

**CFTC Letter No. 97-48****May 6, 1997****Division of Trading & Markets**

Re: Request for Confirmation of Availability of Advisory 18-96 and for Relief from CPO Registration

---

Dear :

This is in response to your letter dated January 21, 1997, to the Division of Trading and Markets ( Division ) of the Commodity Futures Trading Commission ( Commission ), as supplemented by telephone conversations with Division staff. By your correspondence, you seek confirmation that U , a registered commodity pool operator ( CPO ), may file a Notice of Claim for Exemption pursuant to Advisory 18-96 (the Advisory<sup>1</sup>) on behalf of the Fund , a Cayman Islands limited liability company, despite the purchase of interests in the Fund by the Fund s commodity trading advisor ( CTA ).

Based upon the representations made in your correspondence, we understand the pertinent facts to be as follows. U is a Delaware corporation that is wholly-owned by A . A and B are each registered as an associated person ( AP ) and listed as a principal of U . In connection with the contemplated operation of the Fund, U s affiliate, <sup>2</sup>V and <sup>3</sup>W have formed <sup>4</sup>X as a joint venture, with each of V and W owning a fifty percent interest in X . V , W and X are not registered with Commission in any capacity. Y , a Delaware corporation that is registered as a commodity trading advisor ( CTA ), will serve as the Fund s CTA.

The Fund will have as the members of its Board of Directors A and B and two Korean employees of W<sup>5</sup>. A further serves as X s chief executive officer and president. No director of the Fund or X is subject to a statutory disqualification under the Commodity Exchange Act (the Act<sup>6</sup>). The Fund s non-participating, voting shares will be held by X . Subject to the exception discussed below, the Fund s participating, non-voting shares will be held by non-U.S. persons, as that term is defined in Advisory 18-96. As a condition to its selection as the Fund s CTA, Y has been required to purchase a minority interest in the participating, non-voting shares of the Fund.

X will serve as the Fund s sponsor. In this regard, you note that it is the architect of the Fund s structure and it will select the selling agents participating in the distribution of the Fund s shares. Initially, these selling agents will be W and A , in his capacity as a registered AP of U . Other than

X's involvement as the Fund's sponsor, you state that X will have no day-to-day operational functions with regard to the Fund. Pursuant to a Submanagement Agreement entered into between X and U, U is responsible for such activities as hiring and firing the Fund's CTA and selecting and changing the Fund's futures commission merchant (FCM).<sup>7</sup> Further in this regard, you explain that A, in his capacity as president of U, has been solely responsible for all negotiations relating to the selection of Y as the Fund's CTA.

You first request confirmation that a notice pursuant to the Advisory may be filed with respect to the Fund notwithstanding the ownership therein of Y, a U.S. person and the Fund's CTA. In response to this request, we note that the Division has taken the position that the relief available under the Advisory (or pursuant to previously issued no-action relief) is not rendered unavailable by the participation in an offshore pool of a U.S. person where that person is, e.g., the pool's CPO, CTA or a principal thereof.<sup>8</sup> Accordingly, by this letter we confirm that a notice pursuant to the Advisory may be filed for the Fund notwithstanding the ownership of interests in the Fund by Y.

You next request confirmation that U is the proper person to file the notice pursuant to the Advisory which is, in effect, a request that we deem U to be the CPO of the Fund for this purpose. In support of this request, we note, among others, your representations that: (1) U is registered as a CPO; (2) X is jointly owned by V, U's affiliate, and W, a Korean firm; (3) the Fund's Board of Directors will consist of two U.S. persons who are registered APs and listed principals of U (A and B) and two non-U.S. persons who are employees of W; (4) solicitations will be made by one of U's registered APs (A) and W; (5) X will not be involved in the day-to-day operations of the Fund; and (6) pursuant to the Management Agreement, U will have such responsibilities as hiring and firing the Fund's CTA and selecting and changing the Fund's FCM. Based upon your representations, the Division believes that U may be deemed to be the Fund's CPO for the purposes of filing a notice pursuant to Advisory 18-96. Accordingly, the Division will not recommend that the Commission take any enforcement action against X under Section 4m(1) of the Act<sup>9</sup> in connection with its operation of the Fund solely on the basis of its failure to register as a CPO in connection with its services to the Fund. This position is, however, subject to the conditions that: (1) U remain registered as a CPO; and (2) within thirty days of the date of this letter U and X provide the Division with signed and dated acknowledgments wherein each agrees to be jointly and severally liable with the other for any violations of the Act and the Commission's regulations issued thereunder applicable to CPOs in connection with the operation of the Fund.

This letter is solely applicable to X and U in connection with the operation of the Fund. It does not excuse either firm 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, 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 set forth above. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this regard, we request that you notify us immediately in the event that the operations or activities of U , V , X or the Fund change in any way from those described in your letter. Further, the positions taken herein represent the positions of this Division only. They do not necessarily reflect the positions of the Commission or any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact me or Barbara Stern Gold, Assistant Chief Counsel, (202) 418-5450.

Very truly yours,

Susan C. Ervin

Chief Counsel

<sup>1</sup> [1994-96 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,659 (April 11, 1996). The Advisory makes available to registered CPOs of certain offshore commodity pools relief from Rules 4.21, 4.22 and 4.23 (a)(10) and (a)(11) and the location of books and records requirement of Rule 4.23. Among other things, the pool for which relief is claimed may not have a United States ( U.S. ) person as a shareholder or other participant. For purposes of the Advisory, the term United States person has the same definition as that set forth in Rule 4.7(a)(ii)(c). Commission rules referred to herein are found at 17 C.F.R. Ch. I (1996).

<sup>2</sup> V , a Cayman Islands limited liability company, is owned by A and B .

<sup>3</sup> W is a Korean securities brokerage firm.

<sup>4</sup> X is a British Virgin Islands company.

<sup>5</sup> These same persons also comprise X s Board of Directors, and A and B and another Korean employee of W serve as X s officers.

<sup>6</sup> Section 8a(2) or 8a(3) of the Act, 7 U.S.C. §12a(2) or 12a(3)(1994).

<sup>7</sup> Specifically, you explain that pursuant to the terms of the Submanagement Agreement, U will be responsible for (1) evaluating the performance of Y ; (2) monitoring applicable speculative position limits; (3) making any regulatory filings with the Commission in connection with the Fund and its operations; (4) complying with all ongoing reporting and compliance requirements applicable to the Fund; (5) preparing offering materials in respect of the Fund; and (6) providing such other administrative services as are required in connection with the day-to-day operations of the Fund.

<sup>8</sup> See, e.g., CFTC Interpretative Letter 85-13, [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,786 (October 16, 1985). See also Rule 4.13(a)(2)(ii) which, for the purpose of determining the availability of an exemption from registration for the CPO of a family, club or small pool, excludes from the computation of no more than 15 participants allowable under that exemption such persons as immediate family members of the CPO.

<sup>9</sup> 7 U.S.C. §6m(1) (1994).