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U.S. COMMODITY FUTURES TRADING COMMISSION

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DIVISION OF
TRADING & MARKETS

July 22, 1996

Re: Section 4m(1) -- Request for Relief from CTA and CPO Registration Requirements By Investment Adviser to and Trustee of Trust Fund Consisting of Canadian Pension Plans.

Dear :

This is in response to your letter dated February 7, 1996 to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your letter dated April 11, 1996 and telephone conversations with Division staff. By your letter, as supplemented, you request on behalf of "U" and "V" relief from the requirements to register as a commodity trading advisor ("CTA") and commodity pool operator ("CPO") in connection with their roles in advising and operating the "Group Trust", a trust fund that will have as its participants Canadian pension plans. Specifically, you request that the Division confirm that it will not recommend that the Commission take enforcement action for failure to comply with Section 4m(1) of the Commodity Exchange Act ("Act")[1/] against: 1) "U" or any of its affiliates[2/] if "U" or an affiliate manages the Group Trust's assets using commodity interests, as described more fully below, without registering as a CTA or CPO; and 2) "V" or any of

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1/ 7 U.S.C. § 6m(1) (1994).

2/ You represent that for the purpose of this letter an affiliate of "U" would be any entity controlling, controlled by or under common control with "U". You explain that "U" is requesting relief for its affiliates because "V" may wish to sign new contracts with affiliates of "U" under which such affiliates would perform duties on behalf of the Group Trust that are currently the responsibility of "U" under the Investment Management Agreement dated September 15, 1995 between "U" and "V" ("IMA").

its affiliates,[3] if "V" serves as trustee of the Group Trust without registering as a CPO.[4]

Based upon your correspondence, we understand the pertinent facts to be as follows. "U" is incorporated under the laws of the State of Delaware and is a wholly-owned subsidiary of "Z". "U" is a registered investment adviser under the Investment Advisers Act of 1940.[5] "U" provides investment management services to various institutional accounts. "U" currently uses commodity interests solely with respect to entities that are either "qualifying entities" under Rule 4.5(b), and for which notices of eligibility under Rule 4.5 have been filed, or are excluded from the definition of pool under Rule 4.5(a)(4)(i), (ii), (iii) or (iv).[6] "U" has accordingly filed a claim of exemption from CTA registration with the Commission pursuant to Rule 4.14(a)(8).[7] "V" is a Canadian corporation and is a wholly-owned subsidiary of "W", a Delaware corporation, which in turn is a wholly-owned subsidiary of another Delaware corporation, "X". "V" acts as the trustee of the Group Trust.

The Group Trust is a pooled fund trust established under the laws of the province of Ontario, Canada for the collective investment of assets of Canadian pension plans which are registered under Canada's Income Tax Act (the "Plans"). The Group Trust was organized by "V" pursuant to a Declaration of Trust (the "Trust Agreement") dated September 15, 1995. The Group Trust was formed to achieve certain efficiencies by combining the assets of participating Plans. The Trust Agreement provides that the Group Trust will be comprised of two or more sections (each, a

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3/ For the purpose of this letter, an affiliate of "V" would be any entity controlling, controlled by or under common control with "V". You represent that "V" is requesting relief for its affiliates in order to assure that the Commission will not deem one of these affiliates a CPO of the Group Trust based upon "V's" activities under the IMA and on behalf of the Group Trust.

4/ You also request similar relief for the directors, officers and employees of "U" and "V". However, it appears that any such person would be a principal of his respective firm and not a CPO or CTA himself. Accordingly, no such relief is necessary.

5/ 15 U.S.C. § 80a-1 et seq. (1994).

6/ Commission rules referred to herein are found in 17 C.F.R. Ch. I (1995), as amended by 60 Fed. Reg. 38,146 (July 25, 1995).

7/ Our records show that "U" filed a notice of exemption under Rule 4.14(a)(8) effective January 9, 1995.

"Section").[8/] Currently, the Group Trust consists of two Sections. Each of the current Sections has the same investment objectives of long-term growth of capital and future income through investment in equity securities, consistent with principles of prudent investment management and preservation of capital. One Section, however, invests primarily in United States markets while the other invests primarily in non-United States markets. The Group Trust will be operated in accordance with Rule 4.5(c)(2).[9/]

At this time, the Group Trust has only one Plan investor. The sole investor is a pension plan established by "Y"[10/] for the benefit of its employees. However, other Plans are likely to be offered the right to participate in the Group Trust in the future. The employers who have established such other Plans may not be affiliated with "U". In order to be eligible to participate in the Group Trust, a Plan: (1) must be a trusteed pension fund sponsored by a Canadian employer for the benefit of its employees all of whom will be, except in limited circumstances, Canadian

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8/ "V" retains ultimate authority to create new Sections for the Group Trust, although "U" may request or recommend that a new Section be created.

"U", on behalf of the Group Trust and after consultation with Canadian counsel, has advised you that the structure of the Group Trust, including the multi-section arrangement is permissible under applicable Canadian law. Further, each Section is treated as a separate trust, so that each Section will be responsible for its own losses. The Trust Agreement also contemplates that each Plan will be responsible for its proportionate share of the losses of the Section in which it is invested and that in no event will a Plan be responsible for any losses in excess of its proportionate interest in such Section.

9/ In this regard, "U" has agreed to submit to any special calls that the Commission may make to demonstrate compliance with the provisions of Rule 4.5(c) pursuant to Rule 4.5(c)(2)(iv). Further, we note that for the purpose of meeting the trading criterion of Rule 4.5(c)(2)(i), each Section must be treated as a separate trading vehicle -- i.e., the five percent speculative trading restriction set forth therein must be separately calculated for each Section based upon the liquidation value of that Section.

10/ "Y" is a corporation formed under the laws of the province of Ontario, Canada and is affiliated with "U".

residents;[11] and (2) have at least $100 million in assets. The Plans will not be subject to the Employee Retirement Income Security Act of 1974 ("ERISA"),[12] although each Plan will be subject to analogous Canadian provincial or federal statutes that regulate pension plans and afford protection to Canadian pension plan participants.[13] While the Plans are similar in nature and purpose to United States pension plans that would be qualifying entities under Rule 4.5(b) or would otherwise be excluded from the definition of "pool" by Rule 4.5(a)4(i) through (iv), the Plans are not eligible for such treatment because they are organized under and subject to Canadian provincial and federal statutes and not subject to United States regulation under ERISA as required by Rule 4.5.

"U" acts as investment manager for each Section of the Group Trust pursuant to the IMA. Subject to the investment objectives, guidelines and restrictions established by the Trust Agreement for each Section, "U" has broad authority to manage, acquire, control and otherwise dispose of the assets of the Group Trust. Specifically, "U's" duties include, but are not limited to: (1) providing investment analysis and recommendations and supervising the investments for each Section of the Group Trust; (2) determining appropriate modifications to the investment restrictions and

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11/ You indicated that given the proximity of Canada and the United States, there will be some instances in which retired employees who are beneficiaries of a Canadian corporation's pension plan participating in the Group Trust have relocated to the United States after retirement. Further, on rare occasions, a case could conceivably arise in which an active employee of a Canadian corporation who is covered by a pension plan participating in the Group Trust could reside in the United States although such employee would work in Canada. In this regard, in no case will the number of United States residents who are beneficiaries of any Plan participating in the Group Trust be more than three percent of such Plan's total beneficiaries.

12/ 29 U.S.C. § 1001 *et seq*. (1994).

13/ You represent that under Canadian statutes, pension plan assets must be: (1) held separately in a trust or its civil law equivalent; (2) managed soundly and with care and prudence by the fiduciaries to whom they are entrusted; and (3) held for the exclusive benefit of plan participants. In addition, the Group Trust must make certain filings with governmental regulatory authorities respecting its investment activities to ensure compliance with statutory requirements.

guidelines of each Section;[14/] (3) placing orders with brokers and/or dealers chosen by "U", without obtaining the consent of or consulting with the trustee; and (4) otherwise directing the trustee in connection with the investment activities in the manner contemplated by the Trust Agreement. "U" is also responsible for soliciting participation in the Group Trust, which it will undertake through an affiliated, United States broker-dealer, "T". Finally, "U" acts as a fiduciary to the Group Trust pursuant to the IMA with "V", the Group Trust's named fiduciary, and is therefore subject to Canadian regulation which imposes a fiduciary standard of care upon "U" as investment manager.[15/]

In its role as trustee of the Group Trust, "V" acts as the custodian of the assets of each Section and in a safekeeping and banking capacity in respect to the property of the Group Trust.[16/] "V" is also responsible for: (1) the valuation of securities and other assets of the Group Trust; (2) the delivery and receipt of such securities and other assets; (3) maintenance of the accounting and financial records of the Group Trust; (4) preparation of periodic reports; (5) termination or hiring investment managers on behalf of the Group Trust, but only upon the approval of the unit holders; and (6) performance of certain other administrative functions for the Group Trust. "V" has delegated to "U" its investment discretion with respect to the assets of the Group Trust and any responsibilities for the formulation of the investment policies to be followed by the Group Trust. Except to the extent that assets of the Group Trust are invested at the direction of "U" in short-term funds administered by "V", or that "V" is directed by "U" to lend securities on behalf of the Group Trust, the investment management of the Group Trust's assets is the exclusive responsibility of "U".

14/ These modifications must be consistent with the overall goals, objectives and restrictions laid out in the Trust Agreement. Moreover, any such modification may be undertaken only upon sixty days notice to unit holders in the Group Trust.

15/ See, n. 13 supra.

16/ Canadian cash and securities are held in safekeeping by "V". Non-Canadian cash and securities are currently held by "X" or another sub-custodian appointed by "V".

I. Relief for "U"

A. Relief from CPO Registration Requirements

The term "commodity pool operator" is defined in Section 1a(4) of the Act[17] 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 other 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.

In this regard, the Commission has stated that a pool's CPO typically is the person who promotes the pool, who has the authority to hire (and to fire) the pool's CTA and who selects or changes the pool's futures commission merchant ("FCM").[18]

As noted above, under the Group Trust, "U" has responsibility for soliciting participation in the Group Trust and has authority to select the FCM through which any commodity interest transactions will be executed. We believe that such responsibility and authority in connection with a pooled investment vehicle brings "U" within the statutory definition of CPO. "U" cannot be excluded from the definition of CPO pursuant to Rule 4.5 because, as you acknowledge, the Group Trust does not include pension plans that meet the definition of "qualifying entity" nor are any of these plans excluded from the pool definition under Rule 4.5.[19] Rather, it consists of a group of foreign pension plans that are not subject to United States regulation under ERISA.[20] Nor

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17/ 7 U.S.C. § 1a(4) (1994).

18/ 49 Fed. Reg. 4778, 4780 (February 8, 1984).

19/ Nor is it a "qualifying entity" under Rule 4.5(b)(3) because it is not operated by a state or federally regulated financial depository institution.

20/ Cf. CFTC Interpretative Letter No. 93-91, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,857 (September 7, 1993) (granting CPO registration relief to investment manager and operator of group trust consisting of pension plans that are 4.5 qualified entities if operator complies with Rule 4.5); CFTC Interpretative Letter No. 94-52, [1992-1994 Transfer Binder] Comm.

(continued...)

does "U" appear to qualify for any other exemption or exclusion from CPO registration under the Act or Commission rules.[21]

However, based upon your representations, we do not believe that it would be contrary to the public interest or inconsistent with previous Division positions to grant the requested relief.[22] Accordingly, the Division will not recommend that the Commission take any enforcement action for failure to comply with Section 4m(1) of the Act against "U" or its affiliates in connection with their duties as CPO of the Group Trust as described if any such person fails to register as a CPO. This relief subject to the conditions that where the relief will be claimed by an affiliate of "U": (1) like "U", the affiliate will be registered as an investment adviser under, or will be excluded from the definition of investment adviser pursuant to Section 202(a)(2) or 202(a)11 of, the Investment Advisers Act of 1940; and (2) within thirty days following any change that results in an affiliate of

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20/ (...continued)
Fut. L. Rep. (CCH) ¶ 26,116 (June 1, 1994) (granting CPO registration relief to operator and investment manager of group trust consisting of pension plans that are qualified entities under Rule 4.5(b) or excluded from the definition of pool by Rule 4.5(a)(4), if operator complied with Rule 4.5).

21/ See, e.g., Rule 4.13, which provides an exemption from CPO registration to the operators of essentially family, club and small pools.

22/ See CFTC Interpretative Letter No. 94-81 [Current Transfer Binder] Comm. Fut. L. Rep. ¶ 26,210 (June 9, 1994) (granting CTA registration relief to entity advising, among others, foreign pension plans of companies affiliated with advisor's parent company); CFTC Interpretative Letter No. 90-3 [1987-1990 Transfer Binder] Comm. Fut. L. Rep. ¶ 24,581 (January 19, 1990) (excluding collective account consisting entirely of foreign pensions plans from definition of pool); and CFTC Interpretative Letter No. 95-106, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,577 (November 9, 1995), and accompanying Advisory (subject to certain conditions, the Division allowed CTAs to treat foreign entities as qualified eligible clients ("QECs") under Rule 4.7(b) where those foreign entities, although analogous to United States entities that qualified for QEC treatment, could not qualify for QEC treatment because they were not subject to United States laws and regulations as required by Rule 4.7(b)). See also, CFTC Interpretative Letter No. 93-91 and CFTC Interpretative Letter No. 94-52, supra n. 20 (providing CPO registration relief to parties in connection with their operation of group trusts consisting entirely of United States regulated pension plans).

"U" performing any duties that are now "U's" responsibilities under the IMA, "U" provides the Division with written notice of the name and business address of such affiliate.[23/] In addition, this relief is subject to the condition that the Group Trust will be operated in compliance with all applicable Canadian laws.

B. Relief from Registration as a CTA

Commission Rule 4.14(a)(8) provides an exemption from registration as a CTA for an investment adviser registered under the Investment Advisers Act of 1940 who provides commodity interest trading advice solely to entities that are excluded from the definition of pool pursuant to Rule 4.5(a)(4) or are qualifying entities under Rule 4.5(b)(4). As already discussed, the Group Trust does not meet the criteria for exclusion from the commodity pool definition or for treatment as a qualifying entity and, consequently, "U" does not qualify for an exemption from registration as a CTA pursuant to Rule 4.14(a)(8) in connection with its role as investment manager for the Group Trust. However, based upon your representations and related analysis of the requested CPO registration relief set forth above, we do not believe that it would be contrary to the public interest if "U" acted as investment manager to the Group Trust without registration as a CTA.

Accordingly, the Division will not recommend that the Commission take any enforcement action for failure to comply with Section 4m(1) of the Act against "U" or its affiliates solely by reason of their failure to register as CTAs in connection with providing commodity trading advice in the course of performing their duties as investment manager to the Group Trust. In addition, the Division will not recommend that the Commission take any enforcement action for failure to comply with Rule 4.14(a)(8)(i)(A) against "U" or any of its affiliates based solely upon the fact that "U" or such affiliate acts as investment manager to the Group Trust and continues to claim an exemption from CTA registration pursuant to Rule 4.14(a)(8), provided that "U" or such affiliate otherwise complies with Rule 4.14(a)(8).

Where any relief granted by this section will be claimed by an affiliate of "U", such relief is further subject to the conditions that: (1) like "U", the affiliate will be registered as an investment adviser under, or is otherwise excluded from the definition of investment adviser pursuant to Section 202(a)(2) or 202(a)11 of, the Investment Advisers Act of 1940; and (2) within

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23/ To the extent that the activities of "T" on behalf of the Group Trust implicate the conditions for an affiliate of "U" to claim relief, your request has provided the required written notification of such activity.

thirty days following any change that results in an affiliate of "U" performing any duties that are now "U's" responsibilities under the IMA, "U" provides the Division with written notice of the name of such affiliate. In addition, all relief granted by this section is subject to the condition that the Group Trust will be operated in compliance with all applicable Canadian laws.

II. Relief for "V"

With respect to the functions of a CPO (discussed above), we note your representations that "V" formed the Trust, initially had power to delegate trading authority to another entity, and may hire or fire the Group Trust's CTA subject to approval by the Group Trust's unit holders. Nevertheless, based upon your representations, and in particular that both "V" and the Group Trust are organized under the laws of a foreign jurisdiction and that any participating pension plan must have at least $100 million in assets, it does not appear that it would be contrary to the public interest to grant "V" relief from CPO registration requirements in connection with its duties on behalf of the Group Trust and under the IMA. Accordingly, the Division will not recommend that the Commission take any enforcement action for failure to comply with Section 4m(1) of the Act against "V" solely by reason of its failure to register as a CPO of the Group Trust despite preforming the functions set forth above. In addition, the Division confirms that it will not deem any affiliate of "V" to be a CPO of the Group Trust based solely upon "V's" duties on behalf of the Group Trust, as described above. The relief granted by this section is subject to the condition that the Group Trust will be operated in compliance with all applicable Canadian laws.

The relief granted by this letter is based upon the representations made to us and is subject to compliance with the conditions set forth above. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this connection, we request that you inform us immediately in the event that the operations, structure or activities of the Group Trust, "U" or any affiliate thereof, or "V" change from that described in your letter. Further, this letter is applicable to "U", "V" or any affiliate thereof solely with respect to the requirements that such persons register as a CPO or CTA of the Group Trust and solely in connection with their responsibilities and duties on behalf of the Group Trust.

This letter does not excuse "U", "V" and their affiliates from compliance with any other applicable requirements of the Act.[24/] For example, each remains subject to the antifraud

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24/ 7 U.S.C. § 1 et seq. (1994).

provisions of Section 4o of the Act,[25/] as applicable, the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations and the prohibited activities and advertising requirements set forth in Rules 4.20 and 4.41, respectively. This letter represents the views of this Division only and 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 Thomas E. Joseph, an attorney on my staff, at (202) 418-5450.

Very truly yours,

Susan C. Ervin
Chief Counsel

25/ 7 U.S.C. § 6o (1994).