



COMMODITY FUTURES TRADING COMMISSION

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93-102

DIVISION OF  
TRADING AND MARKETS

October 7, 1993

Re: Request for Relief from Commodity Pool Operator  
Registration

Dear :

This is in response to your letter dated September 20, 1993, to the Division of Trading and Markets ("Division"), wherein you requested that the Division not recommend that the Commission take any enforcement action against "A" for failure to register as a commodity pool operator ("CPO") in connection with his serving as a director of "U", "V" and "W" (collectively the "Funds").

Based upon the representations made in your letter, we understand the facts to be as follows. The Funds are organized as "Z" corporations. "A" is one of three directors of "U", one of three directors of "V" and one of seven directors of "W". "A" is the only director of the Funds who is a United States citizen or resident. All actions by and all meetings of the Board of Directors of the Funds will take place outside of the United States. Participants in the Funds will not include any United States persons.<sup>1/</sup>

"A", the Funds, and 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 from United States persons. "T" will act as administrator to the Funds in "Z", where the principal books and records of the Funds will be maintained.

Based upon our review of the representations set forth in your letter and the Division's prior positions, we believe that

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<sup>1/</sup> The definition of "United States person" as set forth in Division of Trading and Markets Interpretative Letter No. 92-3 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,221 (January 29, 1992) applies for purposes of this correspondence.

this situation presents many of the same facts that have supported prior "no-action" positions.<sup>2/</sup> Specifically, your request presents the following facts: (1) the CPO will confine all pool activities to areas outside the United States; (2) none of the participants in the pool will be United States persons; (3) no funds or other capital will be contributed to the pool from United States sources; (4) all meetings and actions of the Funds' Boards of Directors will be conducted outside the United States; and (5) "A", a United States citizen, is but one of several directors of each Fund.

However, the instant case presents the further facts that the applicant for CPO registration "no-action" relief, "A", is affiliated with "X", a registered CPO, commodity trading advisor and introducing broker, as a principal, and with "Y", a registered futures commission merchant and the principal futures broker for the Funds, as a principal and an AP. We believe, however, that these facts should not prevent the Division from taking the requested "no-action" position. Where a CPO is located in the United States but all of its pool activities are offshore, the Division generally requires the CPO to register as such but, upon request, has generally granted the CPO relief from Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11).<sup>3/</sup> As a registered AP, "A" has undergone fitness and qualification examinations. Thus, the only additional requirements which "A" would be required to meet if he registered as a CPO and then requested and received exemptions from Part 4 would be the recordkeeping requirements of Rules 4.23(a)(1) (a)(9) and (b)(1)-(b)(3). In this regard, you have represented that books and records in the nature of those required under these regulations will be kept with regard to the operations of the Funds and made available for inspection by "A".

Accordingly, based upon the representations you have made to us, and consistent with prior positions taken by the Division,<sup>4/</sup> the Division will not recommend that the Commission take any enforcement action against "A" as a result of his engaging in the

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<sup>2/</sup> See, e.g., CFTC Interpretative Letter No. 76-21 [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,222 (August 15, 1976).

<sup>3/</sup> See, e.g., Division of Trading and Markets Interpretative Letter No. 92-3, supra n.1. Commission rules referred to herein are found at 17 C.F.R. Ch. I (1993).

<sup>4/</sup> See, e.g., Division of Trading and Markets Interpretative Letter No. 91-4 [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,090 (April 25, 1991).

activities described above without registering as a CPO. This position is, however, subject to the conditions that: (1) "A" remain registered as an AP; and (2) as you have represented, "A", the Funds and any person affiliated therewith will not undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect, of soliciting participations from United States persons.

The no-action position granted by this letter does not excuse "A" from compliance with any other applicable requirements contained in the Commodity Exchange Act (the "Act")<sup>5/</sup> or in the Commission's regulations thereunder. For example, "A" remains subject to the antifraud provisions of Section 40 of the Act,<sup>6/</sup> to the reporting requirements set forth in Parts 15, 18 and 19 of the Commission's regulations, and to all other provisions applicable to CPOs under Part 4.<sup>7/</sup> Further, this position is applicable to "A" solely in his capacity as the CPO of the Funds.<sup>8/</sup>

This letter is based upon the representations made in your letter and is subject to compliance with the 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 that "A"'s activities or the operations of any of the Funds, including its shareholder and Board of Directors compositions, change in any way from those as represented to us.

This letter represents the position of the Division. It does not necessarily reflect the views of the Commission or any other office or division of the Commission.

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<sup>5/</sup> 7 U.S.C. §1 et seq. (1988 & Supp. IV 1992).

<sup>6/</sup> 7 U.S.C. § 60 (1988 & Supp. IV 1992).

<sup>7/</sup> For example, "A" remains subject to the prohibition against commingling of funds found in Rule 4.20(c), which applies to each person who comes within the CPO definition, regardless of whether that person must register as a CPO.

<sup>8/</sup> Our letter should not be deemed to address the permissibility of the Funds' contemplated trading activity. See, e.g., 50 Fed. Reg. 42963, "Trading in Foreign Currencies for Future Delivery," (October 23, 1985).

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If you have any questions concerning this correspondence please contact me or Mary Cademartori, an attorney on my staff, at (202) 254-8955.

Very truly yours,

Susan C. Ervin  
Chief Counsel