

KIRKLAND & ELLIS
PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.
Washington, DC 20005-5793

(202) 879-5000

www.kirkland.com

Maureen A. Donley-Hoopes
To Call Writer Directly:
(202) 879-5039
maureen_donley-hoopes@dc.kirkland.com

May 1, 2003

RECEIVED
C.F.T.C.

03-6
23

2003 MAY -2 AM 11: 53

OFC. OF THE SECRETARIAT

Facsimile:
(202) 879-5200

RECORDS SECTION
2003 MAY -2 PM 2: 34

RECEIVED
C.F.T.C.

COMMENT

Jean Webb
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: CFTC Proposed Rules regarding Additional Registration and Other
Regulatory Relief for Commodity Pool Operators and Commodity
Trading Advisors, 68 Fed. Reg. 12622 (March 17, 2003).

Dear Ms. Webb:

On behalf of General Motors Investment Management Corporation ("GMIMCo"),¹ we appreciate the opportunity to comment on the Commodity Futures Trading Commission's March 17, 2003 proposal to amend CFTC Rules 4.5, 4.13 and 4.14 to expand registration and other relief for Commodity Pool Operators ("CPOs") and Commodity Trading Advisers ("CTAs"). GMIMCo believes that the CFTC proposal will realign CPO and CTA registration relief in a manner that is fair and consistent with congressionally-identified regulatory interests. In finalizing these proposals, however, GMIMCo urges the Commission to consider the comments below, which GMIMCo believes would further the Commission's goal of providing regulatory relief to otherwise regulated or sophisticated persons.

I. Proposed Amendments to Rule 4.5.

The proposed amendments to Rule 4.5 would eliminate the 5% non-hedging limitation on commodity interest trades and the requirement to disclose in writing to each prospective participant the purpose of and the limitations on the scope of the commodity interest trading.

GMIMCo supports these amendments. In particular, GMIMCo agrees that it does not make sense to impose a limit on commodity interest trading for otherwise regulated persons, as CFTC Rule 4.5 now imposes, when no such limit will be imposed on persons

¹ GMIMCo is an indirect wholly-owned subsidiary of General Motors Corporation ("GM"). It is registered with the Securities and Exchange Commission ("SEC") as an investment adviser pursuant to the Investment Advisers Act of 1940. GMIMCo provides investment management services, including commodity interest management, to pension plans and other sophisticated investors.

exempted from registration who are not "otherwise regulated." GMIMCo further agrees there is no need for the disclosure requirement if the trading limit is eliminated.

GMIMCo continues to believe, however, that the parity of treatment espoused by the Commission in eliminating the 5% commodity interest trading limitation also requires adjustments to the list of persons eligible for relief under Rule 4.5.

- 1) The Commission should exclude from the CPO definition any Eligible Contract Participants ("ECPs") as defined in CEA Section 1a(12)(B)(ii), including SEC-registered investment advisers, that act as investment managers or fiduciaries for other ECPs, as defined in CEA Sections 1a(12)(A) or (C), to the extent such ECPs engage in trading limited to "excluded commodities" as defined in CEA Section 1a(13). For the reasons explained in GMIMCo's January 14, 2003 comment letter on the Commission's earlier Rule 4.5 proposal, this exclusion would be well grounded in the policies embodied in the provisions of the 2000 Act and would foster trading on those regulated markets that promotes the public interests of the CEA without sacrificing in any material way any regulatory protections the CEA would otherwise afford.
- 2) The Commission should add to the list of qualifying entities in Rule 4.5 trusts holding Employee Retirement Income Security Act of 1974 ("ERISA") plan assets (and, to the extent trusts are limited to assets of ERISA plans that are not pools, consider such trusts to be non-pools). Although CFTC staff has issued various no-action letters providing CPO and CTA registration relief to fiduciaries of pension trusts,² Rule 4.5 does not list as a Rule 4.5 qualifying entity a pension trust holding assets of ERISA plan qualifying entities (unless the trust also is a bank collective trust), creating uncertainty whether separate no-action relief is required for those trusts who have not yet obtained their own no-action relief. The Commission should resolve this uncertainty by explicitly including as qualifying entities trusts holding ERISA plan assets. To the extent trusts are limited to assets of ERISA plans that are not pools, such trusts should be listed as non-pools under Rule 4.5 (in the same manner, *e.g.*, as ERISA defined benefit plans).
- 3) The Commission should add to this list of qualifying entities in Rule 4.5 foreign pension plans and foreign trusts holding assets of foreign pension plans. Rule 4.5 currently does not address foreign pension plans or trusts holding assets of foreign pension plans. Various pension plans established in foreign countries, often by employers affiliated with US-based corporations, are not eligible for relief under Rule 4.5 because they are not ERISA-regulated

² See, *e.g.*, CFTC Letters 97-94;93-91; and 94-52.

plans. Throughout the years, the CFTC staff has granted no-action relief to fiduciaries for various foreign pension plans based on analogies to Rule 4.5.³ On other regulatory fronts, both Congress and the CFTC have recognized the diminished need for regulatory oversight of activities with respect to foreign pension plans. See, e.g., CEA §1(a)(12)(vi) (defining an ECP to include foreign pension plans), Rule 4.7, defining a "Qualified Eligible Person" to include a "Non-United States Person," and a "Non-United States Person" to include foreign pension plans. The CFTC should expand the entities eligible for treatment under Rule 4.5 to include foreign pension plans, thereby eliminating another area of uncertainty in the futures community.

GMIMCo also encourages the Commission to eliminate the prohibition against marketing a qualifying entity as a commodity pool or otherwise as a vehicle to trade commodity interests. A marketing prohibition is not needed because the "otherwise-regulated" nature of Rule 4.5 entities already guards against the concern that the marketing prohibition was designed to address. For example, the protections under ERISA provide significant checks and balances on domestic pension entities, requiring the respective eligible persons operating such entities to discharge their duties prudently and solely in the interest of the plan's participants and beneficiaries. See, e.g., March 21, 1996 Letter from the Assistant Secretary for Pension and Welfare Benefits to the Comptroller of the Currency. Moreover, retaining the marketing prohibition while deleting the commodity interest limitation will exacerbate the regulatory uncertainty that has always existed with respect to this prohibition; this is because there will be no regulatory precedent for determining whether descriptions of uses of commodity interests to any degree greater than the current 5% limitation can be made without running afoul of the marketing prohibition. In any event, for the same parity reasons discussed above with respect to proposed Rule 4.13(a)(4), at a minimum, the marketing prohibition should not apply to the operator of any qualified entity whose participants are limited to the sophisticated persons eligible for investing in Rule 4.13(a)(4) entities (where no such specific marketing prohibition is proposed).

Attachment A is a marked-to-show changes version of Rule 4.5 that implements the above comments.

II. Proposed Rule 4.13(a)(3) and (4)

Proposed Rule 4.13(a)(3) would add an exemption for operators of pools that meet a *deminimis* trading test or a notional test, among other conditions. Proposed Rule 4.13(a)(4) would add an exemption (without any trading limitations) for operators of pools

³ See, e.g., CFTC Letters 01-08; 96-60; 93-4; and 90-3. At a minimum, the Commission should expand Rule 4.5's qualifying entity list to include pension plans, and trusts holding assets of such pension plans, in jurisdictions for which the CFTC has previously granted no-action relief.

whose interests are exempt from registration under the Securities Act of 1933, and where pool participants meet specified sophistication criteria, among other conditions. Each of Rules 4.13(a)(3) and 4.13(a)(4) would allow the pool operator to operate pools that meet the requirements of the other rule, respectively.

GMIMCo supports adoption of these proposed rules, but believes that both rules should be amended to accommodate pension entities not explicitly covered by Rule 4.5. For example, unless Rule 4.5 is amended as suggested above to confirm that domestic and foreign pension trusts are qualified entities thereunder, Rule 4.13(a)(4) should be amended to include such trusts, whether or not such trusts are exempt from registration under the Securities Act of 1933. In addition, proposed Rules 4.13(a)(3) and (4) should both be amended so that a pool operator can operate pools for which it is exempt under Rule 4.5 without concern about losing its ability to claim an exemption under Rule 4.13(a)(3) or (4).

III. Proposed Rule 4.14

GMIMCo supports the Commission's proposal. With respect to proposed Rule 4.14(a)(8)(i)(C), which would exempt CTAs who provide advice to foreign funds solely owned by Non-United States Persons (with certain limited exceptions), GMIMCo notes that CTAs advising foreign pension trusts appear to be eligible to rely on this rule because the sole beneficial owners of such trusts will be foreign pension plans, and foreign pension plans are explicitly listed as "Non-United States Persons" in Rule 4.7(a)(1)(iv)(E).

However, CTAs who advise foreign pension plans may be reluctant to rely on this exemption, even if the foreign nature of the plans excludes them from ERISA regulation under ERISA Section 4(b)(4) because they are "maintained outside the United States primarily for the benefit of persons substantially all of whom are non-resident aliens." This is because, even though such plans are excluded from ERISA regulation, not all of their participants may be Non-United States Persons, as the proposal would require. GMIMCo therefore urges the Commission to modify this rule so that CTAs can rely on this exemption if they advise foreign pension plans that are Non-United States Persons, whether or not all of their participants are Non-United States Participants, so long as the foreign pension plan is exempt from ERISA regulation by virtue of ERISA Section 4(b)(4).⁴

CONCLUSION

GMIMCo supports the Commission proposals, although, as stated in its earlier comment letter, GMIMCo believes that the best approach would be to target registration relief to operators of, and advisors to, ECP entities that limit their activities to excluded

⁴ This can be accomplished by amended proposed Rule 4.14(a)(8)(i)(C)(2) to provide "that this condition shall not apply to any employee benefit plan that is a Non-United States Person and excluded from regulation under ERISA."

Ms. Webb
May 1, 2003
Page 5

commodities. In the absence of such targeted relief, GMIMCo believes it is important to address pension trusts and foreign pension plans in the Commission's final rulemaking. Without the changes suggested in the above comments, ERISA pension trusts, foreign pension plans and foreign pension trusts will be the only major institutional entities not squarely encompassed by the broadened CPO and CTA registration relief being considered by the Commission. In order to remove any lingering legal uncertainty, and the need for Commission staff to spend additional resources on interpretive issues related to pension funds, GMIMCo strongly urges the Commission to consider addressing ERISA pension trusts, foreign pension plans and foreign pension trusts in the final regulations.

Sincerely,

A handwritten signature in black ink, reading "Maureen A. Donley-Hoopes". The signature is written in a cursive, flowing style with a long horizontal flourish extending to the right.

Maureen A. Donley-Hoopes

MADH/pan

ATTACHMENT A

Section 4.5

Sec. 4.5 Exclusion for certain otherwise regulated persons from the definition of the term "commodity pool operator."

(a) Subject to compliance with the provisions of this section, the following persons, and any principal or employee thereof, shall be excluded from the definition of the term "commodity pool operator" with respect to the operation of a qualifying entity specified in paragraph (b) of this section:

(1) An investment company registered as such under the Investment Company Act of 1940;

(2) An insurance company subject to regulation by any State;

(3) A bank, trust company or any other such financial depository institution subject to regulation by any State or the United States; and

(4) A trustee of, a named fiduciary of (or a person designated or acting as a fiduciary pursuant to a written delegation from or other written agreement with the named fiduciary) or an employer maintaining a pension plan that is subject to title I of the Employee Retirement Income Security Act of 1974;

Provided, however, That for purposes of this Sec. 4.5 the following employee benefit plans shall not be construed to be pools:

(i) A noncontributory plan, whether defined benefit or defined contribution, covered under title I of the Employee Retirement Income Security Act of 1974;

(ii) A contributory defined benefit plan covered under title IV of the Employee Retirement Income Security Act of 1974; Provided, however, That with respect to any such plan to which an employee may voluntarily contribute, no portion of an employee's contribution is committed as margin or premiums for futures or options contracts;

(iii) A plan defined as a governmental plan in section 3(32) of title I of the Employee Retirement Income Security Act of 1974;

(iv) Any employee welfare benefit plan that is subject to the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974; and

(v) A plan defined as a church plan in Section 3(33) of title I of the Employee Retirement Income Security Act of 1974 with respect to which no election has been made under 26 U.S.C. 410(d); **and**

(vi) A trust in which the ultimate beneficial ownership of all assets held in such trust is limited to one or more of the employee benefit plans listed in subparagraph (a)(4)(i)-(v);

(5) A trustee of, a named fiduciary (or comparable person) of, a person designated or acting as a fiduciary pursuant to a written delegation from or other written agreement with the trustee or named fiduciary (or comparable person), or an employer organized and with its principal place of business outside of the United States maintaining a pension plan of the kind listed in paragraph (b)(5); and

(6) Any Eligible Contract Participant, as defined in Commodity Exchange Act Section 1a(12)(B)(ii).

(b) For the purposes of this section, the term “qualifying entity” means:

(1) With respect to any person specified in paragraph (a)(1) of this section, an investment company registered as such under the Investment Company Act of 1940;

(2) With respect to any person specified in paragraph (a)(2) of this section, a separate account established and maintained or offered by an insurance company pursuant to the laws of any State or territory of the United States, under which income gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account, without regard to other income, gains, or losses of the insurance company;

(3) With respect to any person specified in paragraph (a)(3) of this section, the assets of any trust, custodial account or other separate unit of investment for which it is acting as a fiduciary and for which it is vested with investment authority; and

(4) With respect to any person specified in paragraph (a)(4) of this section, and subject to the proviso thereof, (i) a pension plan that is subject to title I of the Employee Retirement Income Security Act of 1974; (ii) or any trust in which the ultimate beneficial ownership of all assets held in such trust is limited to one or more of the entities specified in subparagraphs (a)(4)(i)-(v) or (b)(4)(i); and

(5) With respect to any person specified in paragraph (a)(5) of this section, (i) a pension plan for the employees, officers or principals of an entity organized and with its principal place of business outside the United States; or (ii) any trust in which the ultimate beneficial ownership of all assets held in such trust is limited to one or more of the entities specified in subparagraph (b)(5)(i); and

(6) With respect to any person specified in paragraph (a)(6), any Eligible Contract Participant defined in Commodity Exchange Act Section 1a(12)(A) or (C) to the extent such Eligible Contract Participant’s trading of commodity interests is limited to “excluded commodities” as defined in Commodity Exchange Act Section 1a(13).

Provided, however, That such entity will be operated in the manner specified in paragraph (c)(2) of this section;

(c) Any person who desires to claim the exclusion provided by this section shall file with the Commission a notice of eligibility;

Provided, however, That a plan fiduciary who is not a named fiduciary but who has an agreement with a named fiduciary (or, in the case of paragraph (a)(5), comparable person) as described in paragraph (a)(4) or (a)(5) of this section may claim the exclusion through the notice filed by the named fiduciary (or, in the case of paragraph (a)(5), comparable person).

(1) The notice of eligibility must contain the following information:

(i) The name of such person;

(ii) The applicable subparagraph of paragraph (a) of this section pursuant to which such person is claiming exclusion;

(iii) The name of the qualifying entity which such person intends to operate pursuant to the exclusion; and

(iv) The applicable subparagraph of paragraph (b) of this section pursuant to which such entity is a qualifying entity.

(2) The notice of eligibility must contain representations that such person will operate the qualifying entity specified therein in a manner such that the qualifying entity:

(i) Will use commodity futures or commodity options contracts solely for bona fide hedging purposes within the meaning and intent of Sec. 1.3(z)(1); Provided, however, That in addition, with respect to positions in commodity futures or commodity option contracts which do not come within the meaning and intent of Sec. 1.3(z)(1), a qualifying entity may represent that the aggregate initial margin and premiums required to establish such positions will not exceed five percent of the liquidation value of the qualifying entity's portfolio, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; And, Provided further, That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in Sec. 190.01(x) may be excluded in computing such 5 percent;

(ii) Will not be, and has not been, marketing participations to the public as or in a commodity pool or otherwise as or in a vehicle for trading in the commodity futures or commodity options markets;

(iii) Will disclose in writing to each prospective participant the purpose of and the limitations on the scope of the commodity futures and commodity options trading in which the entity intends to engage; and

(i) (iv) Will submit to such special calls as the Commission may make to require the qualifying entity to demonstrate compliance with the provisions of this Sec. 4.5(c);

Provided, however, That the making of such representations shall not be deemed a substitute for compliance with any criteria applicable to commodity futures or commodity options trading established by any regulator to which such person or qualifying entity is subject.

(3) The notice of eligibility must be filed with the Commission prior to the date upon which such person intends to operate the qualifying entity pursuant to the exclusion provided by this section.

(4) The notice of eligibility shall be effective upon filing.

(d) (1) Each person who has claimed exclusion hereunder must, in the event that any of the information contained or representations representation made in the notice of eligibility becomes inaccurate or incomplete, file a supplemental notice with the Commission to that effect which, if applicable, includes such amendments as may be necessary to render the notice of eligibility accurate and complete.

(2) The supplemental notice required by paragraph (d)(1) of this section shall be filed within fifteen business days after the occurrence of such event.

(e) An exclusion claimed hereunder shall cease to be effective upon any change which would render:

(1) A person as to whom such exclusion has been claimed ineligible under paragraph (a) of this section;

(2) The entity for which such exclusion has been claimed ineligible under paragraph (b) of this section; or

(3) Either the representations made pursuant to paragraph (c)(2) of this section inaccurate or the continuation of such representations false or misleading.

(f) Any notice required to be filed hereunder must be:

(1) In writing;

(2) Signed by a duly authorized representative of a person specified in paragraph (a) of this section;

(3) Filed with the Commission at the address specified in Sec. 4.2; and

(4) Filed with the National Futures Association at its headquarters office (Attn: Director of Compliance, Compliance Department).