CFTC Letter No. 01-07

January 11, 2001

No-Action

Division of Trading & Markets

Re: Section 4m(1) of the Act: Request for confirmation of continued effectiveness of CPO registration no-action position with respect to the administrative general partner of a pool if tax-exempt U.S. investors (who are QEPs) are permitted to participate in the pool.

Section 4m(1): Request for 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 November 21, 2000, to the Division of Trading and Markets (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by e-mail messages dated November 27, 2000 and December 5, 7, 15, 18 and 21, 2000, facsimile transmissions dated December 29, 2000 and January 2, 2001 and telephone conversations with Division staff. By this correspondence, you request confirmation of continued effectiveness of the no-action positions the Division took by letter dated January 16, 1997 (the "1997 Letter") with respect to your client "P" if tax-exempt U.S. investors are permitted to participate in the "Partnership".

Based upon the representations contained in the correspondence, we understand the facts to be as follows. 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(l) of the Commodity Exchange Act (the "Act")[1] in connection with acting as a general partner of the Partnership. This no-action position was based upon the fact that a second general partner of the Partnership, "Q", already registered with the Commission as a CPO, had exclusive responsibility for, and authority to perform, the functions ordinarily performed by a CPO with respect to the Partnership. Moreover, each of "P" and "Q" acknowledged in writing joint and several liability for any violation by the other of the Act or of Commission rules applicable to CPOs in connection with serving as general partners of the Partnership. Further conditions to the Division's no-action position were that U.S persons would not be solicited to participate in the Partnership and that any U.S. person engaged in soliciting participants on behalf of the Partnership would be registered as associated persons ("APs") of "Q". Now, however, "Q" would like to make participation in the Partnership available to tax-exempt U.S. investors.

The sole limited partner in the Partnership is "R", 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 Spindrift classes of shares in "R". Six of the nine directors (and three of the four alternates) and all but one of the officers of "R" are U.S. persons, each of whom is (or is in the process of becoming) listed as a principal or registered as an AP of "T", the majority owner of "P" and "Q".[2] It is registered with the Commission as a commodity trading advisor ("CTA") and with the Securities and Exchange Commission as an investment adviser.

Under the proposed new activity, "Q", "P" and persons registered as APs of "Q" would solicit U.S. tax-exempt investors for the "R" (as well as other classes of "R" that may, in the future, either have their investment objective changed or be newly authorized, such that the offshore funds into which their proceeds are invested may effect commodity interest transactions).[3] In support of your request you represent that "P" and "Q" will continue to comply with all of the conditions of the 1997 Letter (other than the condition that no marketing activity would be undertaken for the purpose of soliciting U.S. persons for participation in the "R" and indirectly in the Partnership). Those conditions are that: (1) "Q" will remain registered as a CPO; (2) any U.S. persons engaged in the solicitation of investors are to be registered as APs of "Q"; and (3) "P" and "Q" each acknowledge that it is jointly and severally liable for any violation of the Act or Commission rules committed by the other co-CPO in connection with its serving as co-CPO of the Partnership. In addition, you make the following representations: (1) all persons who will engage in the solicitation of U.S. persons for the "R" will be registered as APs of "Q"; (2) all U.S. purchasers of the "R" will be qualified eligible persons ("QEPs"),[4] as defined in Commission Rule 4.7;[5] and (3) none of the officers or directors of "P" or "R" is subject to statutory disqualification under Section 8(a)(2) or 8(a)(3) of the Act.[6]

The addition of U.S. person participants raises the issue of CPO registration in connection with the operation of "R", as was not the case in the 1997 Letter. "R" will be investing assets in the Partnership that were contributed by the purchasers of shares in the Spindrift Classes. The Partnership, in turn, will be engaging in commodity interest trading. Accordingly, both the Partnership and "R" will be pools. Ordinarily, then, one or more of the directors of "R" would be required to register as a CPO. You have indicated that from a functional standpoint, "Q" is the actual operator of "R", and as such, should be considered "R's" CPO, without requiring the directors of "R" to register as CPOs. In support of your position, "Q" on the one hand, and the directors of "R" on the other hand, have provided to the Division cross-acknowledgments of joint and several liability for any violation by the other of the Act or the Commission's rules committed in connection with the operation of "R".

Based upon your representations, the Division believes that your request for confirmation of the continued effectiveness of the previously-granted relief to "P" and your request for relief from CPO registration requirements otherwise applicable to the directors of "R" has merit. Accordingly, subject to the condition set forth below, the Division will not recommend that the Commission take any enforcement action against "P" or any of the directors of "R" for failure to register as a CPO pursuant to Section 4m(1) of the Act in connection with the operation, respectively, of the Partnership and "R". This position is subject to compliance with the conditions set forth in the 1997 Letter, except that shares of "R" representing interests in commodity pools may be offered and sold to U.S. tax-exempt investors who are QEPs.

You also have requested similar relief in the event that in the future shares of "R" are invested in pools other than the Partnership but which similarly have "P" and "Q" as their general partners. Based upon your representations, and subject to the conditions set forth below, the Division will not recommend that the Commission take any enforcement action against "P" or any of the directors of "R" for failure to register as a CPO pursuant to Section 4m(1) of the Act in connection with the operation, respectively, of any such other pool and "R". These positions are similarly subject to compliance with the conditions set forth in the 1997 Letter (except that the shares of "R" that will be invested in the other pools may be sold to U.S. persons who are QEPs) and to the further condition that as soon as practicable following the formation of another pool but prior to the other pool's trading of commodity interests, "Q" will provide the Division with written notice of the name of the other pool.[7]

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 issued thereunder. 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 otherwise 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.

This letter is based upon the representations made to us and is subject to compliance with the conditions set forth above. Any different, changed or omitted facts or circumstances might render this letter void. In this connection, we request that you notify us 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 us. 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 Christopher W. Cummings, an attorney on my staff, at (202) 418-5445.

Very
truly
yours

John C.
Lawton
Acting
Director

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1 7 U.S.C. § 6m(1).

2 Certain of the partners of "T" own an indirect minority interest in each of "P" and "Q" through their ownership interest in "U".

3 You state that the U.S. tax-exempt investors to which the "R" could be marketed under the proposed activity could include foundations, endowments, charitable remainder trusts, pension plans, individual retirement accounts and self-directed 401(k) plans.

4 The restriction of eligibility to investors meeting the QEP definitional criteria will, you state, limit marketing and sales to a fairly institutional group of potential U.S. investors.

5 On August 4, 2000 the Commission published amendments to Rule 4.7, which, among other things, consolidated the former qualified eligible participant and qualified eligible client definitions into a single "qualified eligible person" definition. 65 Fed. Reg. 47848 (August 4, 2000). All other Commission rules referred to herein are found at 17 C.F.R. Ch. I et seq. (2000).

6 7 U.S.C. § 12a(2) or § 12a(3).

7 The Division does not believe it will be necessary for "Q" and the directors of "R" to additionally furnish cross-acknowledgements of joint and several liability at that time. The cross-acknowledgements that have been furnished to the Division broadly acknowledge joint liability on the parts of "Q" and the directors of "R" "in connection with the operation of "R" and do not restrict their application solely to the Partnership. Thus, the Division believes the cross-acknowledgements may be relied upon for purposes of other pools that "Q" and "P" may operate and into which shares of "R" may be invested, and the Division so intends to rely upon them in the event that any such other pools are formed.