



COMMODITY FUTURES TRADING COMMISSION

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93-52

DIVISION OF
TRADING AND MARKETS

COMMODITY FUTURES
TRADING COMMISSION
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April 27, 1993

Re: Relief from CPO and CTA Registration

Dear :

This is in response to your letter dated December 8, 1992, as supplemented by telephone conversations with Division staff in which, on behalf of "X", you request relief from registration as a commodity pool operator ("CPO") and as a commodity trading advisor ("CTA") in connection with operating, and providing commodity interest trading advice to Fund2, an open-end fund.

Based upon the representations made in your letter, as supplemented, we understand the pertinent facts to be as follows. By letter dated July 21, 1992 (the "Division's Letter"), the Division granted CPO and CTA registration relief to "X" in connection with Fund1, a closed-end fund.^{1/} You represent that Fund2, "substantially identical" to Fund1, "would offer an open-end alternative" to Fund1. In particular, you represent that the commodity interest trading of Fund2 and the offer and sale of its units of participation will be substantially identical to those of Fund1.

Based upon our evaluation of the representations provided to us, it is the Division's opinion that the relief provided in the Division's Letter in connection with Fund1 should also be available in connection with Fund2. This opinion is based, among others, on your representations that: (1) "X" is, and Fund2 will be, organized and operated outside of the United States; (2) no more than five percent of Fund2's subscribed capital will be committed as margin and premiums at any time with respect to commodity interest contracts, and such transactions will comply with the guidelines described in connection with Fund1 in the

^{1/} The Division's Letter is incorporated herein by reference.

Division's Letter^{2/}; (3) Fund2 will be sold in an offering exempt from registration under the Securities Act of 1933 ("SA") pursuant to Regulation D thereunder; (4) neither "X", any principal thereof, nor any person with authority over the management of "X" is subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Commodity Exchange Act ("Act"), 7 U.S.C. § 12a(2) or 12a(3) (1988), as amended by the Futures Trading Practices Act of 1992^{3/}; (5) no more than thirty-five percent of Fund2's units of participation will be offered or sold to United States persons^{4/}; (6) each United States investor will be an "accredited investor" as defined in Regulation D of the SA, a "qualified eligible participant" as defined in Rule 4.7^{5/} of the Act and a "qualified institutional buyer" as defined in Rule 144A of the SA; (7) these investors will be primarily employee benefit plans subject to the Employee Retirement Income Securities Act of 1974, as amended ("ERISA"), investment managers and commercial banks; the aggregate investment by employee benefit plans will be kept below 25 percent of total subscribed capital

^{2/} Commodity interests will be traded to hedge certain of Fund2's investments, to "add value" to, or alter the characteristics of, Fund2's other investments and as speculative positions in conjunction with Fund2's investment. The following investment guidelines adopted for Fund1 with respect to sales of unhedged options on interest rate futures will apply also with respect to Fund2: (1) no more than 200 such option contracts may be open and outstanding at any one time; (2) whenever the cost to close out any option exceeds three times the premium received by Fund2 on the sale of such option, the position must be closed out; and (3) Fund2's options will be managed so that any potential aggregate loss that may arise on open options (measured daily by mark-to-market valuation) will not exceed an amount equivalent to 1.0%, in present value terms, of the value of the total portfolio of Fund2 (also measured by mark-to-market valuation). In the case of interest rate options purchased by Fund2, Fund2's risk exposure will be limited to the premium and margin paid therefor. These investment criteria are designed to limit Fund2's potential loss exposure and to permit "X" to calculate its risk exposure through-out the term of Fund2.

^{3/} Pub. L. No. 102-546, 106 Stat. 3590 (October 28, 1992).

^{4/} For the purpose of your request we understand the term "United States person" to have the same meaning as in Division of Trading and Markets Interpretative Letter No. 92-3, Comm. Fut. L. Rep. (CCH) ¶ 25,221 (January 29, 1992).

^{5/} Rule 4.7, recently adopted by the Commission, 57 FR 34853 (August 7, 1992) is found in the Comm. Fut. L. Rep. (CCH) paragraph 22216.

to ensure that there is no significant investment in Fund2 by benefit plan investors for purposes of ERISA; (8) "X" will monitor Fund2 to ensure a maximum thirty-five percent United States participation; and (9) the minimum subscription per investor in Fund2 is approximately \$2.5 million. Accordingly, the Division will not recommend that the Commission take any enforcement action against "X" if "X" fails to register as a CPO and CTA in connection with its operation of Fund2.^{6/}

This letter is based on the representations provided to us and is applicable to "X" solely in connection with Fund2. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event the operations or activities of "X" or Fund2 change in any way from those represented to us.

We note that this letter does not excuse "X" from compliance with any otherwise applicable requirements contained in the Act or in the Commission's regulations thereunder. For example, "X" remains subject to the antifraud provisions of Section 40 of the Act, and to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations, 17 C.F.R. Parts 15, 18 and 19 (1992).

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 France M.T. Maca, an attorney on my staff, at (202) 254-8955.

Very truly yours,

Susan C. Ervin
Chief Counsel

^{6/} Please note that this relief is solely prospective from the date of this letter.