93-12

COMMODITY FUTURES TRADING COMMISSION
2033 K Street, NW, Washington, DC 20581
(202) 254 - 8955
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DIVISION OF TRADING AND MARKETS

February 25, 1993

Re: Request for Relief from CPO and CTA Registration

Dear :

This is in response to your letter dated December 17, 1992, as supplemented by your letters dated January 28 and February 5, 1993 and telephone conversations with Division staff, in which you request in connection with the operation of the Fund that the Division of Trading and Markets ("Division") not recommend any enforcement action to the Commission if under the circumstances set forth below: (1) no member of the Fund's supervisory board (the "Supervisory Board") registers as a commodity pool operator ("CPO"); and (2) the "Sub-Adviser", a registered investment adviser under the Investment Advisers Act of 1940 (the "IAA") and a sub-investment adviser to the Fund, does not register as a commodity trading advisor ("CTA").[1/]

Based upon the representations made in your letter, as supplemented, we understand the relevant facts to be as follows. The Fund is organized and operated pursuant to the laws of the Cayman Islands. The Fund is not and, absent an exemption from the Securities and Exchange Commission ("SEC") cannot, register with the SEC as an investment company under the Investment Company Act of 1940. The Fund's governing documents prohibit the offer or sale of Fund units in the United States and prohibit ownership of Fund units by United States persons.[2/] According-

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1/ You request relief on behalf of the Sub-Adviser with respect to the Sub-Adviser's activities in connection with its providing commodity interest trading advice to the Equity Portfolio (defined below) "or to any other foreign fund operating under similar circumstances[.]" This letter addresses only the current facts and circumstances with respect to the Sub-Adviser's activities in connection with the Equity Portfolio. Should the Sub-Adviser seek relief in the future in connection with activities related to another foreign fund, it must make a separate request to the Division at that time.

2/ You have represented that for the purpose of this request, the definition of "United States person" is identical to the

(continued...)

ly, you represent that the Fund does not, and will not, contain any capital directly or indirectly contributed from United States sources. Further, you represent that all meetings and activities of the Fund's unitholders and the Supervisory Board will be conducted outside of the United States.

The Fund currently has only one investor, a Japanese life insurance company which had reported assets in excess of 6.5 trillion yen as of March 31, 1992.[3/] You represent that the investor is investing its proprietary funds in the Fund. Additionally, you represent that no further solicitation of investors on behalf of the pool is intended and that the initial investor does not intend to transfer its units in the Fund to anyone else.

The Fund is managed by a trustee (the "Trustee"), under the supervision of the Supervisory Board. The Supervisory Board is comprised of three members, who are subject to the power of the Fund's unitholders to remove board members. Two board members are Japanese citizens who have no affiliation with any Commission registrant. The third board member (the "U.S. Member") is a United States citizen and is listed as a principal of a registered futures commission merchant.[4/] Additionally, the U.S. Member is the President of the Sub-Adviser. You have represented that the Japanese members of the Supervisory Board were actively involved in structuring the Fund.

The Investment Adviser to the Fund is the "Adviser", a registered investment adviser under the IAA and a member of the

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2/ (...continued)
definition we employed in Division of Trading and Markets Interpretative Letter No. 92-3, [1990-92 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,221 (January 29, 1992).

3/ Based upon the exchange rate of 124.65 yen to the United States dollar (as reported in The Washington Post on February 5, 1993), the amount of reported assets expressed in terms of United States dollars in excess of $50 billion.

4/ You state that the U.S. Member is a Managing Director and a member of the Executive Committee of X. Under X's policies, all business areas of the firm report to a member of the Executive Committee. X's futures division is one of the business areas that reports to the U.S. Member. You represent, however, that the U.S. Member is not involved in the day-to-day activities of the division, but rather that these activities are supervised and administered by the Managing Director of X, who is registered as an AP of X and who is the person responsible for the day-to-day activities of the division.

Investment Regulatory Organization, which is located in London, England. The Sub-Adviser is a sub-investment adviser to the Adviser with respect to one of the Fund's portfolios (the "Equity Portfolio") which intends to trade commodity futures and options thereon on United States exchanges pursuant to the criteria set forth in Rule 4.5(c)(2).[5/] The Sub-Adviser is primarily engaged in the business of providing securities investment advice to institutional clients, and you represent that it currently does not render commodity interest trading advice to any clients.

Based upon our review of the representations set forth above, the Division will not recommend that the Commission take any enforcement action against the members of the Supervisory Board as a result of their engaging in the activities described above without registering as CPOs. This position is based upon, among others, your representations that: (1) two of the members of the Supervisory Board are Japanese citizens who have no affiliation with any Commission registrant;[6/] (2) while the third member is a United States citizen, he is listed as a principal of a Commission registrant; (3) the pool's activities will be confined to areas outside the United States; (4) none of the participants in the pool will be a United States person; (5) no funds or other capital will be contributed to the pool from United States sources; (6) all shareholders meetings will be conducted outside the United States; and (7) the only investor in the Fund

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5/ On January 21, 1993 the Commission issued certain amendments to Rule 4.5 which were published in the Federal Register on January 28, 1993 and will be effective on March 1, 1993. Under the amended rule a qualifying entity may use commodity futures and option positions (1) for bona fide hedging purposes or (2) for other purposes to the extent that the aggregate initial margins and premiums required to establish such non-hedging positions do not exceed five percent of the liquidation value of such qualifying entity's portfolio. 58 Fed. Reg. 6371, 6372 (January 28, 1993). Unless otherwise noted, Commission rules referred to herein are found at 17 C.F.R. Ch. I (1992).

6/ See Commission Staff Interpretative Letter No. 76-21, [1975-77 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,222 (August 15, 1976), wherein the Office of General Counsel stated that it would not recommend enforcement action for failure to register as a CPO against a non-United States pool operator where: (1) the CPO confined its commodity pool activities to areas outside the territorial United States; (2) none of the participants in the pool were residents or citizens of the United States; and (3) none of the funds or other capital were contributed to the pool from United States sources.

is a Japanese life insurance company which is investing its proprietary funds.[7/]

With respect to your request for relief from CTA registration regarding the Sub-Adviser, we note that we have provided such relief based on the same representations you have made. Specifically, you have made the following representations: (1) the shares of the Fund are not owned either directly or indirectly by any citizen or resident of the United States; (2) the Fund will be operated pursuant to the criteria set forth in Rule 4.5(c)(2); and (3) the Sub-Adviser will provide commodity interest trading advice in a manner solely incidental to its business of providing securities advice to the Fund.

Based upon the foregoing, and consistent with our prior practice in this area,[8/] the Division will not recommend that the Commission take any enforcement action against the Sub-Adviser for failure to register as a CTA in connection with its providing commodity interest trading advice to the Fund. This position is, however subject to the conditions that: (1) the Sub-Adviser does not otherwise hold itself out as a CTA; (2) the Sub-Adviser will submit to such special calls as the Division may make of it to demonstrate compliance with the terms and conditions of this "no-action" position; and (3) the Sub-Adviser's activities in connection with the Fund are subject to section 4o of the Commodity Exchange Act, as amended (the "Act").[9/]

The relief issued by this letter does not excuse any member of the Supervisory Board, including the U.S. Member or the Sub-Adviser 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 Section 4o of the Act, 7 U.S.C. §6o, to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations, and to all other provisions of Part 4. Further, this relief is applicable solely in connection with the activities of the Fund.

7/ You should notify us immediately if these facts change, as the relief granted herein may no longer obtain.

8/ See, e.g., Division of Trading and Markets Interpretative Letter No. 88-5, [1987-90 Transfer Binder] Comm. Fut. L.Rep. (CCH) ¶ 24,166 (February 2, 1988).

9/ 7 U.S.C. § 1 et seq. (1988), as amended by the Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590 (1992).

The no-action positions taken in this letter are based on the representations you have made to us and are subject to the conditions stated 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 operation of the Fund, including its shareholder and Supervisory Board composition 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

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