



**COMMODITY FUTURES TRADING COMMISSION**

2033 K Street, NW, Washington, DC 20581

(202) 254 - 8955

(202) 254 - 8010 Facsimile

93-91

DIVISION OF  
TRADING AND MARKETS

September 7, 1993

Re: Registered Investment Adviser --  
Relief from CPO & CTA Registration

Dear :

This is in response to your letter dated May 13, 1993, as supplemented by telephone conversations with Division staff, in which you request in connection with the operation of the "Group Trust" that the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission") not recommend any enforcement action to the Commission if "X" does not register as a commodity pool operator ("CPO") and a commodity trading advisor ("CTA"). In addition, you request that the Division provide relief to "Y" (the "Bank" or the "Trustee"), if the Bank does not register as a CPO in connection with its service as trustee of the Group Trust.

Based upon the representations made in your letter, as supplemented, we understand the relevant facts to be as follows. "X" is a Delaware corporation which engages in the business of an investment manager and is a registered investment adviser under the Investment Advisers Act of 1940 (the "IAA"). Additionally, "X" is the "investment manager" for the Group Trust, as that term is defined in section 3(38) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The Group Trust was organized pursuant to an Agreement and Declaration of Trust (the "Trust Agreement") by and between "X" as investment manager and the Bank as Trustee dated August 19, 1992, and was formed for the collective investment of assets of "qualified" pension and profit sharing plans (the "Plans") as defined in Section 401(a) of the Internal Revenue Code of 1986, as amended.<sup>1/</sup> Under the terms of the Trust Agreement, each participating Plan is required to adopt and incorporate the Trust Agreement by reference. You represent that each participating Plan is either a qualifying entity under Commission Rule 4.5(b)

<sup>1/</sup> The Group Trust has submitted an application to the Internal Revenue Service for tax exempt status.

or is excluded from the "pool" definition under Rule 4.5(a)(i), (ii) or (iii).<sup>2/</sup> Additionally, you represent that the Group Trust will operate in accordance with the requirements set forth in Rule 4.5(c).

The Trust Agreement provides that the Group Trust will consist of one or more separate investment funds (the "Funds") as may be established by the Trustee upon the direction of "X". As investment manager, "X" has broad authority to manage, acquire, control and otherwise dispose of the assets of any Fund of the Group Trust or to confer such authority to a "Fund Adviser." Accordingly, "X" is a "fiduciary" as defined under section 3(21) of ERISA. Additionally, you represent that "X" drafted the Group Trust documents, was generally responsible for the establishment of the Group Trust and has the authority to hire (or fire) CTAs or FCMS on behalf of the Group Trust.

I. "X"

A. Relief from CPO Regulation

The term "commodity pool operator" is defined in Section 1a(4) of the Commodity Exchange Act, as amended<sup>3/</sup> (the "Act"), in pertinent part as follows:

[A]ny person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities or property . . . for the purpose of trading in any commodity for future delivery . . . but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.

Further in this regard, the Commission has stated that a pool's CPO typically is the person who promotes the pool and has the authority to hire (and to fire) the pool's CTA and to select (and to change) the pool's futures commission merchant.<sup>4/</sup>

Rule 4.5(a)(4) generally provides that a trustee or a named fiduciary of a pension plan that is subject to Title I of ERISA

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<sup>2/</sup> 17 C.F.R. § 4.5 (1993), as amended by 58 Fed. Reg. 6371 (January 28, 1993). All other Commission rules referred to in this letter are found at 17 C.F.R. Ch. I (1993).

<sup>3/</sup> 7 U.S.C. § 1 et seq. (1988 & Supp. IV 1992).

<sup>4/</sup> 49 Fed. Reg. 4778, 4780 (February 8, 1984).

is excluded from the definition of the term "commodity pool operator" with respect to the operation of a pension plan that is a "qualifying" entity under paragraph (b). Pursuant to Rule 4.5(b)(4), a pension plan subject to Title I of ERISA and operated in accordance with certain criteria set forth in paragraph (c)(2) of the rule is a qualifying entity with respect to a person specified in paragraph (a)(4). Further, Rule 4.5(a)(4)(i)-(iii) excludes from the "pool" definition certain pension plans as specified therein.

As you note in your letter, the Group Trust does not fall within the express definition of a "qualifying entity" under Rule 4.5(b)(4) because it is not a "pension plan" but rather a group of pension and profit sharing plans subject to Title I of ERISA. As you further note, "X" is not a trustee or a named fiduciary of the Group Trust or of any of the participating Plans. Accordingly, without relief, "X" would not be entitled to take advantage of the exclusion from the CPO definition with respect to its activities regarding the Group Trust. For the reasons set forth below, however, the Division has determined to make such relief available.

As noted above, the Group Trust is not a "qualifying entity" for the purposes of Rule 4.5(b). However, on facts essentially the same as those presented in your letter, the Division has provided no-action relief to a requestor who was operating a trading vehicle comprised of assets contributed by multiple pension plans sponsored by different employers.<sup>5/</sup>

Moreover, on August 11, 1993, the Commission issued certain amendments to Rule 4.5, which amendments were published in the Federal Register on August 18, 1993 and become effective on September 17, 1993.<sup>5/</sup> Among other things, these amendments revise paragraph (a)(4) of Rule 4.5 such that a person designated or acting as a fiduciary pursuant to a written delegation from or other written agreement with the named fiduciary of a pension plan or employee welfare plan subject to ERISA which otherwise would be deemed to be acting as a CPO would be excluded from the definition of the term "commodity pool operator" provided that it

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<sup>5/</sup> See Division of Trading and Markets Interpretative Letter No. 86-8, [1986-87 Transfer Binder] Com. Fut. L. Rep. (CCH) ¶ 23,014 (April 4, 1986). We note that in Interpretative Letter No. 86-8 the requestors, unlike "X", were the trustees of the group trust. However, in light of the Commission's amendments to Rule 4.5 discussed in the text which follows, we do not believe that this distinction is material.

<sup>5/</sup> 58 Fed. Reg. 43791 (August 18, 1993).

met the other relevant requirements set forth in the rule.<sup>27</sup> In this regard, we note your representations that "X" was generally responsible for the establishment of the Group Trust and has the authority to hire (or fire) CTAs, select (or change) FCMS and make investment decisions on behalf of the Group Trust. Accordingly, it appears that "X" will be acting as the CPO of the Group Trust. Moreover, while each Plan in the Group Trust has its own named fiduciary, each is required under Plan documents to adopt the Trust Agreement between "X" and the Bank. Under these circumstances, we believe that "X" is "a fiduciary pursuant to a written . . . agreement with the named fiduciary" within the meaning of the amended Rule.<sup>28</sup>

Accordingly, the Division will not recommend that the Commission take any enforcement action against "X" if it fails to register as a CPO in connection with its activities as investment manager and fiduciary of the Group Trust, provided that "X" complies in full with amended Rule 4.5.

B. Relief from CTA Registration

Commission Rule 4.6(a)(2) provides an exclusion from the definition of the term "commodity trading advisor" to a person who is excluded from the definition of the term "commodity pool

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<sup>27</sup> The amendments also allow a non-named fiduciary to claim the CPO exclusion through the notice of eligibility filed by the named fiduciary. 58 Fed. Reg. 43791 at 43793.

<sup>28</sup> The Commission stated in its proposed amendments to Rule 4.5 that --

while fiduciaries do not have the same administrative responsibilities as named fiduciaries under ERISA, they are subject to identical fiduciary responsibilities under the statute. Furthermore, the participants in any ERISA plan for which a person serves as a fiduciary receive all of the other protections afforded by ERISA (e.g., disclosure) regardless of who is administratively responsible for providing them. For these reasons . . . the Commission has subsequently become convinced that the current limitation of the CPO exclusion to "named" fiduciaries is unnecessarily restrictive and that the exclusion should be afforded as well to certain other plan fiduciaries who otherwise would be deemed to be acting as CPOs.

58 Fed. Reg. 32314 at 32315. Because "X" is a fiduciary under ERISA, the Group Trust, similarly, would be afforded the ERISA protections discussed in the Commission's proposal.

operator" under Rule 4.5, provided that, among other things, its commodity interest advisory activities are solely incidental to its operation of the trading vehicles for which Rule 4.5 provides relief.

Based upon the relief provided to "X" with respect to CPO registration, as discussed above, the Division will not recommend that the Commission take any enforcement action against "X" if it fails to register as a CTA, provided that, in addition to satisfying the condition discussed above regarding relief from CPO registration, "X" complies with the provisions of Rules 4.6(a)(2)(i)(b) and (c) as if it had filed a notice of eligibility under Rule 4.5 with respect to the Group Trust.

### III. The Bank

As noted above, the factors considered in determining who is the CPO of a pool generally include who will be promoting the pool by soliciting, accepting or receiving from others, property for the purpose of commodity interest trading and who will have the authority to hire and fire the pool's CTA and to select and change the pool's FCM.

With respect to the Bank's activities as Trustee of the Group Trust, you state that the Bank will be the custodian of the Group Trust's assets and will be responsible for maintaining the Group Trust's accounting and financial records as well as for determining the value of the units in each Fund. You represent that the Bank, however, will not: (1) solicit or have any direct contact with participants in the Funds (2) have any investment discretion with respect to the assets of any Fund; (3) make any recommendations or otherwise review the investment decisions of "X" or any Fund Adviser;<sup>2/</sup> or (4) hire or fire or have any authority to hire or fire CTAs or FCMs on behalf of the Group Trust. Rather, as noted above, these are "X"'s responsibilities. Based on the foregoing, the Division confirms that it will not recommend that the Commission take any enforcement action against the Bank based solely upon its failure to register as a CPO.

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The positions taken in this letter do not excuse "X" or the Bank from compliance with any other applicable requirements contained in the Act or the Commission's regulations thereunder. For example, each remains subject to the antifraud provisions of

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<sup>2/</sup> "X" may, however, direct that all or a portion of a Fund's cash balances be invested in a short-term investment Fund established by the Trustee, and the Trustee may be directed by "X" to lend securities on behalf of a Fund.

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Section 40 of the Act, 7 U.S.C. §60, and to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations.

This letter is based on the representations you have made to us, and is subject to compliance with the conditions set forth above. Any different, changed or omitted facts or conditions might require us to reach a different conclusion. In this regard, we request that you notify us immediately in the event the facts change in any way from those represented to us.

Finally, this letter represents the position of the Division of Trading and Markets only. It does not necessarily reflect the views of the Commission or any other office or division of the Commission.

If you have any questions regarding this letter, please contact me or Lawrence Eckert, an attorney on my staff, at (202) 254-8955.

Very truly yours,

Andrea M. Corcoran  
Director