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U.S. COMMODITY FUTURES TRADING COMMISSION

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DIVISION OF
TRADING & MARKETS

November 18, 1997

Re: Request for Relief from Registration as a Commodity Pool Operator and Commodity Trading Advisor under Section 4m(1)

Dear :

This is in response to your letter dated May 6, 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 this correspondence, you request on behalf of "P" that the Division grant it relief from the commodity pool operator ("CPO") and commodity trading advisor ("CTA") registration requirements set forth in Section 4m(1) of the Commodity Exchange Act ("Act")[1/] in connection with its activities on behalf of the "Fund".[2/]

Based upon the representations made in the correspondence, we understand the relevant facts to be as follows. "P" is registered as an investment adviser under the Investment Advisers

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1/ 7 U.S.C. § 6m(1) (1994). The Act is found at 7 U.S.C. § 1 et seq. (1994). Commission rules referred to are found at 17 C.F.R. Ch. I (1996).

2/ This request was initially filed on May 24, 1996 by "Q", a registered broker-dealer, investment adviser and futures commission merchant ("FCM"). It was supplemented by various correspondence with "Q", including the letter of "A", Associate Director of "Q", dated December 16, 1996, confirming certain information to Division staff. By your letter you advised us of your representation in this matter and we accordingly are treating the request as being made by you on behalf of "P". In this regard, you reaffirmed to Division the representations that "Q" previously had made to staff. Thus, for the purpose of considering your request, we are basing our response on the representations made in both the prior correspondence with "Q" and our current correspondence with you.

Act of 1940 ("IAA") and is the Fund's investment manager.[3/] The Fund's assets are primarily invested in a portfolio of debt obligations of issuers located in countries that are generally considered to be "emerging" or "developing" by the World Bank and other international institutions. To date, "P" has not traded any commodity interests for the Fund. It now seeks to trade in commodity interests for the Fund in a manner that would be consistent with the requirements of Rule 4.5(c)(2).

The Fund, incorporated in the Cayman Islands and structured as an open-end investment company, was organized in 1993. The Fund's principal place of business is in the Cayman Islands, no Fund shareholder is or will be a United States ("U.S.") person,[4/] no interest in the Fund is or will be held directly or indirectly by a U.S. person, and neither "P" nor any person affiliated with "P" will undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect, of soliciting participation by U.S. persons.

Interests in the Fund originally were sold through the efforts of three entities: "R",[5/] "S" and "T". "R" is the sole remaining placement agent of the Fund. Interest in the Fund and other funds using similar investment strategies declined precipitously after the Fund was first offered in 1993, and the three entities did not continue to solicit participants in the Fund or undertake any other marketing efforts. Currently, however, "R" is marketing the Fund to prospective investors outside the U.S. The minimum investment is $100,000, which cannot be waived. As of March 31, 1997, the Fund had approximately $ million in assets.

The Fund is operated by its Board of Directors ("Board") and officers appointed by the Board. The two Board members are "B" and "C". Neither is a U.S. citizen or resident, and neither is affiliated with "P". The Board meets at least once a year and all Board meetings are held outside the United States. "P" has

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3/ Pursuant to the May 23, 1995 Investment Management Agreement between the Fund and "P", "P" may retain consultants or other parties to furnish investment information and advice for the Fund.

4/ For the purpose of this letter, "United States" and "U.S. person" are defined as set forth in Rule 4.7(a)(1)(ii)(C).

5/ "R", which is incorporated in the United Kingdom, operates as an exempt foreign firm under Part 30 of the Commission's regulations. "U", a United Kingdom company, is the 100% owner of "R". "V", a Delaware holding company, is the 100% owner of "P", "U" and "Q".

two officers: "D",[6/] president and "B", secretary. "D" is not a U.S. citizen or resident.

The Board appointed "W",[7/] a corporation organized under the laws of the Republic of Ireland, as the Fund's administrator. The Fund, acting through its Board, entered into an Investment Management Agreement with "P" on May 23, 1995 pursuant to which the Fund delegated to "P" responsibility for managing the investment and reinvestment of the Fund's assets, providing the Fund with general corporate management services and performing or arranging for the performance of the following services for the Fund: (1) maintenance of the books and records of the Fund; (2) preparation of financial information for the Fund's semi-annual and annual reports to shareholders; (3) periodic updating of the Fund's Offering Circular, which services are limited to providing information to "W", the Fund and counsel to the Fund, with the Fund's Board remaining ultimately responsible for all information in the Offering Circular; (4) responding to inquiries from Fund shareholders, such as advising shareholders of deficiencies in their subscription agreements or payments, furnishing offering and redemption prices of interests in the Fund, and recording shareholder name and address changes; (5) overseeing "W's" calculation of the net asset value of the Fund's shares; and (6) overseeing the performance of administrative and professional services rendered to the Fund by others, including its custodian, registrar and transfer agent, as well as accounting, auditing and other services.[8/] "P" is now seeking to trade futures contracts and options on futures contracts for the Fund, primarily for hedging purposes and in a manner consistent with the trading requirements of Rule 4.5(c)(2)(i), without "P" being required to register as a CPO or CTA.

As indicated above, interests in the Fund currently are being marketed and sold by "R". However, from time to time, an existing or prospective investor who is not a U.S. person may for business or pleasure visit New York City, where "P" is headquartered, and specifically request to speak with someone about the

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6/ "D" also is a senior managing director of "R" and a registered associated person ("AP") of "Q".

7/ "B", a director and secretary of the Fund, also is general manager of "W".

8/ Although footnote 3 in "Q's" May 24, 1996 letter might suggest that "P" performs such CPO functions as "soliciting, accepting or receiving property for investment in the Fund," this subsequently was clarified by representation that "P" does not in fact solicit, accept or receive property for investment in the Fund and that such activities are performed by "R".

Fund.[9/] As "E" is the Fund's portfolio manager,[10/] the investor would be directed to "E" for information. "P" requests that it not be required to register as a CPO or CTA and that "E" not be required to register as an AP of "P" based upon this minimal U.S. activity. In support of your request, you represent that "P" will not provide any solicitation materials to prospective investors and, if asked for such materials, will direct investors to "R" or request of "R" that it follow through on the request and furnish such materials. You further represent that "P" will not provide any evaluation of the Fund or make any recommendations in connection with investing in the Fund versus another fund. Specifically, "E" will limit any discussion of the Fund to previously published objective information that is available in the public domain, such as the Fund's net asset value and types of investments, and will not provide any non-public information or analysis with regard to the Fund.

Relief from Registration

It appears that granting relief from CPO registration with regard to "P" and relief from registration as an AP of a CPO with regard to "E" would not be contrary to the public interest in light of, among others, the representations that: (1) "P" was not a sponsor of the Fund; (2) interests in the Fund may be held solely by non-U.S. persons; (3) the primary responsibility for managing the Fund rests with the Fund's Board and officers, and Fund management activities that "P" performs have been delegated to it pursuant to the Investment Management Agreement; (4) "P" and "E" have not engaged in any solicitation activities and do not intend in the future to engage in such activities; (5) information provided by "P", through "E", to existing and prospective investors is limited to publicly available information about the Fund's portfolio and trading strategies; and (6) any

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9/ "P" does not initiate any contact with either existing or prospective investors with regard to investing in the Fund. You represent that prospective and existing investors may, when in New York City, discuss other investments with various "V" entities and also request an informational meeting with regard to the Fund. Prospective investors also may be interested in learning more about the Fund because it has been described, along with other investment funds organized and operated outside of the U.S., in various international publications of general circulation. As "P" is listed as the Fund's investment adviser, a prospective investor may request an informational meeting with "P". In support of your request, you state that "P" will only provide to a prospective investor information on the Fund's performance and trading strategies.

10/ Specifically, you state that "E" has the title of "X". He has been employed by "P" as a portfolio manager since May 1995.

U.S. contact for the purpose of discussing the Fund is minimal and is not initiated by "P".

Further, it appears that granting relief from CTA registration with regard to "P" and relief from registration as an AP of a CTA with regard to "E" would not be contrary to the public interest in light of, among others, the representations that: (1) "P" is registered as an investment adviser under the IAA; (2) "P" will employ only such trading strategies as are consistent with the requirements of Rule 4.5(c)(2); and (3) other than providing commodity interest trading advice to the Fund and to certain registered investment companies, as discussed below, "P" does not hold itself out as a CTA.

Accordingly, the Division will not recommend that the Commission take any enforcement action against "P" solely on the basis that "P" fails to register as a CPO and CTA in connection with the Fund under Section 4m(1) of the Act or against "E" solely on the basis that he fails to register as an AP in connection with the Fund under Section 4k of the Act.[11/] This position is, however, subject to the condition that "P" will submit to such special calls as the Division may make of it to assure compliance with the terms of the no-action relief granted herein.

Continued Exemption Under Rule 4.14(a)(8)

"P" has filed a Notice of Exemption from CTA registration pursuant to Rule 4.14(a)(8).[12/] However, upon providing commodity interest trading advice to the Fund in the manner described in the correspondence, "P" will no longer be complying with all of the conditions set forth in Rule 4.14(a)(8).[13/] However, we note that "P": (1) will continue to be registered as an investment adviser; (2) will be employing only such trading strategies as are consistent with eligibility status under Rule 4.5(c)(2); and (3) will not otherwise be holding itself out as a CTA. Based upon the foregoing, the Division will not recommend that the Commission take any enforcement action against "P" for failure to register as a CTA based solely upon "P's" failure to

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11/ 7 U.S.C. § 6k (1994).

12/ Commission records indicate that "P" filed a Notice of Exemption pursuant to Rule 4.14(a)(8) on April 12, 1996.

13/ For example, Rule 4.14(a)(8)(i)(A) restricts the entities to which commodity interest trading advice may be provided to those that have been excluded from the definition of "pool" under Rule 4.5 or qualifying entities under Rule 4.5 for which a notice of eligibility has been filed. The Fund does not fall within any of the categories set forth in Rule 4.5.

comply with all criteria set forth in Rule 4.14(a)(8) in connection with its activities on behalf of the Fund.

This letter is based upon the representations that have been made to us and is subject to compliance with the condition set forth above. Any different, changed or omitted facts or conditions might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event that the activities of "P", the Fund, or any of its directors or officers, change in any way from those represented to us. Moreover, this letter is applicable to "P" solely in connection with the operation of the Fund and "P's" continued exemption under Rule 4.14(a)(8), as set forth above.

We note that "P" remains subject to the antifraud provisions of Section 4o of the Act[14/] and to all otherwise applicable provisions of the Act and the Commission's regulations thereunder. For example, it remains subject to the reporting requirements for traders set forth in Parts 15, 18 and 19 and to all other applicable provisions of Part 4. Further, this letter represents the position of the Division only. It does not necessarily represent the views of the Commission or of any other division or office of the Commission.

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

Very truly yours,

Susan C. Ervin
Chief Counsel

14/ 7 U.S.C. § 6o (1994).