TOUCHE HOLDINGS, INCORPORATED

Publicly Available December 30, 1987

SEC LETTER

Advisers Act Secs. 202(a)(11), 203(a)

November 30, 1987

In your letters of September 1, 1987 and November 9, 1987, you request our assurance either that we agree with the interpretive views expressed in your letters or that we would not recommend any enforcement action to the Commission under the Investment Advisers Act of 1940 ("Advisers Act") if Touche Holdings, Inc. ("Touche Holdings"), the general partner of Partner Wealth Fund I, L.P. ("Partnership"), a Delaware limited partnership formed as an "employees' securities company" within the meaning of Section 2(a)(13) of the Investment Company Act of 1940, proceeds as described in your letters without registering with the Commission as an investment adviser. You state that Touche Holdings is a corporation wholly-owned by Touche Ross & Co. ("Firm"), an accounting firm organized as a general partnership. You also state that the limited partners of the Partnership will be the Firm and partners and principals of the Firm ("Firm Partners"). Finally, you state that Touche Holdings will manage the day-to-day business of the Partnership and will make all decisions for it relating to the acquisition, management and disposition of its investments, for which Touche Holdings will be paid a cost-based management fee as described in your letters.

With respect to your first request, you argue that Touche Holdings will not be an investment adviser within the meaning of Section 202(a)(11) of the Advisers Act,1 because it will not be (1) receiving "compensation," as evidenced by the cost-based nature of the management fee and the fact that the payor and payee of that fee are virtually the same, (2) in "the business" of advising, as evidenced by Touche Holdings not receiving any profit and not holding itself out to the public as an adviser, or (3) performing services for "others," as evidenced by the substantial community of interest that will exist among the beneficial owners of the Partnership, the Firm and Touche Holdings. For the following reasons, we cannot concur with your legal analysis.

The Division has consistently taken the position that the receipt of any economic benefit constitutes the receipt of compensation under Section 202(a)(11) of the Advisers Act. See Investment Advisers Act Release No. 1092 (Oct. 8, 1987) ("Release 1092"). The compensation element is satisfied even if payments for services cover only the cost of the services. See, e.g., CFS Securities Corp. (pub. avail. Feb. 27, 1987); Southwest Corporate Federal Credit Union (pub. avail. May 31, 1983); The Corporate Income Fund (pub. avail. June 14, 1982). Thus, the fact that the management fee to be paid by the Partnership to Touche Holdings will be cost-based is, in our opinion, irrelevant for purposes of determining whether the compensation element in Section 202(a)(11) has been met.

In addition, because there is not a precise identity of interest between the beneficial owners of Touche Holdings' capital stock (i.e., the Firm Partners) and the limited partners of the Partnership,2 the limited partners will not be reimbursed exactly for their pro rata cost of the management fee paid by the Partnership. In fact, the management fee, even though it will be designed only to defray the costs incurred by the Partnership, could result in a profit to some Firm Partners.3

The staff also takes the position that a person is considered to be "in the business" of providing investment advice if, for example, the person provides specific investment advice on anything other than rare, isolated and non-periodic instances.4 Because Touche Holdings will be making regular, specific investment decisions involving securities for the Partnership, an entity registered as an investment company under the Investment Company Act of 1940, Touche Holdings appears to satisfy the "in the business" element of Section 202(a)(11).5

Regarding your interpretation of the term "others," we note that while the limited partners through their investment in the Partnership and their relationship to the Firm will have a substantial community of interest,6 only a few of them, as members of Touche Holdings' board, will be making the actual investment decisions for the Partnership. A community of interest, in any event, does not automatically

eliminate all potential conflicts of interest between the individual limited partners.7 This is especially true where, as in this case, there will be a large number of investors.8

In addition, we believe that the term “others,” as used in Section 202(a)(11), is broad enough to include even situations where only two persons pool their funds in a joint investment and both provide advisory services to the entire pool. In such a case, each person would, in effect, be exercising control over the other's investment in the pool. As we view the proposed arrangement, therefore, Touche Holdings would be advising “others,” despite the substantial community of interest that would exist among the participants.

We would not, however, recommend enforcement action to the Commission under the Advisers Act if Touche Holdings proceeds as described in your letters without registering as an investment adviser under the Advisers Act. Our position is based on the facts and circumstances represented in your letters, especially that: (1) the benefits of registration of Touche Holdings under the Advisers Act would be available to the limited partners without such registration as described in your letters9, (ii) the Partnership obtained an order under Sections 6(b) and 6(c) of the Investment Company Act of 1940 exempting it from all provisions of that Act, except Sections 9, 36 and 37, certain provisions of Sections 17 and 30 and certain rules thereunder (Investment Company Act Release No. 15888), (iii) Touche Holdings will be subject to the antifraud provisions of the Advisers Act, and (iv) all prospective limited partners are experienced and sophisticated in accounting and business and financial matters as evidenced by their having achieved partnership in an accounting firm commonly referred to as one of the “big eight” accounting firms.

Because this position is based on the representations made to us in your letters, you should note that any different facts or conditions may require a different conclusion. Further, this response only expresses our position on enforcement action with respect to the nonregistration of Touche Holdings. In particular, this response should not be interpreted to mean that the staff considers investment advisers to employees' securities companies, in general, to be excepted from the registration requirements of the Advisers Act.10

Joseph R. Fleming
Attorney

Footnotes

1 Section 202(a)(11) of the Advisers Act defines an investment adviser as “... any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities....”

2 In this regard, we note, for example, that: (1) not all Firm Partners intend to invest in the Partnership; (2) Firm Partners may invest different dollar amounts in the Partnership; and (3) Firm Partners have different partnership interests in the Firm.

3 For example, a Firm Partner who decided not to invest in the Partnership could “profit” by virtue of his beneficial ownership of the capital stock of Touche Holdings. Similarly, a Firm Partner who acquired an interest in the Partnership that was proportionately less than his partnership interest in the Firm could “profit,” since his share of the management fee “reimbursement” based on his percentage interest in the Firm would be greater than his share of the management fee payment based on his percentage interest in the Partnership.

4 See Release 1092.

5 The exception from the registration provisions of the Advisers Act provided by section 203(b)(3) is, of course, unavailable to an investment adviser to any investment company registered under the Investment Company Act of 1940.

6 As identified earlier in our response, there would not be an identity of interest.

7 For example, the individual limited partners may not all agree that a particular investment opportunity recommended by Touche Holdings is a good one for the Partnership.

8 The Firm, as stated in your letters, has approximately 800 Firm Partners. In a telephone conversation on November 3, 1987, you indicated that roughly 600 Firm Partners will invest in the Partnership.

9 In particular, see pages 7–8 of your letter dated September 1, 1987, describing the information, protections and benefits that would be available to the limited partners.

10 See, e.g., GAC Properties, Inc. (pub. avail. Oct. 31, 1980) and General Electric Company (pub. avail. Jan. 31, 1977), where the staff expressed the view that, barring an appropriate exemption under Section 203(b), an investment adviser (as defined in Section 202(a)(11)) to an employees' securities company is required to register under the Advisers Act.

INCOMING LETTER

September 1, 1987

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Dear Sirs:

We are acting as counsel to Touche Holdings, Inc. (the “General Partner”), the general partner of Partner Wealth Fund I, L.P. (the “Partnership”), a limited partnership formed to be an “employees' securities company” within the meaning of section 2(a)(13) of the Investment Company Act of 1940 (the “Investment Company Act”). The General Partner is a corporation wholly-owned by Touche Ross & Co. (the “Firm”). The limited partners of the Partnership (the “Limited Partners”) will be the Firm and partners and principals of the Firm (“Firm Partners”).1

On behalf of the General Partner, we respectfully request that the Division of Investment Management (the “Division”) either (a) concur in our view that the General Partner will not be an “investment adviser” within the meaning of section 202(a)(11) of the Investment Advisers Act of 1940 (the “Investment Advisers Act”) and will therefore not be required to register pursuant to section 203(a) of the Investment Advisers Act, or (b) confirm that it will recommend that no enforcement action be taken by the Commission if the General Partner does not so register.

The Partnership and the General Partner

The Firm is a so-called “big eight” public accounting firm organized as a general partnership with approximately 800 Firm Partners in the United States. The purpose of the Partnership is to enable Firm Partners to pool investment resources to take advantage of investment opportunities that come to the attention of the Firm and Firm Partners. The Partnership is intended to achieve long-term capital appreciation, with the expected realization of its investment objectives within approximately seven years.

The Firm will contribute a portion of its assets (and, therefore, a portion of each Firm Partner's assets in the Firm) to the Partnership in an amount equal to the lesser of $3.75 million and 25% of the aggregate amount invested by all individual Limited Partners, and will extend credit, on a subordinated basis, to the Partnership in a principal amount equal to the amount it contributes to the Partnership. The Firm will receive a limited partnership interest in the Partnership in exchange for its capital contribution. Therefore, each Firm Partner will, through his participation in the Firm, beneficially own a limited partnership interest in the Partnership. In addition, each Firm Partner will be permitted to make capital

contributions to the Partnership on an individual basis.

Neither the General Partner nor the Firm will be compensated by the Partnership for services to it, except that the Partnership will pay the General Partner an annual management fee equal to 1% of the greater of (a) the subscribed capital of the Partnership and (b) the value of the Partnership's assets (net of its liabilities) as of the end of the calendar year to which the fee relates, as determined by the General Partner in accordance with section 2(a)(41) of the Investment Company Act. The annual 1% fee is intended to reimburse the Firm for the costs incurred by it in connection with the Partnership. The amount of the annual fee will not exceed the amount of the actual costs incurred by the General Partner on behalf of the Partnership. No sales load is being charged in connection with the investments in the Partnership.

The General Partner will manage the day-to-day business of the Partnership and will make all decisions for it relating to the acquisition, management and disposition of its investments. The directors and officers of the General Partner are Firm Partners selected by the Firm; a variety of geographic and professional backgrounds are represented. The General Partner has an investment advisory committee appointed by the General Partner's board of directors and consisting of members of its board and other Firm Partners. The investment advisory committee will be responsible for evaluating investment opportunities for the Partnership and making recommendations regarding those investment opportunities to the General Partner's board of directors. The General Partner's board of directors will make the investment decisions for the Partnership based on the investment advisory committee's recommendations.

The directors, officers and members of the investment advisory committee of the General Partner are among the leading professionals in their respective areas of expertise. The services they will render to the General Partner, for which they will receive no special compensation, will be incidental to their practices as Firm Partners. Each such individual will purchase a minimum of a $25,000 interest in the Partnership.

On July 21, 1987, the Commission, pursuant to an application for exemption under sections 6(b) and 6(e) of the Investment Company Act, granted an order exempting the Partnership from all the provisions of the Investment Company Act, except sections 9, 36 and 37 and certain provisions of sections 17 and 30 of the Investment Company Act. A copy of the order is attached to this letter.

Sections 202(a)(11) and 203(a)

In pertinent part, section 202(a)(11) of the Investment Advisers Act defines an “investment adviser” as

> “... any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities....”

In addition, section 203(a) of the Investment Advisers Act provides the following:

> “Except as provided in subsection (b), it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.”

Accordingly, if the General Partner, by virtue of its activities as the general partner of the Partnership, were deemed to be engaging in the business of advising others, for compensation, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, the General Partner would, in the absence of an exemptive order, be required to register pursuant to section 203(a) of the Investment Advisers Act.

The Commission could, by order upon application pursuant to section 206A of the Investment advisers Act, exempt the General Partner from the provisions of section 203(a) of the Investment Advisers Act inasmuch as the exemption would be appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Investment

Advisers Act. We believe that an application for such an order, if made, should be granted for the same reasons as the Division should respond affirmatively to the requests made in this letter. However, because we do not believe the General Partner is an “investment adviser” within the meaning of section 202(a)(11) of the Investment Advisers Act and because we believe that substantially the same purposes that would be served by obtaining an exemption may be served more expeditiously through an affirmative response to the requests made in this letter, we are submitting this letter in lieu of an application for exemption.

We believe there are several legal and policy reasons why the Division should either (a) concur in our view that the General Partner will not be an “investment adviser” within the meaning of section 202(a)(11) of the Investment Advisers Act and will therefore not be required to register pursuant to section 203(a) of the Investment Advisers Act, or (b) confirm that it will recommend that no enforcement action be taken by the Commission if the General Partner does not so register.

First, the contemplated activities of the General Partner will not constitute “the business” of advising. One necessary element of activities that would constitute “the business” of advising is a profit motive. As stated above, the 1% annual fee payable to the General Partner is not intended to result in a profit to the General Partner and, in fact, will not exceed the amount of the actual costs incurred by the General Partner on behalf of the Partnership. A second necessary element of activities that would constitute “the business” of advising is holding oneself out to the public as an adviser. The General Partner will not be holding itself out to the public as an adviser. The General Partner's sole “client” will be the Partnership, and the sole beneficiaries of the General Partner's activities on behalf of the Partnership will be Firm Partners.

Second, the services to be performed by the General Partner will not be performed for “others.” The General Partner and the Partnership will be beneficially owned by the same individuals. Thus, the services to be performed by the General Partner will be performed exclusively for an entity whose only beneficial owners will beneficially own all the outstanding capital stock of the General Partner itself; and each Limited Partner of the Partnership, through his participation in the Firm, will be allocated a portion of the 1% annual fee payable by the Partnership to the General Partner. By virtue of the Limited Partners' professional affiliation with other Limited Partners, including officers and directors of the General Partner and members of the General Partner's investment advisory committee, and by virtue of the Firm's investment as a Limited Partner in the Partnership, a substantial and unique community, if not identity, of interest will exist between the General Partner, on the one hand, and the Limited Partners, on the other hand.

Third, the 1% annual fee payable by the Partnership to the General Partner should not be deemed “compensation.” As stated above, the fee will not result in a profit to the General Partner. Moreover, even if the fee were otherwise deemed “compensation,” it should not be deemed compensation because the beneficial owners of the capital stock of the party to whom the fee is to be paid (i.e., the General Partner) also will beneficially own the party that is paying the fee (i.e., the Partnership).

Fourth, the need for the protections provided by the Investment Advisers Act in general, and registration pursuant to section 203(a) in particular, is obviated by the community of interest between the General Partner and the Limited Partners and by the experience and sophistication of the Limited Partners. The livelihood of each Limited Partner derives from the Firm, and management by other Firm Partners of a Limited Partner's investment in the Partnership is therefore consistent with the relationship among them and is not the type of situation that requires such protections. The Partnership is organized by the Firm and not promoted by persons seeking to profit from fees for investment advice. The 16 Firm Partners selected to serve as the officers and directors of the General Partner and as members of the General Partner's investment advisory committee will be available on an ongoing basis to answer questions and supply additional information concerning the Partnership and its investments for no special compensation. In addition, all prospective Limited Partners are experienced and sophisticated in accounting and business and financial matters as evidenced by their having achieved partnership in a “big eight” accounting firm. They are equipped by experience and education to understand the nature and structure of the Partnership and its investment plans and to evaluate the risks and investment opportunity afforded by the Partnership compared to other investment opportunities.

Finally, even if the General Partner were deemed to be an “investment adviser” within the meaning of

section 202(a)(11) of the Investment Advisers Act, registration of the General Partner pursuant to section 203(a) of the Investment Advisers Act would not provide the Limited Partners of the Partnership with any meaningful protections they would otherwise not have. The purposes that would be served by subjecting the General Partner to the Commission's powers to revoke or deny registration pursuant to section 203(c)(2) and 203(e) of the Investment Advisers Act would already be served by virtue of the fact that the Partnership is subject to sections 9, 36 and 37 of the Investment Company Act. All or substantially all the information called for by Form ADV and Form ADV–S would be available to the Limited Partners by virtue of their status as Firm Partners. All or substantially all the books and records required to be maintained pursuant to section 204 of the Investment Advisers Act would be maintained by the General Partner with respect to the Partnership, and, pursuant to the Partnership's partnership agreement and by virtue of the Limited Partners' status as Firm Partners, would be open to inspection and examination by the Limited Partners. All or substantially all the information that would be contained in reports required to be furnished pursuant to section 204 of the Investment Advisers Act would, to the extent applicable, be furnished to, or made available for inspection by, the Limited Partners pursuant to the Partnership's partnership agreement. The substance of the provisions of section 205 of the Investment Advisers Act is embodied in the Partnership's partnership agreement. Section 206 of the Investment Advisers Act is applicable to an investment adviser, regardless of whether the adviser is registered pursuant to section 203(a). The protections available to clients of a registered investment adviser pursuant to section 207 of the Investment Advisers Act are unnecessary in light of the Limited Partners' direct access to information, as set forth above. The General Partner represents that it will comply with section 208 of the Investment Advisers Act as if the General Partner were registered pursuant to section 203(a). In short, the benefits to the Limited Partners of registration of the General Partner pursuant to section 203(a) of the Investment Advisers Act are available to the Limited Partners without registration, and, therefore, the administrative and legal costs associated with registration would not be justified.

In conclusion, it is our view that the General Partner will not be an “investment adviser” within the meaning of section 202(a)(11) of the Investment Advisers Act and will therefore not be required to register pursuant to section 203(a) of the Investment Advisers Act. We urge the Division to concur in this view. Alternatively, as a matter of sound policy, the Division should recommend that no enforcement action be taken by the Commission if the General Partner does not so register. The Division's position would principally be based on the following: (a) the General Partner will not be in “the business” of advising, as evidenced by the absence of any profit to the General Partner and the General Partner's not holding itself out to the public as an adviser; (b) the services to be performed by the General Partner will not be performed for “others,” as evidenced by the fact that the General Partner and the Partnership will be beneficially owned by the same individuals and the substantial and unique community, if not identity, of interest between the General Partner and the Limited Partners; (c) the 1% annual fee payable by the Partnership to the General Partner should not be deemed “compensation,” inasmuch as the fee will not result in any profit to the General Partner and the beneficial owners of the capital stock of the General Partner also will beneficially own the Partnership; (d) the need for the protections provided by the Investment Advisers Act in general, and registration pursuant to section 203(a) in particular, is obviated by the community of interest between the General Partner and the Limited Partners and by the experience and sophistication of the Limited Partners; and (e) the benefits of registration pursuant to section 203(a) of the Investment Advisers Act are available to the Limited Partners without such registration.

We would appreciate a response to our request as soon as reasonably practicable. Should you require additional information, please contact the undersigned or Bertram A. Abrams of this firm, by telephone, collect, at (212) 599–3200.

In accordance with Release No. 33–6269, seven additional copies of this letter are enclosed.

Very truly yours,
Edward W. Kerson

Footnote

1 “Principals” are so denominated because they are not certified public accountants and, under applicable authority, the partners of a firm of certified public accountants must be certified public

accountants. The Firm's principals primarily consist of attorneys, individuals with graduate level business degrees, and individuals who, through education and experience, are knowledgeable in accounting, business, and financial matters.

INCOMING LETTER

November 9, 1987

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Dear Sirs:

Reference is made to my letter dated September 1, 1987 with regard to Touche Holdings, Inc. (the "General Partner") and to my further conversations with Joseph Fleming of the staff regarding that letter.

The General Partner represents that (a) all information called for by Form ADV and Form ADV–S would continue to be available to any individual who ceases to be a partner or principal of Touche Ross & Co. ("TR") but continues to be a limited partner of Partner Wealth Fund I, L.P. ("PWF"), to the same extent such information would be available had that individual continued to be a partner or principal of TR, as long as that individual continues to be a limited partner of PWF, and (b) all books and records maintained by the General Partner would continue to be open to inspection and examination by any such individual, to the same extent such books and records would be open to inspection and examination had that individual continued to be a partner or principal of TR, as long as that individual continues to be a limited partner of PWF.

Should you require additional information, please contact the undersigned, by telephone, collect, at (212) 909–7048.

In accordance with Release No. 33–6269, seven additional copies of this letter are enclosed.

Very truly yours,

Edward W. Kerson