CFTC letter No. 02-115
November 27, 2002
Interpretation
Division of Clearing and Intermediary Oversight

Re: Section 4m(1) -- Request for CPO Registration No-Action Position

Dear :

This is in response to your letter dated August 1, 2002, to the Division of Clearing and Intermediary Oversight (the "Division")[1] of the Commodity Futures Trading Commission (the "Commission"), as supplemented by the e-mail message of "A" of your firm, dated August 9, 2002, your e-mail messages dated August 23, 2002, September 30, 2002 and October 7, 2002, and telephone conversations with Division staff. By your correspondence, you request on behalf of "X" assurance that the Division will not recommend that the Commission commence any enforcement action based upon the failure of "X" to register under Section 4m(1) of the Commodity Exchange Act (the "Act")[2] as a commodity pool operator ("CPO") in connection with providing certain services to a Canadian pension trust (the "Canadian Trust"), which is comprised of the assets of the the "Canadian Plan".

Based upon the representations made in your correspondence, we understand the facts to be as follows. "X" is a direct, wholly-owned subsidiary of "Y", and it is registered with the Securities and Exchange Commission ("SEC") under the Investment Advisers Act of 1940[3] as an investment adviser. "X" is in the process of registering as an Adviser under the Ontario Securities Act (the "SA").[4]

The Canadian Plan was established by "Z", an Ontario corporation which is also an administrator of the Canadian Plan. The Canadian Plan is noncontributory, in that it is wholly-funded by "Z" with no employee contributions. The Canadian Trust was formed by "Z" to comply with requirements of the Pension Benefits Act (Ontario) ("PBA") and the Income Tax Act (Canada) that assets of a Canadian pension plan be held separately in a trust or other qualified funding medium.[5]

Once "X" becomes registered as an Adviser under the SA, "X" will provide advice and assistance to "Z" with respect to investment of the Canadian Plan's assets pursuant to an investment management agreement with "Z".[6] In addition, pursuant to delegated authority from "Z", "X": (1) will select, hire and terminate Sub-Advisers; (2) will allocate assets among Sub-Advisers; (3) will manage the relationship with the Canadian Plan's trustee; and (4) will hire and fire futures commission merchants ("FCMs") used by the Canadian Plan and the Canadian Trust.

You seek CPO registration relief for "X" because it is a named fiduciary of the Canadian Plan and, as

such and as stated above, it has certain managerial authority — albeit on a delegated basis — with respect to the Canadian Plan.

In support of your request you represent that: (1) the Canadian Plan is regulated and affords protection to Canadian pension plan participants under the PBA in a manner analogous to that of United States ("U. S.") pension plans with respect to U.S. plan participants under the Employee Retirement Income Security Act of 1974 ("ERISA");[7] (2) as a noncontributory pension plan, the Canadian Plan would be automatically excluded from the definition of "pool" under Rule 4.5 but for the fact that it is not subject to ERISA;[8] and (3) the Canadian Plan restricts participation by U.S. persons to instances where, *e.g.*, a participating Canadian resident moves to the U.S after retirement (otherwise all beneficiaries are Canadian residents).[9] Further, you note that the Division has previously issued CPO registration relief under representations similar to those you have made.[10]

Based upon the foregoing representations, the Division believes that your request is not contrary to the public interest and the purposes of Section 4m(1). Accordingly, the Division will not recommend that the Commission commence any enforcement action against "X" for failure to register as a CPO pursuant to Section 4m(1) of the Act in connection with "X's" involvement with the Canadian Trust and the Canadian Plan, as discussed above.

This letter, and the no-action position taken herein, are based upon the representations made to the Division and are applicable to "X" solely in connection with its involvement with the Canadian Plan and the Canadian Trust. Any different, changed or omitted facts or circumstances might render the no-action position taken herein void. You must notify the Division immediately in the event the operations or activities of "X", the Canadian Plan or the Canadian Trust change in any material way from those represented to the Division.

This letter does not excuse "X" from compliance with any other applicable requirements contained in the Act or in the Commission's rules issued thereunder. For example, "X" remains subject to all antifraud provisions of the Act,[11] to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's rules, and to all other applicable provisions of Part 4.

This letter and the no-action position taken herein represent the views of the Division only and do 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 Christopher W. Cummings, Special Counsel, at (202) 418-5445.

Very truly yours

Jane Kang Thorpe
Director

[1] As of July 1, 2002, a reorganization of Commission staff became effective. For purposes of this letter, the term "Division" includes the Division of Clearing and Intermediary Oversight and its predecessor, the Division of Trading and Markets, as the context requires.

[2] 7 U.S.C. §6m(1) (2000).

[3] 15 U.S.C. §80b-1 *et seq.* (2000).

[4] You state that "X" is not seeking commodity trading advisor ("CTA") registration relief in reliance upon, among other things, Section 4m(3) of the Act. You also state that "X" is not a CPO as a result of its involvement with certain charitable foundations because, you conclude, these foundations are not commodity pools. For the purpose of this letter, we are accepting as accurate the validity of these claims and are not making any independent determination on these claims, other than to confirm the CTA (and CPO) registration no-action positions the Division previously has taken with respect to other of "X's" activities, as stated in footnote 1 of your letter.

[5] The trustee of the Canadian Trust is "P". The trustee's duties are to hold, invest, re-invest, manage, administer and distribute the Canadian Plan's assets in accordance with the provisions of the Canadian Trust and the instructions of "Z" or the investment manager appointed by "Z" (*i.e.*, "X"), as applicable.

[6] "Z" is not affiliated with either "X" or "X's" ultimate corporate parent, "Y".

[7] Among other things, you note the fiduciary, disclosure and reporting requirements under the PBA.

[8] As the Commission explained in adopting Rule 4.5:

[A] non-contributory plan, *i.e.*, one in which all contributions are solely made by an employer, can *never* be a commodity pool, because no funds are solicited from participants and only the employer bears the funding responsibility of the plan if there are losses. 50 Fed. Reg. 15868, 15873 (April 23, 1985). [emphasis in original]

[9] You state that in no case would U.S. residents be more than 2 percent of total beneficiaries. At the present time, no more than ___ of the ____ active participants are U.S. resident aliens or U.S. citizens permanently residing in Canada.

[10] *See* CFTC Staff Letter No. 90-03 [1988-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,581 (Jan. 19, 1990).

[11] *See*, *e.g.*, Sections 4b and 4*o*, 7 U.S.C. §§6b and 6*o* (2000).