

**CFTC Letter No. 97-73****August 20, 1997****Division of Trading & Markets**

Re: Section 4m(1)-- Request for Relief from CPO Registration

Rule 4.23(a) -- Request for Relief Concerning Location of Original Books and Records

Dear :

This is in response to your letter dated May 1, 1997, as supplemented by letters dated July 25, August 5 and August 14, 1997 and telephone conversations with Division staff, in which you request, in connection with the operation of the "Fund", that the Division of Trading and Markets ("Division") not recommend any enforcement action to the Commission for failure to comply with Section 4m(1) of the Commodity Exchange Act, as amended (the "Act")<sup>1</sup> against any persons serving on the Fund's board of directors ("Directors") if under the circumstances set forth below none of the Directors registers as a commodity pool operator ("CPO"). You also have requested relief on behalf of X from the requirement in Rule 4.23(a) concerning the location of the original books and records of the Fund.

Based upon the representations made in your correspondence, we understand the relevant facts to be as follows. The Fund will invest primarily in fixed income and equity securities but also will invest and trade in a variety of other financial investments, including commodity futures contracts and options thereon. The Fund may invest in commodity interests both directly and indirectly through other pooled investment vehicles. X, a registered CPO, acts as the Fund's investment manager and is responsible for making all day-to-day decisions regarding the trading and investment of the Fund's assets, including the trading of commodity interests. X played an integral part in establishing the Fund, having performed such functions as hiring lawyers, accountants and other service providers to represent the Fund and participating in the preparation of the Fund's offering memorandum. X will operate the Fund pursuant to Commission Rule 4.7(a)<sup>2</sup> and, accordingly, each investor in the Fund is required to be a qualified eligible participant ("QEP") as defined in the rule. The minimum investment required of each investor in the Fund is \$1 million, although X will have the discretion to accept investments of less than this amount.

The Fund's Board of Directors currently is comprised of five individuals, none of whom is a United States person.<sup>3</sup> None of the Directors is affiliated with X or with any other Commission

registrant.<sup>4</sup> You represent that any future Director who is a United States person will be either registered as an associated person ("AP") or listed as a principal of X . You further represent that none of the Directors is or will be subject to any statutory disqualification under Section 8a(2) or 8a(3) of the Act.<sup>5</sup>

All offers and sales of interests in the Fund to United States persons will be made through Y , an affiliate of X and a registered futures commission merchant. Any person who solicits United States persons to invest in the Fund will be registered as an AP of Y . All meetings of the Fund and its Board of Directors are conducted outside the United States.

The Board of Directors will enter into an agreement with X whereby: (1) the Fund's Board of Directors delegates to X , and X agrees to accept, responsibility for the operation of the Fund as a commodity pool, the solicitation of investors and the supervision of the handling of all business of the Fund relating to commodity interests;<sup>6</sup> and (2) each member of the Fund's Board of Directors and X agree to be jointly and severally liable with each other for any violations of the Act and the Commission's regulations issued thereunder applicable to CPOs committed by any member of the Board or X in connection with its activities with respect to the Fund.

Based on the foregoing, the Division will not recommend that the Commission take any enforcement action against the Directors for failure to register as CPOs in connection with their activities as Directors of the Fund. This relief is, however, conditioned on the following: (1) the Division receives within thirty days from the date of this letter a written acknowledgment whereby (a) the Board of Directors delegates to X and X agrees to accept sole responsibility for operating the Fund as a commodity pool, solicitation of investors and supervising the handling of all business of the Fund relating to commodity interests; and (b) each member of the Board of Directors and X agrees to be jointly and severally liable with each other for any violations of the Act and the Commission's regulations issued thereunder applicable to CPOs committed by any member of the Board or X in connection with its activities with respect to the Fund; and (2) X continues to serve as the CPO of the Fund.

You also have requested that the Division grant relief to X from certain requirements of Rule 4.23 (a) to the extent that such rule requires a registered CPO to keep its original books and records at its main business office. The Division has determined that, based upon the representations made to us, it is appropriate to grant an exemption from the requirement of Rule 4.23(a) regarding the location where original books and records must be kept. This determination is based primarily upon your representations that: (1) while the Fund's original books and records will be kept at the Fund's main business office in Bermuda, duplicates of the Fund's books and records will be kept by X at its main business office in New York City; and (2) the Fund must maintain its original books and records offshore to comply with Internal Revenue Service requirements for relief from United States income taxation. Based upon the foregoing and pursuant to the authority delegated by Rule 140.93(a)(1), the Division hereby exempts X from Rule 4.23(a) to the extent it requires

that the Fund's original books and records be kept at X 's main business office, provided that, within 72 hours after a request from a Commission representative is made, X will make the original books and records of the Fund available at a place located in the United States and specified by the Commission representative.

The relief issued by this letter does not excuse X or any Director from compliance with any other applicable requirements contained in the Act or the Commission's regulations thereunder. For example, each remains subject to the antifraud provisions of Section 40 of the Act, 7 U.S.C. §60, to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations, and to all other provisions of Part 4. Further, this relief is applicable solely in connection with the operation and activities of the Fund.

The positions taken in this letter are based on the representations you have 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 a different conclusion. In this regard, we request that you notify us immediately in the event the operations of the Fund, including its shareholder and Board of Directors composition, change in any way from those represented to us.

Finally, the registration no-action position taken by this letter represents the position of the Division of Trading and Markets only. It does not necessarily reflect the views of the Commission or any other office or division of the Commission. If you have any questions regarding this letter, please contact me or Lawrence Eckert, an attorney on my staff, at (202) 418-5450.

Very truly yours,

Susan C. Ervin

Acting Director

<sup>1</sup> 7 U.S.C. § 1 et seq. (1994).

<sup>2</sup> Commission rules referred to in this letter are found at 17 C.F.R. Ch. I (1997).

<sup>3</sup> For the purposes of your letter, you use the definition of the term "United States person" used in Rule 4.7.

<sup>4</sup> In this regard, you represent that four of the Directors either own shares or have family members who own shares, directly or indirectly, in foreign privately held companies which have invested in the Fund (the "Investors"). Specifically, you represent that: (1) A and B, who are related, and their families (the "C Family") have sole control, directly or indirectly, of Investors who have contributed approximately forty-five percent of the total funds currently invested in the Fund; and (2) D and E, who are related, and

their families own, directly or indirectly, fifty percent of another Investor who has contributed approximately fifty-five percent of the funds currently invested in the Fund. The C Family owns directly or indirectly, the remaining fifty percent of this Investor. F, the Fund's fifth Director, is a director and officer of certain of the Investors.

<sup>5</sup> 7 U.S.C. § 12a(2) or § 12a(3).

<sup>6</sup> X generally will be responsible for making all day-to-day decisions regarding the trading and investment of the Fund's assets. You note, however that the non-commodity interest activities of the Fund, which include investment by the Fund in securities and the handling of general administrative activities, will be supervised by the Fund's Board of Directors as a group.