under Rule 4.5, "P" has not been able to claim exemption from CTA registration pursuant to Rule 4.14(a)(8) in connection with providing commodity interest trading advice to those entities.⁹

In support of your request you call the Division's attention to the following: (1) "P" is registered with, and regulated by, the SEC as an investment adviser; (2) "P" does not hold itself out as a CTA; (3) "P" has filed a notice of claim of exemption under Rule 4.14(a)(8); (4) "P" employs only such strategies as are consistent with eligibility status under Rule 4.5; and (5) the provision of commodity interest trading advice by "P" is and will continue to be incidental to "P's" main business of securities investment management and subject to the operational constraints of Rule 4.5(c)(2). We also note that the plans managed and advised (directly or indirectly) by "P" are all sponsored by "Q" or current or former

affiliates or subsidiaries of "Q", and "S" is an indirect wholly-owned subsidiary of "Q".

Based upon the representations made in your correspondence, the Division believes that the requested relief is appropriate. Accordingly, the Division will not recommend that the Commission commence any enforcement action under Section 4m(1) of the Act against "P" based solely upon its failure to register as a CPO or as a CTA in connection with managing or providing commodity interest trading advice to the Group Trust, "S", the "T" Trust, the Canadian Plans or the "U".

Insofar as your request concerns circumstances in which plans sponsored by entities unaffiliated with "Q" (other than "R" or "R" affiliates) become included in the Group Trust and/or circumstances in which the "T" Trust comes to hold assets of additional employee welfare benefit plans that are subject to the fiduciary responsibility provisions of ERISA (but which are not sponsored by entities affiliated with "Q" or "Q" affiliates), the Division does not believe that granting your request with respect to those circumstances is proper at this time, in light of the absence of particular facts. At such time as "P" is able to make a developed presentation, we will consider the appropriateness of extending the no-action positions taken herein to cover new circumstances involving the Group Trust or the "T" Trust.

This letter does not excuse "P" from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, "P" remains subject to all of the antifraud provisions of the Act and the Commission's regulations, to the reporting requirements for traders set forth in parts 15, 18 and 19 of the Commission's regulations and to all otherwise applicable provisions of Part 4.

This letter and the no-action positions taken herein are based upon the representations you have made to us and are applicable to "P" solely in its capacity as the CPO and/or the CTA of the entities identified above. Any different, changed or omitted material facts or circumstances might render these positions void. In this connection, we request that you notify us immediately in the event that the operations or activities of "P" or the entities identified above change in any material way from those represented to us (for example, if plans sponsored by entities unaffiliated with "Q" other than "R" or "R" affiliates are included in the Group Trust, or if the "T" Trust comes to hold assets of additional employee welfare benefit plans). Further, the no-action positions taken herein are solely those of the Division and do not necessarily represent the views of the Commission or those of any other division or office of the Commission.

If you have any questions concerning this correspondence, please contact Chris Cummings, an attorney on my staff, at (202) 418-5445.

Very truly yours

John C. Lawton
Acting Director

1 7 U.S.C. § 6m(1) (1994)

2 15 U.S.C. 80b-1 *et seq.* (1994).

3 Commission rules referred to herein are found at 17 C.F.R. Ch. I (2000).

4 In your letter you refer to the enacting release for Rule 4.5, in which it is noted that the holding of commodity interests in an insurance company's general account should not make the insurance company a commodity pool. 50 Fed. Reg. 15868, 15872 (April 23, 1985).

5 And, as you note in your letter, the Commission stated in the adopting release for Rule 4.5 that the exclusion is eligible "only at the pension plan level itself and not at any subsequent level where the assets of any such pension plan are commingled with the assets of any other person in trading commodity interests and gains and losses are not separately accounted for." 50 Fed. Reg. 15868, 15873 (April 23, 1985).

6 You cite to CFTC Staff Letter 97-94 [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,198 (November 21, 1997); CFTC Staff Letter 94-52 [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,116 (June 2, 1994); and CFTC Staff Letter 93-91 [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,857 (September 7, 1993).

7 You cite CFTC Staff Letter 94-80 [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,209 (August 2, 1994).

8 You refer to CFTC Staff Letter 90-3 [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,581 (January 19, 1990); and CFTC Staff Letter 96-60 [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,778 (July 22, 1996).

9 In support of CTA registration relief with respect to "S" and the "T" Trust you cite CFTC Staff Letter 89-2 [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,405 (March 1, 1989). With respect to the "W" and "X" Accounts you cite CFTC Staff Letter 94-52 and 93-91 (previously referenced). In connection with the "U", you cite CFTC Staff Letter 96-60 (referenced above).