

**CFTC Letter No. 03-02**

**December 23, 2002**

**Interpretation**

**Division of Clearing and Intermediary Oversight**

Re: Section 4m(1) of the Act: “P” -- Request for continued effectiveness of existing CPO registration no-action position with respect to the administrative general partner of a pool if United States persons who are QEPs are permitted to participate in the pool.

Section 4m(1): “R” – Request for continued effectiveness of CPO registration no-action position with respect to the directors of an investor pool where an affiliated registered CPO is the CPO of the investee pool

Dear :

This is in response to your letter dated October 1, 2002, to the Division of Clearing and Intermediary Oversight (the “Division”)<sup>[1]</sup> of the Commodity Futures Trading Commission (the “Commission”), as supplemented by your e-mail message dated November 14, 2002 and by telephone conversations with Division staff. By your correspondence, you request confirmation that any person meeting the “qualified eligible person” criteria of Rule 4.7(a)<sup>[2]</sup> may participate in the “Partnership” without vitiating continued effectiveness of the no-action positions the Division took by letter dated January 16, 1997 (the “1997 Letter”), as modified by the Division’s letter dated January 11, 2001 (the “2001 Letter”) with respect to your client “P.”<sup>[3]</sup>

In the 1997 Letter, the Division stated that it would not recommend that the Commission take any enforcement action against “P” for failure to register as a commodity pool operator (“CPO”) pursuant to Section 4m(1) of the Commodity Exchange Act (the “Act”)<sup>[4]</sup> in connection with acting as a co-general partner of the Partnership. The Division took this position based upon, among other things, the facts that “P” was under common ownership and control with “S”<sup>[5]</sup> a registered CPO “Q”, and that “Q” had exclusive responsibility for, and authority to perform, the functions ordinarily performed by a CPO with respect to the Partnership. The 1997 Letter required compliance with the following conditions: (1) as co-general partner with “P” in the Partnership, “W” was (and would remain) a registered CPO; (2) no marketing activity for the purpose of soliciting United States persons to participate in the Partnership would be undertaken by “P”, “Q”, the Partnership or any person affiliated with them; and (3) any United States person soliciting investors for the Partnership would be registered as an associated person (“AP”) of “Q”. In addition, “Q” and “P” provided cross acknowledgments of joint and several liability for any violation of the Act or Commission rules by either of them in connection with the operation of the Partnership.

The 2001 Letter confirmed the position taken in the 1997 Letter and took a CPO registration no-action position with respect to “P” and the United States person directors of “R” in connection with the operation of the Partnership and “R”. “R” is the sole limited partner of the Partnership and the vehicle by which investors participate in the Partnership.<sup>[6]</sup> The no-action position taken in the 2001 Letter was based upon, among other things, the fact that “S” was effectively the CPO of the Partnership and of “R”. The Division expressly required compliance with the conditions set forth in the 1997 Letter “except that shares of “R” representing interests in commodity pools [*e.g.*, the Partnership] may be offered and sold to United States tax-exempt investors who are QEPs.”

By your correspondence, you now ask the Division to permit any QEP (and not just United States tax-exempt persons) to participate in the Partnership without invalidating the relief provided by the 1997 and 2001 Letters. In this regard, the Division notes that subsequent to the issuance of the 1997 Letter, the Division has taken CPO registration no-action positions with respect to a co-general partner, where another general partner was a registered CPO, without conditioning the relief on the restriction of pool participants to non-United States persons.<sup>[7]</sup> There, as here, the following factors were present: (1) the co-general partners were affiliated entities; (2) the co-general partner that solicited pool participants or engaged in the investment, use or disposition of pool funds or property was a registered CPO; (3) the co-general partner seeking relief either was a passive investor or performed only administrative functions; and (4) cross-acknowledgements of joint and several liability for violations of the Act and Commission rules were made by the registered CPO and the co-general partner for which relief was sought

Based upon the foregoing, the Division believes that your request is not contrary to the public interest and the purposes of the Act and the Commission’s rules issued thereunder. Accordingly, the Division will not recommend that the Commission commence any enforcement action against “P” or the United States person directors of “R” based on their failure to register as CPOs in connection with the operation of the Partnership or “R”, notwithstanding that persons who are QEPs are solicited and permitted to participate in the Partnership.

This letter does not excuse “P” or any of the directors of “R” from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations. For example, each remains subject to the antifraud provisions of the Act, to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission’s rules, and to all applicable provisions of Part 4. Also, this letter is applicable to “P” and the directors of “R” solely in connection with the activities described above and except as stated herein, it does not in any way affect the positions or conditions of the 1997 Letter or the 2001 Letter.

This letter, and the no-action positions taken herein, are based upon the representations made to the Division. Any different, changed or omitted facts or circumstances might render the no-action positions taken herein void. You must notify the Division immediately in the event that the operations or activities of “P”, “Q”, “R” or the Partnership change in any respect from those as represented to the Division. Further, the no-action positions taken in this letter represent the positions of this Division only and do

not necessarily represent the positions 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 Christopher W. Cummings, Special Counsel, at (202) 418-5445.

Very truly yours

Jane Kang Thorpe  
Director

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<sup>[1]</sup> As of July 1, 2002, a reorganization of Commission staff became effective. Accordingly, for purposes of this letter, the term “Division” includes the Division of Clearing and Intermediary Oversight and its predecessor, the Division of Trading and Markets, as the context requires.

<sup>[2]</sup> Commission rules referred to herein are found at 17 C.F.R. Ch. I (2002).

<sup>[3]</sup> Except as noted herein, you represent that the facts set forth in the 2001 Letter remain accurate.

<sup>[4]</sup> 7 U.S.C. §6m(1) (2000).

<sup>[5]</sup> “S” has been reconstituted as “Q”. For purposes of your request and this letter, “Q” refers to both the predecessor and the successor.

<sup>[6]</sup> “R” is a limited liability company incorporated as a mutual fund company in Bermuda. Persons investing in the Partnership do so by subscribing for one of the four classes of shares in “R” (the Classes”). At the time of the 2001 Letter, six of the nine directors and all but one of the officers of “R” were United States persons, each of whom was (or was in the process of becoming) listed as a principal or registered as an AP of “V”, the majority owner of “P” and “Q”. On November 7, 2002, the board was reduced in size to five members. Currently three members are United States persons (one is listed as a principal of “V” and the other two are in the process of being so listed). “V” is registered with the Commission as a commodity trading advisor (“CTA”) and with the Securities and Exchange Commission as an investment adviser.

<sup>[7]</sup> See CFTC Staff Letter 02-21 [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,954 (March 1, 2002), and CFTC Staff Letter 01-10 [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,483 (February 22, 2001).