

CFTC Letter No. 98-80**November 25, 1998****Division of Trading & Markets**

Re: Request for Confirmation that Commodity Pool Operator Registration under Section 4m(1) is not required. Request for Exemption from the Disclosure Document Delivery Requirement of Rule 4.31

Dear :

This is in response to your letter dated February 5, 1998 to the Division of Trading and Markets (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by your facsimile transmissions dated February 24, 1998 and March 5, 1998 and telephone conversations with Division staff. By your correspondence, you request confirmation that: (1) "A", a director of (the "Fund"), is not required to register as a commodity pool operator under Section 4m(1) of the Commodity Exchange Act (the "Act");¹ and (2) (the "Company"), a registered commodity trading advisor ("CTA"), be exempt from the requirement of Rule 4.31² to deliver a Disclosure Document to the Fund.

Based upon the representations made in your correspondence, we understand the facts to be as follows. The Fund is organized under the laws of the Bahamas, and does not have any shareholders or officers who are "United States persons" as that term is defined in Rule 4.7(a)(1)(ii)(C). The Fund has three directors (the "Directors"): "A", who is a United States ("U.S.") citizen residing in Greece;³ "B", who is "A's" wife and a citizen and resident of Greece; and "C", a citizen and resident of Germany. The Fund does not contain any capital directly or indirectly contributed from U.S. sources. Neither any director, the Fund nor any person affiliated therewith have undertaken or will undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect, of soliciting participation from U.S. persons. The Fund's sole office is located outside of the U.S. and the Fund will not conduct any marketing activities within the U.S.

"A" is registered as an associated person ("AP") of the Company and listed as its sole principal. "A" will not be involved in any solicitation activities on behalf of the Fund.⁴ He will maintain the books and records of the Fund equivalent to those required of registered CPOs under Rule 4.23(a)(1)-(a)(9) and (b)(1)-(b)(3) at the Company's main business office in Greece and these records will be made available in the U.S. for inspection by a duly authorized representative of the Commission or the National Futures Association ("NFA") within seventy-two hours of receipt of a request for the production of these

records.⁵

Request for Confirmation that "A" Need Not Register as a CPO

Commission staff historically has taken the position that a person does not need to register as a CPO with the Commission where it: (1) is located outside the territorial U.S.; (2) none of the participants in any pool it operates is a U.S. person; and (3) no funds or other capital are contributed to a pool from U.S. sources.⁶ However, because "A" is a U.S. citizen (living in Greece), you have requested confirmation that this position is applicable to him.

In response, the Division notes that the Commission itself has had occasion to consider the need for persons who are engaged in activities that would require registration if conducted in this country to register if they confine their activities to areas outside the U.S. Specifically, with respect to APs of FCMs, the Commission has stated its belief --

that, given this agency's limited resources, it is appropriate at this time to focus [the Commission's] customer protection activities upon domestic firms and upon firms soliciting or accepting orders from domestic users of the futures markets and that the protection of foreign customers of firms confining their activities to areas outside this country, its territories, and possessions may best be for local authorities in such areas. Any person who solicits or accepts orders from within, or from any person residing within, the United States, its territories, or possessions, or who supervises any person or persons so engaged, however, would be required to register⁷

The Commission subsequently affirmed this position and extended it to such persons as foreign brokers, who would not need to register as introducing brokers.⁸

Thus, the Commission and its staff have looked to such factors as where solicitation activities will take place and to whom those solicitation activities will be directed, and not the citizenship of the solicitor, in deciding whether registration is required.⁹ In the instant case: (1) the Fund is organized outside of the U.S.; (2) the Fund has no U.S. persons as shareholders; (3) the Fund contains no capital from U.S. sources; (4) none of the directors reside in the U.S.; and (5) none of the Fund's marketing activities will be for the purpose of soliciting U.S. persons nor will any marketing activities be conducted within the U.S. Accordingly, we confirm that "A" need not register as a CPO.

Request for Exemption from Rule 4.31

The Company will have discretionary authority to trade commodity interests, among other things, for the Fund, which will be its sole client. Rule 4.31 generally requires that a CTA

deliver to prospective clients a Disclosure Document that contains specified information about the CTA and its principals before the CTA can enter into an agreement to direct a client's account. Your letter recognizes that, absent relief, the Company must deliver a Disclosure Document to the Fund and, specifically, to the Directors who will accept the Disclosure Document on behalf of the participants in the Fund.

In support of this request, you note that "A", who is one of the Fund's three directors, also is the sole principal and a registered AP of the Company. Thus, he is in possession of all of the information that the Company's Disclosure Document would contain. You also note that where, as here, a CTA has no U.S. persons as clients, the Division historically has exempted the CTA from Rule 4.31.¹⁰ In light of the foregoing, we believe that granting your request would not be contrary to the public interest and the purposes of Rule 4.31. Accordingly, by the authority delegated to it under Rule 140.93(a)(1), the Division hereby exempts the Company from the Disclosure Document delivery requirement of Rule 4.31 in connection with providing commodity interest trading advice to the Fund.

This letter does not excuse "A" or the Company from compliance with any other applicable requirements contained in the Act¹¹ or the Commission's regulations issued thereunder. For example, each remains subject to all antifraud provisions of the Act, to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the regulations, and to all other applicable provisions of Part 4. Moreover, this letter is applicable to "A" solely in connection with his activities as a director of the Fund and to the Company solely in connection with its provision of commodity interest trading advice to the Fund.

This letter, and the confirmation and exemption provided herein, are based upon the representations you have made to us. Any different, changed or omitted material facts or circumstances might render this letter void. You must notify us immediately in the event the activities of "A", the Company or the Fund change in any material way from those represented to us. Moreover, the confirmation provided herein represents the position 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 Barbara Stern Gold, Assistant Chief Counsel, at (202) 418-5450.

Very truly yours,

I. Michael Greenberger

Director

¹ 7 U.S.C. § 6m(1) (1994).

² Commission rules referred to herein are found at 17 C.F.R. Ch. I (1998).

³ By your March 5, 1998 facsimile transmission you represented that "A" has changed his permanent residence to Greece, and he intends to remain in Greece for the foreseeable future."

⁴ Shares in the Fund will be offered solely by "X", a German-based brokerage firm whose president is "C".

⁵ Rule 4.23 provides that where the main business office of a registered CPO is outside the U.S., the CPO has seventy-two hours to produce requested books and records within the U.S.

⁶ CFTC Interpretative Letter No. 76-21, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,222 (August 15, 1976).

⁷ 45 Fed. Reg. 18356, 18360 (March 20, 1980).

⁸ 48 Fed. Reg. 35248, 35261 (August 3, 1983).

⁹ See also Advisory 18-96, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,659 (April 11, 1996). By this Advisory the Division has made available certain relief from the disclosure, reporting and recordkeeping requirements of Part 4 to registered CPOs (e.g., because they are located in the U.S.) who operate pools that, among other things, are organized and operated offshore, contain no U.S. participants or capital and are not marketed to U.S. persons.

¹⁰ *See, e.g.*, Division of Trading and Markets Interpretative Letter No. 97-42, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,077 (May 28, 1997).

¹¹ 7 U.S.C. § 1 *et seq.* (1994).