

CFTC letter No. 03-04
January 14, 2003
Interpretation
Division of Clearing and Intermediary Oversight

Re: Section 4m(1) – Request for CTA registration no-action position for SEC-registered investment adviser with office in the U.S. that provides services to Japanese investment trusts

Section 4m(1) – Request for CPO registration no-action position for Japanese investment adviser operating Japanese investment trusts in which solely Japanese investors may participate

Rule 4.14(a)(8) – Request for confirmation of continued eligibility of the SEC-registered investment adviser if the Japanese trusts trade commodity interests.

Dear:

This is in response to your letter dated August 1, 2002, to the Division of Trading and Markets (the “Division”) of the Commodity Futures Trading Commission (the “Commission”), as supplemented by the e-mail messages of “A” of your firm dated October 4, 2002, December 4, 2002 and January 10, 2003, your e-mail message dated October 18, 2002 and by telephone conversations with Division staff. By your correspondence, you request relief on behalf of “V” and “W” in connection with advising and operating certain Japanese investment trusts (the “Japan Trusts”) sponsored by “W” and for which “X” serves as the trustee.^[1] Specifically, you request that the Division confirm: (1) that it will not recommend that the Commission commence any enforcement action against “V” for failure to register as a commodity trading advisor (“CTA”) under Section 4m(1) of the Commodity Exchange Act (the “Act”);^[2] (2) that it will not recommend that the Commission commence any enforcement action against “W” for failure to register as a commodity pool operator (“CPO”) under Section 4m(1) of the Act;^[3] and (3) that “V” may claim the CTA registration exemption provided by Commission Rule 4.14(a)(8).^[4]

Based upon the representations made in your correspondence, we understand the facts to be as follows. “V” is organized under the laws of England and has its principal office in England and a branch office in the United States. It is an investment adviser registered as such with the U.S. Securities and Exchange Commission (“SEC”) under the Investment Advisers Act of 1940. “W” is an investment adviser chartered under the laws of Japan and it is registered as an investment adviser with the SEC.^[5] Neither “V” nor “W” was organized outside the U.S. for the purpose of avoiding registration requirements under the Act. You represent that none of the directors or officers of “V” or, to the best of your knowledge and belief, “W”, is subject to statutory disqualification under Section 8a(2) or 8a(3) of the Act.^[6]

The Japan Trusts are among a number of investment trusts and funds advised by “V” in which interests are sold exclusively to Japanese investors. “W” will solicit participants in the Japan Trusts, will hire and

fire futures commission merchants for the Japan Trusts, will hire and fire the Japan Trusts' sub-advisers, and will maintain the Japan Trusts' records. The trustee of the trusts is "X".^[7] While the Japan Trusts have not previously engaged in commodity interest trading, they now intend to engage in such trading. You represent that the Japan Trusts will be operated in a manner consistent with the requirements of Rule 4.5(c)(2).

In support of a CTA registration no-action position for "V", you further represent that: (1) the provision of commodity interest trading advice by "V" to the Japan Trusts will be solely incidental to the provision of securities trading advice to the Japan Trusts; (2) "V" will provide commodity interest trading advice to the Japan Trusts in a manner consistent with eligibility status under Rule 4.5; (3) "V" will not otherwise hold itself out as a CTA; and (4) with the exception that the Japan Trusts are neither entities excluded from the definition of "pool" under Rule 4.5 nor qualifying entities under Rule 4.5 for which a notice of eligibility has been filed, (and with the additional exception of the Cayman Islands trust advised by "V" in accordance with Staff Letter 01-62)^[8] "V" will otherwise meet the criteria of Rule 4.14(a)(8).

In support of a CPO registration no-action position for "W" you further represent that: (1) beneficial interests in the Japan Trusts will be offered and sold exclusively to Japanese nationals; (2) only Non-United States Persons (as defined in Rule 4.7(a)(1)(iv)) will participate, directly or indirectly, in the Japan Trusts; (3) no funds or other capital will be contributed to the Japan Trusts, directly or indirectly, from United States persons; (4) no person affiliated with the Japan Trusts has undertaken or will undertake any marketing activity for the purpose of, or that could reasonably have the effect of, soliciting participations from United States persons; and (5) no marketing activities in connection with the Japan Trusts will be conducted within the United States.

Based upon the representations made in your correspondence and consistent with prior practice,^[9] the Division will not recommend that the Commission commence any enforcement action: (1) against "V" based solely upon the failure of "V" to register as a CTA under Section 4m(1) of the Act in connection with providing commodity interest trading advice to the Japan Trusts; or (2) against "W" based solely upon the failure of "W" to register as a CPO under Section 4m(1) of the Act in connection with operating the Japan Trusts in the manner described above. Moreover, the Division does not believe that CTA registration no-action position taken herein (or the no-action position previously taken by the Division with respect to "V" in Staff Letter 01-62) should, in itself, render "V" ineligible to claim exemption from CTA registration under Rule 4.14(a)(8) in a situation in which "V" would meet all of the criteria for exemption under Rule 4.14(a)(8) but for the fact that it was advising the Japan Trusts pursuant to this letter.^[10]

This letter does not excuse "V" or "W" from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, each remains subject to the antifraud provisions of Sections 4b and 4o of the Act,^[11] to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's rules, and to all otherwise applicable

provisions of Part 4.

This letter, and the no-action positions taken herein, are based upon the representations made to us. Any different, changed or omitted 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 “V”, “W”, “X” or the Japan Trusts change in any respect from those as represented to us. Further, this letter represents the views of this Division only and does not necessarily represent the views of the Commission or of any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact me or Christopher W. Cummings, Special Counsel, at (202) 418-5445.

Very truly yours,

Jane Kang Thorpe
Director

^[1] By your January 10, 2003 e-mail message, and following discussions with Commission staff, you withdrew that part of your original request that sought CPO registration relief for “X” based on the limited nature of “X’s” role as trustee. You represent that “X” is effectively no more than a custodian with respect to the Japan Trusts.

^[2] 7 U.S.C. § 1 *et seq.* (2000). By your October 4, 2002 e-mail message, and following discussions with Commission staff, you withdrew that part of your original request that sought CPO registration relief for “V”, based on the fact that “V” will be advising the Japan Trusts, and will not be performing CPO functions, such as solicitation of participants and funds or property.

^[3] 7 U.S.C. § 6m(1) (2000).

^[4] Commission rules referred to herein are found at 17 C.F.R. Ch. I (2002).

^[5] Although “W” has an investment advisory office in the United States and several affiliates that are registered as investment advisers with the SEC and that have places of business in the United States, none of these provide any type of securities-related services to the Japan Trusts, and it is not expected that they will provide any type of commodity interest related services to the Japan Trusts.

^[6] 7 U.S.C. §12(a)(2) or 12(a)(3)(2000)

[7] As noted previously, “X’s” role as trustee is entirely custodial.

[8] CFTC Staff Letter 01-62 [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,575 (June 13, 2001) (CPO registration not required for Cayman Islands bank operating a Cayman Islands trust in which only Japanese investors may participate; CTA registration not required for “V” as adviser of the Cayman Islands trust; and eligibility to claim relief under Rule 4.14(a)(8) confirmed for “V”, notwithstanding advising the Cayman Islands trust).

[9] *Id.*

[10] *See* CFTC Staff Letter 97-05 [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,972 (February 12, 1997) (no-action position permitting a registered investment adviser advising several companies pursuant to claim of CTA registration exemption under Rule 4.14(a)(8) to also provide commodity interest trading advice to an offshore pool without registering as a CTA).

[11] 7 U.S.C. § 6b and 6c (2000).