

**CFTC Letter No. 02-04**  
**January 8, 2002**  
**Interpretation**  
**Division of Trading and Markets**

Re: "X"

Dear:

This is in response to your letter dated May 20, 2001, to Barbara Gold, Assistant Chief Counsel in the Division of Trading and Markets (the "Division"), as supplemented by conversations with Division staff. By your correspondence, you inquired about possible exemptions from registration as a commodity pool operator ("CPO") regarding the operation of an "investment club."

Section 2(c)(2)(B) of the Commodity Exchange Act (the "Act")<sup>[1]</sup> makes clear that offering foreign currency futures and options contracts, other than those that are executed or traded on an organized exchange<sup>[2]</sup> ("off-exchange"), to retail customers<sup>[3]</sup> is unlawful unless the counterparty is a regulated entity enumerated in the Act. The counterparties enumerated include registered futures commission merchants ("FCMs") and certain affiliated persons of registered FCMs.<sup>[4]</sup> However, if the off-exchange foreign currency transaction is offered to, or entered into with, an eligible contract participant, then the Act is not applicable to, and the Commission does not have jurisdiction over, the transaction.<sup>[5]</sup>

Based upon your representations, we understand the facts to be as follows. The investment club will combine the funds of its participants. An account will be opened in the name of the investment club with 'Y', a registered FCM, for the purpose of trading in off-exchange foreign currency. The investment club will limit its activities to the trading of off-exchange foreign currency and will not conduct any trading on or subject to the rules of an organized exchange.

Commission Rule 4.10(d)(1) defines the term commodity "pool" as "any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests."<sup>[6]</sup> Generally, a person who, in connection with a "pool," "solicits, accepts, or receives from others, funds, securities, or property . . . for the purpose of trading in" commodity futures contracts is a CPO.<sup>[7]</sup> Absent an exemption, a CPO is required to register with the Commission.<sup>[8]</sup> However, it is the opinion of the Division that, with respect to a person operating a "pool" that limits its trading activities to off-exchange foreign currency with a registered FCM acting as a counterparty under Section 2(c)(2)(B)(ii) of the Act, the person is not required to register as a CPO, but may voluntarily do so.<sup>[9]</sup>

Although you, or any other person who operates the investment club, may not be required to register as a CPO, please be aware that, if the investment club enters into off-exchange foreign currency futures or

options transactions with an entity that is not one of the counterparties enumerated in Section 2(c)(2)(B)(ii) of the Act, the transaction is unlawful and the operator of the investment club may be liable for aiding and abetting a violation of the Act.<sup>[10]</sup> Even if the investment club enters into off-exchange foreign currency futures or options transactions with an enumerated counterparty, such as a registered FCM, the operator of the investment club may still be subject to the relevant antifraud provisions of the Act and rules thereunder.

I hope you find this letter responsive to your inquiry. If you have any questions concerning this correspondence, please contact Michael A. Piracci, an attorney on my staff, at (202) 418-5430.

Very truly yours,  
Lawrence B. Patent  
Associate Chief Counsel

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<sup>[1]</sup> 7 U.S.C. § 2 (2000).

<sup>[2]</sup> 7 U.S.C. § 1a(27).

<sup>[3]</sup> As used in this letter, the term "retail customer" refers to any person other than a person that comes within the definition of an "eligible contract participant" under Section 1a(12) of the Act, 7 U.S.C. § 1a(12).

<sup>[4]</sup> The other enumerated counterparties are: (1) financial institutions; (2) registered broker-dealers; (3) associated persons of registered broker-dealers; (4) insurance companies or affiliates thereof; (5) financial holding companies; and (6) investment bank holding companies. *See* Section 2(c)(2)(B)(ii) of the Act, 7 U.S.C. § 2(c)(2)(B)(ii).

<sup>[5]</sup> A commodity pool that has total assets exceeding \$5 million and is formed and operated by a registered CPO, or a foreign person performing a similar function subject as such to foreign regulation, is an "eligible contract participant." Section 1a(12)(A)(iv) of the Act, 7 U.S.C. § 1a(12)(A)(iv).

<sup>[6]</sup> Commission rules referred to herein are found at 17 C.F.R. Ch. 1 (2001).

<sup>[7]</sup> 7 U.S.C. § 1a(5).

<sup>[8]</sup> Section 4m(1) of the Act, 7 U.S.C. § 6m(1); *see also* Commission Rule 4.13.

<sup>[9]</sup> This opinion is solely that of the Division of Trading and Markets and does not necessarily represent the opinion of the Commission or any other division or office of the Commission and is not binding on the Commission. Moreover, the Division does not express any opinions as to the status of the investment

club under applicable state or federal laws that are not within the jurisdiction of the Commission, e.g., federal securities laws which fall under the jurisdiction of the Securities and Exchange Commission.

[\[10\]](#) See Section 4(a) of the Act, 7 U.S.C. § 6(a); *see also* Section 13(a) of the Act, 7 U.S.C. § 13c(a).