

**CFTC Letter No. 97-65****July 31, 1997****Division of Trading & Markets**

Re: Request for Relief from CPO Registration Requirement of Section 4m(1) of the Act

Dear :

This is in response to your letter dated July 3, 1997 to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your letters dated July 22 and July 23, 1997, and by telephone conversations with Division staff. By your correspondence, you request that the Division not recommend that the Commission take any enforcement action against X , a Cayman Islands company, for failure to comply with the commodity pool operator ("CPO") registration requirement of Section 4m(1) of the Commodity Exchange Act ("Act")<sup>1</sup> in connection with serving as the sole general partner of the "Fund", a Cayman Islands limited partnership on whose behalf Y registered CPO, has claimed relief pursuant to Rule 4.7(a).<sup>2</sup>

Based upon the representations made in your correspondence, we understand the relevant facts to be as follows. The Fund's sole investment will be in the shares of U , Rule 4.7(a) exempt pool which invests in a variety of securities and other financial instruments issued by United States ("U.S.") and foreign issuers, as well as commodity interests.<sup>3</sup> The current minimum investment for the Fund is \$1,000,000. You request that Y be deemed to be the CPO of the Fund.

Since X will be serving as the sole general partner of the Fund, it would, absent relief, be required to be registered as a CPO in connection with its operation of the Fund.<sup>4</sup> You propose that Y be considered to be the Fund's CPO, notwithstanding that X is the sole general partner of the Fund. In support of this request, you represent that (1) Y is registered as a CPO; (2) X and Y are affiliated companies in that X is a wholly owned subsidiary of, and is controlled by, Y;<sup>5</sup> (3) X was established pursuant to a requirement under Cayman Islands law that the general partner of a partnership formed under Cayman Islands law must itself be formed under Cayman Islands law;<sup>6</sup> (4) X will not engage in any activity that could subject it to regulation as a CPO other than serving as the general partner of the Fund; and (5) neither X nor any principal thereof is subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Act.<sup>7</sup> You have enclosed with your letter a signed acknowledgment, dated July 3, 1997, whereby Y and X agree to be jointly and severally liable with each other for any violations of the Act and Commission regulations

applicable to CPOs in connection with the operation of the Fund.

Based upon the foregoing and subject to the following conditions, the Division will not recommend that the Commission take any enforcement action against X solely on the basis of its failure to register as a CPO in connection with its serving as the sole general partner of the Fund. This position is, however, subject to the following conditions: (1) Y will serve as the CPO of the Fund and will remain registered as a CPO;<sup>8</sup> and (2) X 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<sup>9</sup> or (ii) the investment, use or other disposition of funds or property of the Fund.

This letter is based upon the representations made in your correspondence 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 ask that you notify the Division immediately in the event the operations or activities of X, Y or the Fund change in any way from those as represented to the Division.

We note that this letter is applicable to X and Y solely in connection with the operation of the Fund. It does not excuse X or Y from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, each remains subject to the antifraud provisions of Section 40 of the Act,<sup>10</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. Further in this regard, we note that Y, as the CPO of the Fund, must provide material disclosures, including fee information, with respect to offering the Fund pursuant to Rule 4.7(a).

This letter represents the views of this Division only and does not necessarily represent the views of the Commission or of any other office or division of the Commission. If you have any questions concerning this correspondence, please contact me or Monica S. Amparo, an attorney on my staff, at (202) 418-5450.

Very truly yours,

Susan C. Ervin

Acting Director

<sup>1</sup> 7 U.S.C. § 6m(1) (1994).

<sup>2</sup> Y filed a Notice of Claim for Exemption pursuant to Rule 4.7(a) on behalf of the Fund effective June

20, 1997. Pursuant to this exemption, interests in the Fund may be sold solely to "qualified eligible participants" ("QEPs") as that term is defined in the rule. Specifically, the Fund will have as participants (1) up to 300 U.S. tax-exempt persons who are (a) qualified purchasers under the Investment Company Act of 1940, as amended, (b) QEPs, and (c) accredited investors under the Securities Act of 1933, as amended; and (2) an unlimited number of persons who are not "United States persons," as that term is defined in Rule 4.7(a). Commission rules referred to herein are found at 17 C.F.R. Ch. 1 (1997).

<sup>3</sup> The registered CPO of U is V .

<sup>4</sup> See, e.g., CFTC Staff Interpretative Letter No. 75-16, [1975-77 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,104 (October 15, 1975).

<sup>5</sup> In this regard, you represent that Y and X have one common principal, A , who serves as a director of X and as an officer of Y . A is listed as a principal of Y .

<sup>6</sup> Cayman Islands law provides that, alternatively, where the general partner of a partnership formed under Cayman Islands law is not itself formed under Cayman Islands law, then the general partner must register as a foreign entity in order to conduct business (i.e., operate the partnership) in the Cayman Islands. These registration requirements would have been extremely onerous for Y in light of its existing structure and operations.

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

<sup>8</sup> Y will also serve as the Fund's commodity trading advisor ("CTA") pursuant to the exemption from CTA registration provided in Rule 4.14(a)(4).

<sup>9</sup> You have explained that in furtherance of compliance with relevant exemptive provisions of federal law, the general partner of a limited partnership (i.e., X with respect to the Fund) must exercise discretion, supervision and control over, and must participate in, the admission of new limited partners to the extent of confirming their qualifications as qualified purchasers, qualified eligible participants and accredited investors. In connection with such confirmation activities, X has the authority to refuse to accept any person as a limited partner. Compliance with the foregoing federal law provisions will not be deemed to be in conflict with condition (2).

<sup>10</sup> 7 U.S.C. § 60 (1994).