



COMMODITY FUTURES TRADING COMMISSION

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DIVISION OF
TRADING AND MARKETS

94-52

June 1, 1994

Re: Relief from CPO/CTA Registration for Registered
Investment Adviser Operating a Group Trust

Dear :

This is in response to your letter dated April 22, 1994, 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 against "X", the "Bank" or the "Trustee") or any of their affiliates, directors, officers or employees if: (1) "X" does not register as a commodity pool operator ("CPO") and commodity trading advisor ("CTA"); and (2) the Bank does not register as a CPO.

Based upon the representations made in your letter, as supplemented, we understand the relevant facts to be as follows. "X", the sponsor of the Group Trust, is a Delaware corporation and is a registered investment adviser under the Investment Advisers Act of 1940 (the "IAA").^{1/} The Group Trust was organized pursuant to an Agreement of Trust (the "Trust Agreement") by and between "X" as Sponsor and the Bank as Trustee dated December 1, 1993. As the Sponsor, "X" appoints investment managers ("Investment Managers") to direct the investment of the assets of the Group Trust, subject to guidelines established by and the supervision of "X".

The Group Trust was formed for the collective investment of assets of trusts that form part of pension or profit-sharing plans and government pension plans (the "Plans").^{2/} It is composed of assets of the participating trusts, each of which is part of a Plan and each of which is exempt under Section 501(a) of the Internal Revenue Code of 1986, as amended (the "Code"),

^{1/} "X" is also the holding company for "Y", a brokerage and investment banking firm, and its affiliates.

^{2/} The Group Trust is intended to be a tax-exempt, pooled fund arrangement as described in Internal Revenue Service ("IRS") Revenue Ruling 81-100. In this regard, the Group Trust has submitted an application to the IRS for tax exempt status.

from United States income taxation by reason of being "qualified" under Section 401(a) of the Code or is a governmental plan described in Sections 401(a)(24) and 818(a)(6) of the Code. Under the terms of the Trust Agreement, each participating Plan is required to adopt and incorporate the Trust Agreement by reference and to adopt the Group Trust as part of such Plan. You represent that each participating Plan is either a qualifying entity under Commission Rule 4.5(b) or is excluded from the "pool" definition under Rule 4.5(a)(i), (ii) or (iii).^{3/} 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". Subject to the investment objectives, guidelines and restrictions established by "X" for any particular fund, the Investment Manager of each Fund has broad authority to manage, acquire, control and otherwise dispose of the assets of any Fund. Accordingly, each Investment Manager must acknowledge that it is a "fiduciary," as defined under section 3(21) of ERISA, with respect to each Fund for which it has been appointed investment manager and with respect to each Plan having an interest in such Fund. You represent that "X" has been responsible for the establishment of the Group Trust and has the authority to hire (or fire) the Investment Managers and make investment decisions on behalf of the Group Trust.

The Bank will act as the trustee of the Group Trust. In this regard, the Bank will be custodian of the Group Trust's assets and will be responsible for the valuation, delivery and receipt of the securities and other assets of the Group Trust. The Bank will be responsible for maintaining accounting and financial records and preparing periodic reports for the Group Trust. The Bank has no investment discretion with respect to the Group Trust's assets and has no responsibilities for the formulation of investment policies to be followed by the Group Trust. Except to the extent that assets of the Group Trust are invested at the direction of the Investment Managers in short-term funds administered by the Bank, the investment management of the Group Trust's assets is the exclusive responsibility of "X".

I. "X"

A. Relief from CPO Regulation

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

^{3/} 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).

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, including governmental pension plans. Further, "X" is not a trustee or a named fiduciary (as that term is defined in the Employee Retirement Income Security Act of 1974 ("ERISA")) of the Group Trust or of any of the participating Plans.^{4/} However, based on your representations and consistently with our prior positions in this area,^{5/} 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 Sponsor and fiduciary of the Group Trust, provided that "X" complies in full with Rule 4.5.^{6/}

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 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. As noted above, however, "X" is not a "qualifying

^{4/} However, as you note, by adopting the Group Trust as part of a Plan, each participating Plan effectively designates "X" as a named fiduciary with respect to those assets invested by such Plan in the Group Trust.

^{5/} See CFTC Interpretative Letter No. 93-91, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,857 (September 7, 1993).

^{6/} Thus, if the Group Trust contains both plans which are covered by Rule 4.5(b)(4) and plans which are excluded from the pool definition by Rule 4.5(a)(4), "X" must file a notice of eligibility pursuant to Rule 4.5(c) with respect to the Group Trust and must operate the Group Trust pursuant to Rule 4.5(c)(2). If, however, prior to trading commodity interests it is determined that the Group Trust contains only plans excluded from the pool definition by Rule 4.5(a)(4), then "X" would not be subject to any filing or operational requirements under Rule 4.5.

entity" for which Rule 4.5 provides an exclusion. Accordingly, absent relief, "X" would be unable to avail itself of the exclusion under Rule 4.6.

Based, however, 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.

II. The Bank

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 futures commission merchant ("FCM").^{7/}

With respect to the Bank's activities as Trustee of the Group Trust, you represent 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 preparing periodic reports. You represent that the Bank will not: (1) solicit or otherwise 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 Investment Manager;^{8/} 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 or those of the investment managers with respect to appointment of FCMS. Based on the foregoing, the Division will not recommend that the Commission take any enforcement action against the Bank if it fails to register as a CPO in connection with its serving as the Trustee of the Fund.

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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 Commodity Exchange Act (the "Act") or the Commission's regulations thereunder. For example, each remains

^{7/} 49 Fed. Reg. 4778, 4780 (February 8, 1984).

^{8/} However, as noted above, assets of the Group Trust may be invested at the direction of the Investment Managers in short-term funds administered by the Bank.

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subject to the antifraud provisions of 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,

Susan C. Ervin
Chief Counsel