



COMMODITY FUTURES TRADING COMMISSION

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94-11

DIVISION OF
TRADING AND MARKETS

December 17, 1993

Re: Request for Relief from Rules 4.21, 4.22 and 4.23

Dear :

This is in response to your letters dated August 9, September 24, and October 28, 1993, as supplemented by telephone conversations with Division staff in which, on behalf of the Operator, a registered commodity pool operator ("CPO"), you request relief from certain requirements of Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11)^{1/} in connection with the operation of the Funds.

Based upon the representations made in your letter, as supplemented, we understand the pertinent facts to be as follows. "A" is wholly-owned by "X". "X", together with its majority owned subsidiaries, is an internationally known business, consulting and management firm which specializes in top-management problem-solving. Members of the top two levels of senior professionals of "X",^{2/} together with a number of senior administrators ("administrative shareholders"), are "X"'s only shareholders. As of July 1, 1993, of a total 5,600 employees, 465 were shareholders.^{3/}

The Funds are an additional benefit offered, pursuant to Regulation D of the Securities Act of 1933, exclusively to certain managing group members and key employees ("Eligible Employees") of "X", all of whom are experienced professionals in the consulting business or in administrative, financial, accounting, legal or operational activities related thereto. All Eligible

^{1/} Commission rules referred to herein are found at 17 C.F.R. Ch. I (1993).

^{2/} The most senior professionals are called "directors" and the next most senior are called "principals".

^{3/} Of the 465 shareholders, 152 were directors, 281 principals and 32 administrative shareholders.

Employees are accredited investors as defined in Regulation D,^{4/} who are provided, when solicited, with a private offering memorandum containing information deemed material by "X" to a decision to invest in a Fund and have direct access to the individuals managing the assets of the Funds and to information relating to the Funds. Moreover, as is set forth more fully below, the Eligible Employees generally are shareholders of "X" and the Funds will mainly be offered to "X" shareholders. The Funds do not invest directly in commodity futures or option contracts; however, their assets are allocated to other pooled investment vehicles, some of which are commodity pools. Neither the Operator nor any principal thereof is paid a fee or commission in connection with solicitations for the Fund and the Operator does not receive a management or incentive fee from the Fund. However, fees and expenses incurred by or allocable to the Fund, including legal and accounting fees and transaction-related fees, are generally borne by the Fund itself. Employees of "X", including "B", the president and a registered associated person of the Operator, provide administrative support to the Funds and are compensated by "X" for their services, including their services to the Funds.

Specifically, the Eligible Employees are: (1) shareholders of "X", i.e., management group members, who are directors, principals^{5/} and a limited number of high-level administrators and client service support personnel of "X", i.e., administrative shareholders who hold high-level positions in the administrative, financial, accounting, legal or operational departments of "X" and whose positions are comparable to those held by the chief financial officer, general counsel and other executive-type positions in other large corporations; (2) certain retired directors of "X"^{6/}; and (3) the director of "Y"^{7/}, the director of Re-

^{4/} You further note that approximately two-thirds of the Eligible Employees are qualified eligible participants ("QEPs") as defined in Rule 4.7.

^{5/} There is currently only one such principal, a non-United States person who administers investment programs and handles administrative affairs in Europe for the Operator.

^{6/} Investment in one of the Funds is permitted only if the retired director, although retired, continues to take an active role in the parent company activities and be compensated for their services. Directors who are participants in a Fund and retire are allowed to maintain their Fund participation.

^{7/} "Y" is the unit of "X" in charge of certain investment programs on behalf of management group members.

retirement Plan Investments^{8/}, and the director of European Investment Programs.^{9/} These three individuals have extensive experience, both personally and professionally, in many types of investments.

Based on the foregoing, you claim that the investment acumen and financial resources of the Eligible Employees evidence that they do not need the full protections offered by Part 4 of the Commission regulations. In support of this claim you note that the Division has previously granted the Operator relief from the requirement of Rule 4.21(e)(1) that the Fund's performance record be current within three months of the date of the Disclosure Document^{10/} and from the requirements of Rule 4.22 that the annual reports for the Funds be certified and that Account Statements be distributed monthly.^{11/}

Based upon the representations made in your letters, as supplemented, the Division will not recommend that the Commission take any enforcement action against the Operator if the Operator does not comply with the specific requirements of Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11) in connection with its operation of the Funds. This exemption is, however, subject to the conditions that the Operator: (1) discloses to prospective participants in each Fund that pursuant to relief issued by the Commodity Futures Trading Commission the Operator is not required to make, and is not making, all of the disclosures to prospective participants otherwise required by Commission rules; and (2) prepares and distributes to each participant in each Fund the periodic and annual reports specified in Rules 4.7(a)(2)(ii) and (a)(2)(iii) in lieu of those required by Rule 4.22 and that copies of such reports are maintained at the Operator's main business office in accordance with Rule 1.31.^{12/}

^{8/} Retirement Plan Investments is the unit of "X" with responsibility for certain profit sharing and retirement plans on behalf of "X" employees, including various ERISA plans.

^{9/} European Investment Programs is the unit of "X" that is in charge of investment programs for shareholders of "X" who reside in Europe.

^{10/} See the Division's letter to "B" dated October 24, 1989.

^{11/} Accounts statements are distributed on a quarterly basis. See Division's letter to "B" dated August 15, 1988.

^{12/} In your August 9, 1993 letter you propose to file a Rule 4.7 notice of claim for exemption for the Funds. However, because a significant number of their participants may not be QEPs, no such notice may be filed. You have also requested relief for "similar (continued...)

This letter is based on the representations provided to us and is subject to compliance with the conditions set forth above. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event the operations or activities of the Operator change in any way from those represented to us. Further, this letter is applicable to the Operator solely in connection with its operation of the Funds.

We note that this letter relieves the Operator solely from the requirements of Rule 4.21, 4.22 and 4.23(a)(10) and (a)(11) and does not excuse it from compliance with any other applicable requirements contained in the Commodity Exchange Act ("Act"), 7 U.S.C. § 1 et seq. (1988 & Supp. 1992), or in the Commission's regulations thereunder. For example, the Operator remains subject to the antifraud provisions of Section 4o of the Act, 7 U.S.C. § 6o (1988 & Supp. 1992), to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations, 17 C.F.R. Parts 15, 18 and 19 (1993), and to all other provisions of Part 4.

Further, this letter represents the views of this Division only and does 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 France M.T. Maca, an attorney on my staff, at (202) 254-8955.

Very truly yours,

Susan C. Ervin
Chief Counsel

^{12/} (...continued)
funds" to be formed. The Division will consider relief for similar funds on a case-by-case basis.