COMMODITY FUTURES TRADING COMMISSION
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DIVISION OF
TRADING AND MARKETS

94-65

June 22, 1994

Re: Limited -- Request for Relief from CPO Registration

Dear :

This is in response to the letter of "V" dated April 27, 1994, as supplemented by letter dated June 9, 1994 and telephone conversations with Division staff, in which "V" requests in connection with the operation of (the "Fund") that the Division of Trading and Markets ("Division") not recommend any enforcement action to the Commission against "W", the Fund or any persons serving on the Fund's board of directors ("Directors") if under the circumstances set forth below none of the Directors registers as a commodity pool operator ("CPO").

Based upon the representations made in your letter, as supplemented, we understand the relevant facts to be as follows. The Fund invests and trades in a variety of financial investments, including commodity futures contracts and options thereon. "W", a registered commodity trading advisor and a member of the U.K. Investment Management Regulatory Organization Limited, acts as the Fund's investment manager. As the Fund's investment manager, "W" has arranged for "X" and its affiliates to act as the placement agents for the Fund.

Participation in the Fund is currently limited to investment by non-United States persons.[1/] However, the Fund plans to

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1/ In your letter, as supplemented, you use the definition of the term "United States person" 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).

solicit tax-exempt investors that are United States persons.[2/] Each current investor in the Fund is and all future investors will be qualified eligible participants as defined in Commission Rule 4.7.[3/] The minimum investment required of each investor in the Fund is $1 million, although the Fund has the discretion to accept investments of less than this amount.[4/]

The Fund's Board of Directors is currently comprised of four individuals who were elected at the behest of "W", all of whom are non-United States persons and none of whom are affiliated with "W" or any other Commission registrant. In addition, all of the current Directors are officers of the "Bank", which holds all of the ordinary shares of the Fund[5/] as trustee under the terms of a charitable trust. You note, however, that the Fund anticipates adding an additional Director to its board. This additional Director would be "A", a United States person who is the current chairman and a principal and registered associated person ("AP") of "W". You represent that none of the current Directors nor "A" is subject to any statutory disqualification under Section 8a(2) or 8a(3) of the Commodity Exchange Act, as amended (the "Act").[6/] You further represent that any future Director who is appointed by the "Bank", as holder of all of the Fund's ordinary shares, will not be subject to any statutory disqualification under the Act and will be either an AP or listed as a principal of "W" or "Y", a registered commodity trading advisor and a United States affiliate of "W".[7/] All meetings of the Fund and its Board of Directors are conducted outside the United States.

2/ You explain that there is a tax advantage for United States tax-exempt investors to invest through an offshore corporate vehicle, such as the Fund, because such investors are not required to recognize "unrelated business taxable income" from investments in offshore corporate vehicles.

3/ Commission rules referred to in this letter are found at 17 C.F.R. Ch. I (1993).

4/ Currently the Fund is comprised of 91 investors, 15 of whom have made investments in the Fund of less than $1 million. The smallest investment made by an investor is $115,000. Seven investors have made investments of less than $500,000 and eight investors have made investments between $500,000 and $1 million.

5/ Only ordinary shares have the right to vote for Directors.

6/ 7 U.S.C. § 12a(2) or § 12a(3) (1988 & Supp. IV 1992).

7/ You note, however, that as a practical matter, although the "Bank" has the ability to remove and replace Directors, it is unlikely that they would do so given the relationship that the "Bank" has with the Directors and "W".

"W" will be responsible for the operation of the Fund and for all solicitations of investors to participate in the Fund. In this regard, you represent that "W" will, prior to soliciting any United States persons to participate in the Fund, register with the Commission as a CPO and will operate the Fund pursuant to Commission Rule 4.7. You represent that "W" will enter into an agreement with the Board of Directors of the Fund whereby: (1) the Board of Directors delegates and "W" agrees to accept sole responsibility for supervising the handling of all business of the Fund relating to the purchase and sale of commodity interests; and (2) the Board of Directors and "W" agree to be jointly and severally liable with each other for any violations of the Act and the Commission regulations issued thereunder applicable to CPOs commited by the other in connection with its serving as a co-CPO of the Fund.

All offers and sales of interests in the Fund to United States persons will be made through "Z", a registered futures commission merchant. Moreover, any person soliciting United States persons on behalf of the Fund will be registered with the Commission as an AP of "Z", "W" or another Commission registrant affiliated with "W".

Based on the foregoing, the Division will not recommend that the Commission take any enforcement action against "W", the Fund or the Directors if the Directors fail to register as CPOs in connection with their activities as Directors of the Fund. This relief is, however, conditioned on the Division's receipt of a written acknowledgment whereby: (1) the Board of Directors delegates and "W" agrees to accept sole responsibility for operating the Fund as a commodity pool, solicitation of investors and supervising the handling of all business of the Fund relating to the purchase and sale of commodity interests; and (2) the Board of Directors and "W" agree to be jointly and severally liable with each other for any violations of the Act and the Commission regulations issued thereunder applicable to CPOs commited by the other in connection with its serving as a co-CPO of the Fund.

You also have requested that the Division grant relief to "W" from certain requirements of Rule 4.23(a) to the extent that such rule requires a registered CPO to keep its books and records at its main business office. In this regard, you represent that the original records of the Fund are currently maintained at the offices of the Fund in the Cayman Islands and at the offices of the Fund's administrator in Dublin, Ireland. Duplicate records for the Fund will, however, be maintained at "W"'s principal office in London.

The Division has determined that, based upon the representations made to us, it is appropriate to grant an exemption from the requirement of Rule 4.23(a) regarding the location where original books and records must be kept. Based upon your

representations and pursuant to the authority delegated by Rule 140.93(a)(1), the Division hereby exempts "W" from the requirement of Rule 4.23(a) to the extent it requires that the Fund's original books and records be kept at "W"'s main business office, provided that, within 72 hours after a request of a Commission representative is made, "W" will obtain the original books and records from the Fund's main office in the Cayman Islands and/or from the offices of the Fund's administrator, in Dublin, Ireland and provide them for inspection at a place located in the United States and specified by the Commission representative.

The relief issued by this letter does not excuse "W", the Fund or any Director from compliance with any other applicable requirements contained in the Act or the Commission's regulations thereunder. For example, each remains subject to the antifraud provisions of Section 4o of the Act, 7 U.S.C. §6o, to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations, and to all other provisions of Part 4. Further, this relief is applicable solely in connection with the operation and activities of the Fund.

The no-action positions taken in this letter are based on the representations you have made to us and are subject to the conditions stated above. Any different, changed or omitted facts or conditions might require us to reach a different conclusion. In this regard, we request that you notify us immediately in the event the operations of the Fund, including its shareholder and Board of Directors composition, change in any way from those represented to us.

Finally, this letter represents the position of the Division of Trading and Markets only. It does not necessarily reflect the views of the Commission or any other office or division of the Commission. If you have any questions regarding this letter, please contact me or Lawrence Eckert, an attorney on my staff, at (202) 254-8955.

Very truly yours,

Susan C. Ervin
Chief Counsel