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COMMODITY FUTURES TRADING COMMISSION
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DIVISION OF
TRADING AND MARKETS

March 14, 1995

Re: Relief From Registration As Commodity Pool Operator

Dear :

This is in response to your letter dated February 9, 1995 to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by telephone conversations with the Division staff. By your letter, as supplemented, you request that the Division confirm that it will not recommend that the Commission commence enforcement action if the following wholly-owned subsidiaries of "V", a bank holding company ("V"), do not register as commodity pool operators ("CPOs") under the Commodity Exchange Act, as amended ("Act"),[1/] in connection with the operation of the "W", a Delaware business trust ("Trust"): (1) "X", a Delaware corporation ("X"), (2) "Y", a bank chartered under the laws of the State of Delaware ("Y"), and (3) "Z", a commercial bank chartered under the laws of the State of New York, ("Z").

Based upon the representations made in your letter, as supplemented, we understand the relevant facts to be as follows. "X" is a registered investment adviser under the Investment Advisers Act of 1940 ("IAA") and a registered commodity trading advisor ("CTA") under the Act. In connection with the Trust, "X" is serving as the investment manager. A second "V" affiliate, "Y", is acting as the trustee of the Trust. Finally, "Z", a third affiliate of "V", is acting as the placement agent for the Trust.

Specifically, you represent that the Trust will be operated in compliance with all of the operating criteria of Rule 4.5(c), including the limitation on investment in futures and commodity options.[2/] The Trust will invest primarily in Japanese securities, including stocks, warrants and convertible bonds. You state

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1/ 7 U.S.C. § 1 et seq. (1988 & Supp. V 1993). Commission rules referred to hereinafter are found at 17 C.F.R. Ch. I (1994).

2/ This limitation provides that a Rule 4.5 "qualifying entity" may not invest more than five percent of the value of the qualifying entity's portfolio in positions which do not constitute "bona fide hedging transactions and positions" as defined in Rule 1.3(z)(1). The five percent investment limitation is measured by aggregating initial futures margins and option premiums.

that futures and options contracts may be used: (1) during periods of large cash inflows, "to reduce risk to the Trust's underlying investment strategy"; (2) "to protect against the risk of a decline in the value of securities and/or property contributed to the Trust by a Unitholder pending the conversion of such assets into suitable investments for the Trust"; and (3) "to maintain a neutral exposure to the equity market." In addition, you represent that Trust interests will be privately placed with well capitalized investors. You state that each investor in the Trust will hold a beneficial interest in the Trust upon the purchase of Trust units and that offerees must be institutional investors, who will be solicited in a private placement. Each investor must invest a minimum of $10 million.[3/]

The term "commodity pool operator" is defined in Section 1a(4) of the Act in pertinent part as follows:

> [A]ny person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities or property . . . for the purpose of trading in any commodity for future delivery . . . but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.

Under Section 1a(4) of the Act[4/], "X", "Y" and "Z" may each be deemed to be acting as a CPO. Rule 4.5, however, excludes certain "otherwise regulated persons" from the definition of the term CPO. Specifically, Rule 4.5 excludes federal and state chartered banks from registration as CPOs if, under subparagagraph (b)(3), the bank acts as a fiduciary for the trust assets and also is vested with investment authority over such assets, and the other criteria of the rule are complied with. Although "Y" is acting as the trustee of the Trust, it is not vested with investment authority. Rather, "X" is serving as the Trust's investment manager.

Notwithstanding the combined involvement with, and management of the Trust by, "Y", "X" and "Z", the Division believes that relief under Rule 4.5 should be available. First, but for the vesting of investment authority in a "V" affiliate other than "Y", the activities of "Y" with respect to the Trust would fall within the scope of Rule 4.5(b)(3). Second, "X" is: (1) registered with the Commission as a commodity trading advisor and already subject to the Commission's regulatory scheme; and (2) registered as an investment adviser. Third, "Z" is otherwise regulated by a state banking authority. Fourth, as noted earlier, "Y", "X" and "Z" are corporate affiliates. Essentially, as you note, the functions

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3/ "Z", as placement agent, may waive the minimum investment requirement.

4/ 7 U.S.C. § 1a(4) (1988 & Supp. V 1993).

typically performed by a CPO are allocated among the three affiliates, two of which are banks.

Accordingly, for the reasons set forth above and subject to compliance with the filing, operating and other criteria of Rule 4.5, the Division will not recommend that the Commission take any enforcement action against: (1) "X", if its fails to registers as a CPO in connection with its activities as investment manager of the Trust for which it is vested with and exercising investment authority; (2) "Z", if it fails to registers as a CPO in connection with its activities as placement agent of the Trust; and (3) "Y", if it fails to register as a CPO in connection with its activities as the trustee of the Trust, discharging fiduciary responsibilities.

The positions taken in this letter do not excuse "Y", "X" or "Z" from compliance with any applicable requirements contained in the Act or the Commission's regulations thereunder. Further, this letter is based on the representations you have made to us, including the activities and status of each of the above-referenced institutions and their activities with respect to the Trust. 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 facts 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 Sharon Zackula, an attorney on my staff, at (202) 254-8955.

Very truly yours,

Susan C. Ervin
Chief Counsel