

**CFTC Letter No. 99-04****December 31, 1998****Division of Trading & Markets**

Re: Request for Confirmation of Continued Availability of the Exemption from CTA Registration in Rule 4.14(a)(8).

Dear :

This is in response to your letter dated May 15, 1998, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your facsimile transmission dated June 15, 1998 and telephone conversations among you, "A" of your firm and Division staff. By your correspondence you request confirmation that the no-action position we previously have taken with respect to the need for "V" to register as a commodity trading advisor ("CTA") based solely upon its failure to meet all of the criteria for CTA exemption in Rule 4.14(a)(8)<sup>1</sup> will continue if certain facts pursuant to which that position was issued change. The no-action position was issued by letter dated June 5, 1995 and confirmed by letter dated July 20, 1995 (the "Prior Letters").

Based upon the representations you made to us, as supplemented by the representations made in support of the Prior Letters, we understand the facts to be as follows. "V" is registered as an investment adviser ("IA") under the Investment Advisers Act of 1940 (the "IAA"). "V" is the IA of "W", an investment company registered under the Investment Company Act of 1940. "W" has filed a Notice of Eligibility for exclusion from the definition of the term commodity pool operator ("CPO") pursuant to Rule 4.5 and "V" has filed a Notice of Exemption from commodity trading advisor ("CTA") registration pursuant to Rule 4.14(a)(8).<sup>2</sup> "V" does not hold itself out as a CTA.

Rule 4.14(a)(8) provides that a person is not required to register as a CTA if it is registered as an IA under the IAA and --

(i) The person's commodity interest trading advice:

(A) Is directed solely to, and for the sole use of, entities which are excluded from the definition of the term "pool" under §4.5 or are qualifying entities under §4.5 for which a notice of eligibility has been filed;

(B) Is solely incidental to its business of providing securities advice to each

such entity; and

(C) Employs only such strategies as are consistent with eligibility status under §4.5.

(ii) The person is not otherwise holding itself out as a commodity trading advisor; and

(iii) Prior to the date upon which such person intends to engage in business as a commodity trading advisor, the person files a notice of exemption with the Commission.

At the time "V" filed a Rule 4.14(a)(8) Notice of Exemption from CTA registration it was operating pursuant to the criteria of the Rule.

Subsequent to the filing of the Rule 4.14(a)(8) Notice of Exemption from CTA registration, (the "Partnership"), for which it serves as the commodity pool operator ("CPO") and to which it also provides commodity interest trading advice.<sup>3</sup> "V" operates the Partnership pursuant to an exemption from CPO registration under Rule 4.13(a)(1).<sup>4</sup>

Rule 4.13(a)(1) provides that a person is not required to register as a CPO if --

(i) It does not receive any compensation or other payment, directly or indirectly, for operating the pool, except reimbursement for the ordinary administrative expenses of operating the pool;

(ii) It operates only one commodity pool at any time;

(iii) It is not otherwise required to register with the Commission and is not a business affiliate of any person required to register with the Commission; and

(iv) Neither the person nor any other person involved with the pool does any advertising in connection with the pool (for purposes of this section, advertising includes the systematic solicitation of prospective participants by telephone or seminar presentation).

The exemption from CPO registration in Rule 4.13(a)(1) is not conditioned upon the financial status or sophistication of any of the participants in the pool.

What has not been at issue in the past, and what is not now at issue, is the ability of "V" to

claim an exemption from CPO registration under Rule 4.13(a)(1). Rather, what has been and is at issue is the ability of "V" to continue to claim an exemption from CTA registration under Rule 4.14(a)(8) in connection with its providing commodity interest trading advice to "W". This is because in operating the Partnership (subsequent to the filing of its Rule 4.14(a)(8) Notice of Exemption), "V" could no longer meet the criteria in Rule 4.14(a)(8) that its commodity interest trading advice: (1) is directed solely to, and for the sole use of, Rule 4.5 trading vehicles; (2) is solely incidental to its business of providing securities advice to each such entity; and (3) is consistent with eligibility status under Rule 4.5.

By our June 5, 1995 letter we took a no-action position with respect to the need for "V" to meet each criterion of Rule 4.14(a)(8) in order to continue to be exempt from CTA registration under that Rule. The Division took this position in light of the representations that "V": (1) would continue to be registered as an IA; and (2) would not be holding itself out as a CTA. In addition, the Division noted that the sole non-Rule 4.5 trading vehicle to which "V" proposed to provide commodity interest trading advice consisted of senior, key officers of "V" and "X".<sup>5</sup> By our July 20, 1995 letter the Division confirmed the continued availability to "V" of the CTA registration exemption in Rule 4.14(a)(8) notwithstanding the admission by "V" of other key, senior officers of "V" or "X" into the Partnership.<sup>6</sup>

By your May 15, 1998 letter, "V" has requested confirmation that the previous no-action position from Rule 4.14(a)(8) will continue in the event it admits additional key, senior officers of "X" or its subsidiaries into the Partnership. In response, we again note that "V" continues: (1) to be registered as an IA; (2) not to hold itself out as a CTA; and (3) to have as its sole non-Rule 4.5 client a trading vehicle operated by it and comprised of key, senior officers of it, its parent and its parent's other affiliates. Accordingly, by this letter the Division confirms that "V" may continue to rely on the positions taken in the Prior Letters. Thus, the Division will not recommend that the Commission commence enforcement action against "V" for failure to register as a CTA based solely upon its failure to comply with all of the criteria for exemption from CTA registration in Rule 4.14(a)(8) in connection with its activities on behalf of the Partnership.

This letter does not excuse "V" from compliance with any other applicable requirements contained in the Commodity Exchange Act ("Act") or in the Commission's regulations issued thereunder. For example, "V" remains subject to all antifraud provisions of the Act and the Commission's regulations, to the reporting requirements for traders set forth in Parts 15, 18 and 19 and to all otherwise applicable provisions of Part 4.

This letter, and the position taken herein, are based upon the representations that you have made to us and are applicable to "V" solely in connection with its providing commodity interest trading advice to the Partnership. Any different, changed or omitted material facts or conditions might render this position void. You must notify us immediately in the event

the operations or activities of "V" or the Partnership change in any material way from those represented to us.

This letter represents the position of the Division of Trading and Markets only. It does not necessarily represent the views of the Commission or any other office or division of the Commission. If you have any questions concerning this correspondence, please contact Barbara S. Gold, Assistant Chief Counsel, at (202) 418-5450.

Very truly yours,

I. Michael Greenberger

Director

<sup>1</sup> Commission rules referred to herein are found at 17 C.F.R. Ch. I (1998).

<sup>2</sup> Commission records indicate that the Notice of Eligibility was filed on July 13, 1994 and the Notice of Exemption was filed on May 8, 1995.

<sup>3</sup> The Partnership is an "in-house" trading vehicle established for the commodity interest trading activities of certain senior, key officers of "V" and "X", the parent of "V".

<sup>4</sup> By the Prior Letters the Division confirmed to "V" that it met the criteria for exemption from CPO registration in Rule 4.13(a)(1) in connection with its operation of the Partnership.

<sup>5</sup> Thus, if in operating the Partnership (albeit as a CPO exempt from registration under Rule 4.13(a)(1)) "V" had to register as a CTA because it would no longer meet each criterion of Rule 4.14(a)(8), this would mean, among other things, that "V", as a registered CTA, would have to provide itself, as the (exempt) CPO of the Partnership, with a Disclosure Document concerning its CTA activities. Also, it would have been likely that many of the persons that "V" would list as principals on its CTA registration application would be persons who were participants in the Partnership. In light of the foregoing, the Division believed that with respect to this unique situation, the benefits of CTA registration would be outweighed by its attendant burdens.

<sup>6</sup> As noted above, the availability to "V" of the exemption from CPO registration in Rule 4.13(a)(1) was not at issue in either the June 5 or July 20 letter, because on those dates, and at all times subsequent, "V" has met each criterion of Rule 4.13(a)(1) (which criteria do not include any financial status or sophistication test for the participants in a pool for which a CPO seeks to claim an exemption from registration).