

## COMMODITY FUTURES TRADING COMMISSION

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DIVISION OF  
TRADING AND MARKETS

August 14, 1995

Re: Rules 4.21, 4.22, 4.23(a)(10) and (a)(11), 4.31, and  
4.33 -- Request for Relief in Connection with Offshore  
Fund.

Dear :

This is in response to your letter dated June 6, 1995 to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your letters dated June 20, 1995, June 22, 1995 and July 19, 1995 and telephone conversations with Division staff. By your correspondence, you request on behalf of: (1) "X", a registered commodity trading advisor ("CTA"), relief from the disclosure and recordkeeping requirements of Rules 4.31<sup>1/</sup> and 4.32,<sup>2/</sup> respectively, in connection with "X's" offering of commodity interest trading advice to (the "Fund"); and (2) "Y", a registered commodity pool operator<sup>3/</sup> ("CPO"), an exemption from the disclosure, reporting and recordkeeping requirements of Rules 4.21,<sup>4/</sup> 4.22<sup>5/</sup> and 4.23(a)(10) and (a)(11),<sup>6/</sup> respectively, in connection with the operation of the Fund.

<sup>1/</sup> 60 Fed. Reg. 38,146, 38,189 (July 25, 1995) (to be codified in 17 C.F.R. Part 4).

<sup>2/</sup> Since the date of your original request, the Commission rules concerning the disclosure and recordkeeping requirements for CTAs and CPOs have been amended and renumbered. While the recordkeeping requirements of Rule 4.32 have not been amended in any substantive manner, the rule has been renumbered as Rule 4.33. 60 Fed. Reg. 38,189.

<sup>3/</sup> "Y" is also registered with the Commission as a CTA and an introducing broker.

<sup>4/</sup> 60 Fed. Reg. 38,183 (to be codified in 17 C.F.R. Part 4).

<sup>5/</sup> 17 C.F.R. § 4.22 (1994).

<sup>6/</sup> 17 C.F.R. § 4.23(a)(10)-(a)(11) (1994).

(a) General Representations

Based upon your correspondence, we understand the pertinent facts to be as follows. The Fund will be organized and operated pursuant to the laws of the Bahamas. It will hold shareholder meetings, perform its annual audits and conduct its other business outside of the United States. No shareholder of the Fund will be a United States person;<sup>7/</sup> nor will the Fund contain capital directly or indirectly contributed by United States persons. The Fund's CTA and futures commission merchant will be registered as such with the Commission.

"Z" will act as the sponsor of the Fund. As such, it will assist in the formation of the Fund, which will include helping to structure the Fund and to write any materials used in soliciting potential shareholders. "Z" will also help solicit potential shareholders for the Fund but will not accept subscriptions on behalf of the Fund. "Z" is a corporation formed under the laws of the British Virgin Islands. It is subsidiary of "Y" and is fifty-one percent owned by "Y" and forty-nine percent owned by a citizen and resident of Switzerland.

"Y" has two directors, both of whom are listed as principals of the firm (the "'Y" Directors"). The "Y" Directors also serve as two of the three directors of "Z". The third director of "Z" is also an American citizen but is not listed or registered in any capacity with the Commission. However, he is not subject to any statutory disqualification to registration under Section 8a of the Commodity Exchange Act ("Act").<sup>8/</sup> One of the two "Y" Directors will be appointed as a director of the Fund.

The Fund will also have an Administrator, which will be a Bahamian company. In addition to the one "Y" Director, the Administrator will appoint two other persons, who will be affiliated with the Administrator and not with any Commission registrant, to the Fund's board of directors. Neither of these other two persons will be a United States person.<sup>9/</sup> To preserve

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<sup>7/</sup> You have represented that for the purposes of this request, the definition of "United States person" is identical to the definition employed in Division of Trading and Markets Interpretative Letter No. 92-3, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,221 (January 29, 1992).

<sup>8/</sup> 7 U.S.C. § 12a (1994).

<sup>9/</sup> It is anticipated that the director of the Fund who is a "Y" Director will be responsible for appointment and supervision of the  
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the Fund's offshore status for United States federal income tax purposes, the Administrator will own one hundred percent of the voting shares of the Fund. Moreover, you state that since "Z" was instrumental in the formation of the Fund, was responsible for the selection of the Administrator and is responsible for soliciting investors for the Fund, it is confident that it will be able to maintain a representative on the Fund's board of directors.

(b) Request for Relief on Behalf of "X"

Once the Fund is operational, it will be the first and therefore only client to which "X" offers commodity interest trading advice. In light of this fact, you request relief from the Disclosure Document requirement of Rule 4.31 with respect to "X's" providing commodity interest trading advice to the Fund. Based on the representations made in your letter, as supplemented, and pursuant to the authority delegated by Rule 140.93(a)(1), the Division exempts "X" from compliance with Rules 4.31 in connection with serving as the CTA of the Fund.<sup>10/</sup>

You also request on behalf of "X" relief from the record-keeping requirements of Rule 4.33. In adopting the Part 4 rules, the Commission noted that the recordkeeping requirements for CTAs play an important role in helping the Commission monitor a CTA's compliance with its obligations under the Act.<sup>11/</sup> The importance of the recordkeeping requirements to the Commission's enforcement of the Act is not diminished because a client is a non-United States person. Therefore, we are declining to grant the requested relief from the recordkeeping requirements of Rule 4.33.

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<sup>9/</sup> (...continued)

trading advisor and other matters involving the trading operations of the Fund. The two non-United States directors of the Fund will be responsible for administrative operations, investor communications, subscriptions, and redemptions.

<sup>10/</sup> The Division has granted relief from the disclosure document requirement of Rule 4.31 to CTAs based upon representations which are similar to those made by you with respect to "X". See, e.g., CFTC Interpretative Letters No. 94-68, [1992-1994 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 26,157 (June 30, 1994); and No. 93-86, [1992-1994 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 25,852 (August 24, 1993).

<sup>11/</sup> See 44 Fed. Reg. 1918, 1924 (January 8, 1979).

(c) Requests for Relief on Behalf of "Y"

Based upon the representations you have made to us, and pursuant to the authority delegated by Rule 140.93(a)(1), the Division exempts "Y" from compliance with Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11). In addition, pursuant to the authority delegated by Rule 140.93(a)(1), the Division exempts "Y" from Rule 4.23(a) to the extent that it requires "Y" to keep the Fund's original books and records at its main business office, provided that "Y" will make available to the Commission originals of the Fund's books and records within 72 hours after a request by a duly qualified representative of the Commission, at a place located in the United States as specified by the Commission representative. This determination is based primarily upon your representations that the Fund maintains its original books and records offshore to comply with Internal Revenue Service requirements for relief from United States taxation and that "Y" will agree to maintain a copy of the Fund's books and records at its offices in the United States.<sup>12/</sup>

(d) Relief for "Z"

Given the activities of "Z" in acting as the Fund's sponsor, it appears that it is required to register with the Commission as a CPO.<sup>13/</sup> However, given the fact the "Y" owns a controlling

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<sup>12/</sup> We note that you requested on behalf of Dearborn Capital an exemption from all requirements of Rule 4.23, 17 C.F.R. § 4.23 (1994) (as amended by 60 Fed. Reg. 38,183). The relief granted herein, albeit not as broad as that requested, is consistent with previous relief granted by the Division to registered CPOs, based upon representations that were similar to those made by you. See, e.g., CFTC Interpretative Letter No. 93-38, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,729 (May 3, 1993). See, also, the discussion of the importance of the recordkeeping requirements of Rule 4.33, supra.

<sup>13/</sup> We note that the Division generally has not required the board members of a fund that is organized outside of the United States and has no participation by United States persons to register as CPOs if such board members are either not United States persons or are associated with the registered CPO of the fund. See, e.g., CFTC Interpretative Letter 93-12, [1992-1994 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 25,612 (February 25, 1993) (non-United States persons on board of foreign fund who are not affiliated with any Commission registrant not required to register as CPOs); CFTC Interpretative Letter 92-3, supra n. 7 (United States directors of foreign fund, who were also officers of the

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interest in "Z" and that two of the three directors of "Z" and one of the three directors of the Fund will be listed as principals of "Y", the Division will not recommend that the Commission take any enforcement action against "Z" pursuant to Section 4m(1) of the Act if it fails to register as a CPO. This relief is conditioned upon the following: (1) "Y" files a Form 3-R naming the Fund as a commodity pool to be operated by it; and (2) within thirty days of the date of this letter, "Z" and "Y" each provides this Division with a written acknowledgement whereby each accepts joint and several liability for any violation of the Act or the Commission's regulations issued thereunder committed by the other or persons acting as employees or agents of the other relating to their activity in connection with the Fund.

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This letter is subject to the conditions that "X", "Y", "Z", the Fund or 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 participation from United States persons. This letter is applicable solely to "X", "Y" and "Z" in connection with the Fund. It does not excuse "X", "Y" or "Z" from compliance with any other applicable requirements of the Act or the Commission's regulations thereunder. For example, each remains subject to the antifraud provisions of Section 4o of the Act,<sup>14/</sup> to the reporting requirements for traders set forth in Parts 15, 18, and 19 of the Commission's regulations and to all other applicable provisions of Part 4.

This letter is based upon the representations that you have made to us, and is subject to compliance with the conditions stated above. 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 that the operations or activities of "X", "Y", "Z" or the Fund change in any way from those described in your letter. Further, the no-action position taken herein represents the views of the Division only and does not necessarily reflect the views of the Commission or any other office or division of the Commission.

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<sup>13/</sup> (...continued)  
registered CPO of the fund, not required to register individually).

<sup>14/</sup> 7 U.S.C. § 6o (1994).

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

Very truly yours,

Susan C. Ervin  
Chief Counsel