records

U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5430
Facsimile: (202) 418-5536

DIVISION OF
TRADING & MARKETS

95-92

October 26, 1995

Re: Section 4m(1) -- Request for Relief from Commodity Pool Operator Registration Requirements for an Administrative General Partner of an Offshore Fund

Dear :

This is in response to your letter dated December 23, 1994, as supplemented by letters dated March 24, 1995, August 18, 1995, August 30, 1995 and September 22, 1995, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), and as supplemented by telephone conversations with Division staff. By your letter you request on behalf of "X" and "Y" that the Division not recommend that the Commission take any enforcement action against "X" or "Y" for "Y's" failure to register as a commodity pool operator ("CPO") in connection with its serving as the administrator of the "Fund", a Cayman Islands limited partnership. You also request relief from the requirements of Rule 4.23 regarding the location of the Fund's original books and records.

Based upon the representations made in your letter, as supplemented, we understand the relevant facts to be as follows. "X", a registered CPO, is one of two general partners of the Fund and holds a 0.5% interest in the Fund. You represent that "X" is the investment general partner of the Fund, is performing all CPO-related activities on behalf of the Fund and is responsible for the oversight of the Fund's investment portfolio. "Y", a Cayman Islands limited liability company, is the other general partner of the Fund and also holds a 0.5% interest in the Fund. "Y" is the administrative general partner of the Fund and in this capacity will be responsible for the Fund's administrative affairs but has no responsibility or authority with respect to, nor has it participated in, the solicitation of investors or the management of the Fund's investment or trading activities. Specifically, "Y" took no part and it did not exercise discretion, supervision or control over any solicitations for the Fund. Rather, such solicitation activity was conducted by "X". Further, "Y" has no authority or responsibility with respect to the management of the Fund's investment activities, which are carried out solely by "X", the

operating general partner of the Fund.[1/] "Y" is wholly-owned by the principals of "X" and has three directors: "A", a United States person[2/] who is registered as an associated person of "X"; "B", a United States person; and "Z", a Cayman Island Company that is an affiliate of the Fund's administrative services provider. None of the directors is subject to a statutory disqualification under Sections 8a(2) or 8a(3) of the Commodity Exchange Act ("Act").[3/] You further represent that with respect to the Fund, "Y's" activities to date have been, and in the future are expected to be, ministerial in nature.

The Fund is organized as a Cayman Islands limited partnership and is being established as an investment vehicle for non-United States persons. It is anticipated that the Fund will invest in managed funds (such as hedge funds), securities and other investment instruments held in segregated accounts and other investment vehicles. You represent that all of the investors of the Fund will be qualified eligible participants, as that term is defined in Rule 4.7, and that "X" has filed the required notice of claim under Rule 4.7 in connection with its operation of the Fund.[4/]

1/ As the administrative general partner, "Y's" responsibilities will include: acceptance of subscriptions and receipt of capital contributions forwarded to "Y" pursuant to instructions provided to investors in the Fund's subscription agreement; payment of Fund expenses; making distributions to investors as directed by the operator; maintenance of a registry for the ownership and transfer of interests in the Fund; maintenance of the Fund's original books and records; coordination with the Fund's auditors of the audit of the Fund's books and the preparation of its tax returns; preparation and distribution of reports to investors; communications with investors (e.g., advising subscribers if their subscription agreement or subscription payment is deficient as to signature, date, etc., recording name and address changes and conducting meetings of Fund investors according to an agenda preset by the operating general partner); furnishing the offering and redemption prices of interests in the Fund; and making such filings and keeping such records as are required by Cayman Islands law.

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

3/ 7 U.S.C. § 12a(2) or 12a(3) (1994).

4/ Commission rules referred to herein are found at 17 C.F.R. Ch. I (1995), as amended by 60 Fed. Reg. 38146 (July 25, 1995).

Inasmuch as "Y" will be a general partner of the Fund, it would be required to be registered as a CPO of the Fund, absent the relief requested herein.[5/] In support of the instant request, "X" has represented that it will, by written and dated acknowledgment, accept joint and several liability with "Y" for any violations of the Act or the Commission's regulations promulgated thereunder applicable to CPOs in connection with "Y" and "X" serving as general partners and CPOs of the Fund. In addition, "Y" has represented that it will, by written and dated acknowledgment, accept joint and several liability with "X" for any violations of the Act or the Commission's regulations promulgated thereunder applicable to CPOs in connection with "X" or "Y" serving as general partners and CPOs of the Fund.

In light of the foregoing, the Division will not recommend that the Commission take any enforcement action against "X" or "Y" for "Y's" failure to register as a CPO in connection with its serving as a general partner and administrator of the Fund. This position is, however, subject to the following conditions: (1) "Y" will not exercise discretion, supervision or control over or participate in: (i) the solicitation, acceptance or receipt of funds or property to be used for purchasing interests in the Fund, or (ii) the investment, use or disposition of funds or property of the Fund; and (2) the Division receives the above specified acknowledgments within thirty days of the date of this letter.

In addition, based upon your representations, the Division has determined that it is appropriate to grant an exemption from the requirement of Rule 4.23 regarding the location where original books and records must be kept. This determination is based primarily upon your representations on behalf of "X" that: (1) duplicates of the books and records of the Fund will be kept by "X" at its New York office; (2) the Fund maintains its original books and records offshore to comply with Internal Revenue Service requirements for relief from United States taxation; and (3) upon request of a Commission or National Futures Association representative, "X" will obtain the original books and records from the Fund's main office for inspection at the place specified by the representative within seventy-two hours after the request is made. Accordingly, pursuant to the authority delegated by Rule 140.93(a)(1), the Division hereby exempts "X" from the requirement of Rule 4.23 regarding the location of original books and records with respect to the Fund.

The relief provided by this letter does not excuse "X" and "Y" from compliance with any otherwise applicable provisions of the Act

---

5/ See CFTC Interpretative Letter 75-16, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,104 (October 15, 1975).

and the Commission's regulations issued thereunder. For example, "X" and "Y" remain subject to the antifraud provisions of Section 4o of the Act,[6/] to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations and to Rules 4.20 and 4.41, which apply to each person who comes within the CPO definition, regardless of registration status. Moreover, this letter is applicable to "X" and "Y" solely in connection with their serving as general partners of the Fund. In addition, the Division notes that it is not excusing or in any way limiting the Commission's authority to proceed against "X", "Y" or the Fund for any past violation of the Act or the Commission's rules thereunder. The position stated herein is prospective only.

The positions taken in this letter are based upon the representations that have been made to us and are subject to compliance with the conditions stated above. Any different, changed or omitted facts or conditions might require us to reach different conclusions. In this connection, we request that you notify us immediately in the event that the activities of "X" or "Y" change in any way from those as represented to us. Further, the no-action position taken in this letter represents the position of the Division of Trading and Markets only. It does not necessarily represent the views of the Commission or any other office or division of the Commission. If you have any questions concerning this correspondence, please contact me or Myra Silberstein, an attorney on my staff, at (202) 418-5450.

Very truly yours,

Susan C. Ervin
Chief Counsel

6/ 7 U.S.C. § 6o (1994).