



COMMODITY FUTURES TRADING COMMISSION

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DIVISION OF
TRADING AND MARKETS

95-45

November 22, 1994

Re: Request to Treat Certain Persons as QEPs under
Rule 4.7

Dear :

This is in response to your letter dated September 23, 1994, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your letter dated October 7, 1994, and telephone conversations with Division staff. By your letter you request confirmation that "A", a registered commodity pool operator ("CPO"), may claim relief under Rule 4.7^{1/} in connection with the operation of the "Fund", a commodity pool organized as a limited partnership, notwithstanding that two investors with interests in the Fund are not qualified eligible participants ("QEPs") as defined in Rule 4.7(a)(1)(ii).^{2/}

Based upon the representations made in your letter, as supplemented, we understand that the facts are as follows. The Fund was formed in 1991 as an investment vehicle for "A" and his family members. The Fund did not admit non-family members until October 1, 1993. As of July 1, 1994, the Fund had thirty partners and \$32,144,442 in assets. Nine of the accounts were of family members, with total assets of \$25,773,675.

You represent that the Fund will not invest directly in commodity interest contracts. Rather, the Fund invests in investment partnerships and managed funds, securities and other investment vehicles, in each case managed by unrelated third parties who are either registered with the Securities and Exchange Commission ("SEC") or the Commission in the appropriate capacity or

^{1/} Commission rules referred to herein are found at 17 C.F.R. Ch. I (1994).

^{2/} Your letter of September 23, 1994 represented that there were four investors with interests in the Fund that were not QEPs. On October 16, 1994, you informed Division staff that two of the four investors who are themselves investment partnerships are withdrawing their interests in the Fund.

exempt from such registration. You also represent that the Fund is exempt from registration with the SEC pursuant to Rule 506 of Regulation D promulgated under the Securities Act of 1933. The current minimum investment in the Fund is \$500,000, but such minimum may be decreased at "A's" discretion.

"A" seeks to convert the Fund into an exempt pool pursuant to Rule 4.7. You represent that "A" has complied with the requirements of Rule 4.7(a)(3)(i)(I)(2) with respect to providing all pool participants with notice of his intention to convert the Fund to Rule 4.7 exempt status and will otherwise comply with the requirements of the rule, including the requirement to provide pool participants with an opportunity to object to the conversion of the Fund and the requirement for filing a Rule 4.7 notice of claim for exemption within twenty-one days after the date of the notification, absent objection by the holders of a majority of the units of participation in the Fund who are unaffiliated with "A" ("Objecting Investors").^{3/}

"A" qualifies in all respects for Rule 4.7 relief in connection with his operation of the Fund but for the fact that two individuals who invest directly in the Fund do not meet the criteria for QEPs (collectively, the "Non-QEP Investors"). These Non-QEP investors seek to maintain their investments in the Fund and to be treated as QEPs. These Non-QEP Investors are as follows:

1. A husband and wife who are friends and neighbors of "A". They are accredited investors under Regulation D and have investments in excess of \$1,000,000. The husband has a bachelor of arts degree and a master's degree in business administration from "S" University and owns and operates a manufacturing business with factories in "U" and "V".^{4/} The wife has two graduate degrees and teaches dentistry at the "T" University. The husband and wife had joint incomes of \$340,000 and \$325,000 in 1992 and 1993, respectively.

2. An attorney who is a business acquaintance of "A". He is an accredited investor and has investments in excess of \$1,000,000. You represent that he has been practicing for eleven years, has substantial experience with investment partnerships and also

^{3/} In this regard, the Division notes that it has issued an advisory setting forth the procedures that a CPO must follow in order to claim relief from Rules 4.21 and 4.22 under Rule 4.7 for previously offered pools in which some participants are not QEPs. Division of Trading and Markets Advisory for Interpretative Letters Nos. 93-1 and 93-2, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,935 (January 7, 1993).

^{4/} "A" serves on an advisory committee to this business.

manages on behalf of his family a family investment partnership that has in excess of \$2,000,000 in assets. In 1993, he and his wife had income in excess of \$350,000.

You represent that, prospectively, only QEPs will be allowed to invest in the Fund. In addition, you claim that the Non-QEP Investors are informed about financial matters in general and have access to information regarding the Fund. In addition, you state that the Non-QEP Investors have consented to being treated as QEPs.

Based upon the representations made in your letter, as supplemented, and in accordance with prior Division positions,^{5/} the Division believes that your request has merit. Accordingly, subject to the conditions stated 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 Non-QEP Investors by allowing the Non-QEP Investors to continue to maintain their investments in the Fund and treating them as QEPs. The conditions to this relief are as follows: (1) "A" complies with the requirements of Rule 4.7(a), including the procedures in Rule 4.7(a)(3)(i)(I)(2), in lieu of the disclosure, reporting and recordkeeping requirements of Rules 4.21, 4.22 and 4.23; (2) "A" provides any Objecting Investors with the disclosure and reporting required under Part 4 for pools that are not operated pursuant to Rule 4.7; (3) "A" modifies the first sentence of the statement required by Rule 4.7(a)(2)(i) to read as follows:

PURSUANT TO RELIEF FROM THE COMMODITY FUTURES
TRADING COMMISSION IN CONNECTION WITH THIS
OFFERING TO QUALIFIED ELIGIBLE PARTICIPANTS AN
OFFERING MEMORANDUM FOR THIS POOL IS NOT
REQUIRED TO BE, AND HAS NOT BEEN FILED, WITH
THE COMMISSION;

(4) "A" will not claim exemption from disclosing in the disclosure document of nonexempt pools the past performance of the Fund if the Fund has any Objecting Investors who were not QEPs when Rule 4.7 relief is claimed; and (5) prospectively, only QEPs are permitted to invest in the Fund.

The position taken herein is based on the representations made in your letter, as supplemented, and is subject to the conditions stated 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

^{5/} See e.g., Division of Trading and Markets Interpretative Letter No. 93-2, [1992-1994 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 25,532 (December 10, 1992).

the operations or activities of "A" or the Fund change in any way from those as represented to us.

The Division notes that this letter relieves "A" solely from the QEP criteria of Rule 4.7 with respect to the participation of the Non-QEP Investors in the Fund on a prospective basis only,^{6/} and does not excuse "A" from compliance with any other 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 40 of the Act, 7 U.S.C. § 60 (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 otherwise applicable 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

^{6/} The Division understands that in December of 1993, "A" requested relief under Rule 4.12(b). Subsequently, certain issues arose relating to the presentation of performance data in the Fund's disclosure document. By letter dated June 2, 1994, John Courtade, Esq., submitted a request to the Division to obtain relief from certain requirements relating to the presentation of performance data in the Fund's disclosure document. At the direction of "A", the June 2, 1994, request to the Division was withdrawn and you submitted the relief request addressed herein. Based on the information provided to the Division, it appears that the Fund has been operating during the pendency of the relief requests without full compliance with the requirements of Part 4 of the Commission's regulations. This letter does not excuse, or in any way limit the Commission's ability to proceed against "A" for, any past violations of the Commodity Exchange Act or the Commission's regulations, if the Commission determines that such action is appropriate.