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COMMODITY FUTURES TRADING COMMISSION

2033 K Street, NW, Washington, DC 20581

(202) 254 - 8955

(202) 254 - 8010 Facsimile



DIVISION OF  
TRADING AND MARKETS

December 22, 1994

Re: Treatment of Non-QEP as a QEP for Purposes of Rule 4.7 Pool

Dear :

This is in response to your letter dated November 21, 1994 to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by telephone conversations with Division staff. By your letter you request on behalf of your client, "A", a registered commodity pool operator ("CPO"), confirmation that "A" may claim relief under Rule 4.7<sup>1/</sup> in connection with the operation of (the "Fund"), notwithstanding the fact that one of the participants is not a qualified eligible participant ("QEP") as defined in Rule 4.7(a)(1)(ii).

Based upon the representations made in your letter, we understand that the facts are as follows. "A" is the general partner of the Fund. The Fund is an investment limited partnership that invests in other investment funds. It does not currently invest in any commodity pools or otherwise invest in commodity interests.<sup>2/</sup> However, the Fund is considering investing a portion of its assets in one or more securities pools that may in turn allocate a portion of their assets to commodity interests. When this occurs, the Fund would become a commodity pool.<sup>3/</sup>

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<sup>1/</sup> Commission rules referred to herein are found at 17 C.F.R. Ch. I (1994).

<sup>2/</sup> In this regard you explain that "A" became registered as a CPO in 1993 because of the possibility that the Fund at some later date might wish to invest in one or more funds that invest in commodity interests. Thus, "A" is eligible to apply for Rule 4.7 exempt status on behalf of the Fund but has not done so to date because the Fund is not currently a commodity pool.

<sup>3/</sup> The National Futures Association ("NFA") has informed Division staff that "A" obtained a waiver from examination requirements pursuant to NFA Compliance Rule 402 at the time of his CPO  
(continued...)

All of the investors in the Fund are QEPs with the exception of (the "Trust"). The Trust is an irrevocable, living trust established in 1989 by "C" and "D" (husband and wife) for their grandchildren and has approximately \$1 million in assets. The Trust is a component of the overall estate of the Silvermans, which has approximately \$50 million in assets. The trustees of the Trust are "C" and "D" and "E", their attorney. "C" and "E" make the investment decisions on behalf of the Trust. "C" is a QEP and an investor in the Fund and has approximately forty years of investment experience.<sup>4/</sup> "E", while not a QEP, is an accredited investor under Regulation D of the Securities Act of 1933. You claim that the trustees of the Trust are informed about financial matters in general and have access to all information regarding the Fund.

Based upon the representations made in your letter, the Division believes that your request has merit. This is because, among other things, "C", one of the trustees who established the Trust on behalf of his grandchildren, is himself a QEP and invests directly in the Fund. In this regard, he would have access to information regarding the Fund and participates in making the investment decisions on behalf of the Trust.

Accordingly, subject to the conditions set forth below, the Division will not recommend that the Commission take any enforcement action against "A" for failing to comply with the QEP criteria of Rule 4.7 with respect to the Trust if he allows the Trust to continue as a participant in the Fund after the Fund becomes a commodity pool and treats the Trust as a QEP. This position is subject to the conditions that "C" and "D" and "E", as trustees of the Trust, consent to the Trust being treated as a QEP, and that "A" files the notice of claim for exemption under Rule 4.7 and

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<sup>3/</sup> (...continued)

registration. The Division understands that such waiver was granted by NFA on or about May 24, 1994, under the conditions stated in your letter of May 17, 1993, to Mr. Daniel Driscoll, Vice President - Compliance, NFA. Such conditions include a cap on the amount of the Fund's assets that can be committed to "futures margin and futures-option premiums" and limits the use of futures to "hedging or risk management purposes." "A" should notify NFA if the investments by the Fund in securities pools as contemplated herein are not in conformity with the conditions under which NFA's waiver was granted.

<sup>4/</sup> You represent that "C's" "portfolio is approximately \$25 million, and he has invested in commodity pools, real estate partnerships, leveraged buy-out partnerships, hedge funds and individual securities."

Frederick L. White, Esq.  
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otherwise complies with the requirements of Rule 4.7 at such time as the Fund becomes a commodity pool.

This letter is based on the representations made in your letter, as supplemented, and is subject to compliance with the conditions set forth above. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event the operations or activities of "A", the Fund or the Trust change in any way from those as represented to us.

We note that this letter relieves "A" solely from the QEP criteria of Rule 4.7 with respect to the participation in the Fund of the Trust, and does not excuse "A" from compliance with any otherwise applicable requirements contained in the Commodity Exchange Act, 7 U.S.C. § 1 et seq. (1988 & Supp. IV 1992) ("Act"), or in the Commission's regulations issued thereunder. For example, "A" remains subject to the antifraud provisions of Section 4o of the Act, 7 U.S.C. § 6o (1988 & Supp. IV 1992), 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 letter represents the views of this Division only and does not necessarily represent the views 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 Tina Paraskevas Shea, an attorney on my staff, at (202) 254-8955.

Very truly yours,

Susan C. Ervin  
Chief Counsel