

CFTC Letter No. 97-82**September 23, 1997****Division of Trading & Markets**

Re: Section 4m(1) of the Commodity Exchange Act -- Request for Relief from CPO and CTA Registration for Trustee and Investment Manager of Foreign Trust

Dear :

This is in response to your letter dated April 18, 1997, to the Division of Trading and Markets (Division) of the Commodity Futures Trading Commission (Commission), as supplemented by letters dated July 18 and September 5, 1997 and telephone conversations with Division staff, in which you request on behalf of your client, R , that the Division not recommend enforcement action to the Commission if R fails to register as a commodity pool operator (CPO) or commodity trading advisor (CTA) in connection with R s activities related to the operation of the Trust . You also request that the Division not recommend enforcement action against the Trustee if the Trustee fails to register as a CPO in connection with its activities related to the Trust.¹

Based upon the representations contained in your correspondence, we understand the relevant facts to be as follows. The Trust is a unit trust established under the laws of the Cayman Islands and is exempt from registration as an investment company under Section 3(c)(1) of the Investment Company Act of 1940. R was responsible for establishing the Trust, including the payment of legal fees related to the Trust and obtaining the Trust s administrator. Units in the Trust were offered initially at an offering price of \$100,000 per unit on October, 1 1993, and thereafter on each weekly valuation date at their net asset value until November 30, 1993. The Trustee serves as Trustee of the Trust and is responsible for the day-to-day administration of the Trust, retention of the Trust s books and records, preparation and distribution of reports to unitholders and responding to unitholders inquiries relating to the Trust. The Trustee also acts as the Trust s transfer agent.

The Trustee has entered into an agreement with R naming R as the Trust s investment manager. R is a United States subsidiary of S which, together with its consolidated subsidiaries (T) is a bank engaged principally in commercial banking operations in other countries.² As a branch of a foreign bank, R is exempt from registration as an investment adviser with the Securities and Exchange Commission (SEC) pursuant to Section 202(a)(ii)(A) of the Investment Advisers Act of 1940. R s activities in the United States are subject to regulation by the Board of Governors of the Federal Reserve System pursuant to the International Bank Holding Company Act.

As the Trust s investment manager, R is responsible for, among other things, making investment decisions on behalf of the Trust, placing purchases and sale orders for investments on behalf of the Trust, monitoring the credit quality of the instruments held by the Trust and selecting the dealers that will execute the purchases and sales of portfolio securities for the Trust. R has not provided and will not provide commodity interest trading advice to any persons other than the Trust and is not affiliated with any Commission registrant.

The Trust is authorized to invest in commodity interests on behalf of its unitholders. You represent that to date the Trust has not invested in commodity interests; however, based upon the recommendation of R as the Trust s

investment manager, the Trust now desires to invest in interest rate and currency commodity interests. In this regard, you represent that the Trust will trade such commodity interests in compliance with the trading requirements specified in Rule 4.5(c)(2).

As of March 31, 1997, the Trust had issued and outstanding approximately [] units at a net asset value of approximately [] per unit. Of these outstanding units, a total of fourteen units are owned by two United States persons.³ Four units are owned by U , a New York Limited Partnership (the NYLP), and the remaining ten units are owned by V , a New York limited liability company (the NYLLC).

The NYLP is a collective investment vehicle organized as a New York limited partnership which invests principally in newly developing countries or in emerging markets securities as well as investing a portion of its assets in commodity interests. Interests in the NYLP are offered to United States persons who are qualified eligible participants within the meaning of Commission Rule 4.7 (QEPs). The general partner of the NYLP, W , is a registered CPO and operates the NYLP under Commission Rule 4.7. In addition to each of its participants being a QEP, the NYLP is itself a QEP. The minimum initial investment in the NYLP is \$1 million, although this minimum may be waived by the general partner. In January 1996, 9.3% of the NYLP s assets were used to purchase the four units in the Trust which it owns currently. The NYLP is not affiliated with R or the Trust except to the extent that it is a unitholder in the Trust.

The NYLLC investor is a New York limited liability company and a wholly-owned subsidiary of X , a public corporation organized under the laws of Canada (X). The NYLLC is engaged in publicly held business operations outside of Canada, including the acquisition and operation of such businesses. X is a QEP and, as a public company, prepares a consolidated annual report on behalf of itself and its wholly owned subsidiaries, including NYLLC. The NYLLC, however, is not a QEP itself. In 1993, X purchased ten units in the Trust which it transferred to NYLLC in 1994. At the time of the transfer, the units were valued at four percent of NYLLC s total assets.

You represent that the Trust will not accept investments from any additional United States persons and that at no time will the NYLP and the NYLLC own, in the aggregate, more than two percent (2%) of the Trust s outstanding units. All material activities with respect to the operation and administration of the Trust (except for the location of the investment manager in the United States) occur outside of the United States. In further support of your request, you represent that none of R , the Trustee, any principal thereof or any person with the authority over the management of R or the Trustee is subject to any statutory disqualification under Section 8a(2) or 8a(3) of the Commodity Exchange Act, as amended (the Act).⁴

Based upon the representations made in your correspondence, the Division will not recommend that the Commission take enforcement action against R based solely upon its failure to register with the Commission as a CPO or CTA or against the Trustee based solely upon its failure to register as a CPO in connection with their activities with respect to the Trust as discussed above. Specifically, we note your representations that: (1) the Trust will not accept any additional investments from United States persons; (2) at no time will the NYLP and the NYLLC own, in the aggregate, more than two percent of the Trust's outstanding shares; and (3) the Trust will trade commodity interests in compliance with the trading requirements specified in Rule 4.5(c)(2).⁵

This letter is based upon the representations provided to us. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event the operations or activities of R , the Trustee or the Trust change in any way from those

represented to us. Further, this letter is applicable to R and the Trust solely in connection with their activities related to the Trust.

We note that this letter does not excuse R or the Trustee from compliance with any 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, 7 U.S.C. 60 (1994), 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.

If you have any questions concerning this correspondence, please contact me or Lawrence T. Eckert, an attorney on my staff, at (202) 418-5450.

Very
truly
yours,

Susan C. Ervin

Chief Counsel

¹ We note that you also have requested CPO and CTA registration relief on behalf of the employees and controlling persons of R and CPO registration relief on behalf of the employees and controlling persons of the Trustee. As you discussed with Division staff, based upon the information you have provided it does not appear that such registration would be necessary. Accordingly, we are not considering these issues separately herein.

² You represent that, as of December 31, 1996, T had total assets of approximately \$ [].

³ The Trust Deed does not permit the offer, sale or transfer of units in the United States or to a United States person, other than to United States persons that are non-natural persons and accredited investors as defined in Rule 501(a)(1), (2), (3) and (7) of the Securities Act of 1933. By telephone conversation with Division staff you represented that the term United States person as used in your letter has the same definition as that used by the Commission in Rule 4.7(a).

⁴ 7 U.S.C. § 12a(2) or 12a(3) (1994).

⁵ In this regard, we note that the value of commodity interest positions entered into by the Trust for bona fide hedging purposes may not, by definition, exceed the value of the Trust's portfolio at risk.