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U.S. COMMODITY FUTURES TRADING COMMISSION
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DIVISION OF
TRADING & MARKETS

May 2, 1996

Re: Rule 4.7 -- Request to treat as qualified eligible participants ("QEPs") certain non-QEP participants.

Dear :

This is in response to your letter dated March 11, 1996 to the Division of Trading and Markets (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by your letter dated March 13, 1996 and by telephone conversations with Division staff. By your correspondence, you request on behalf of "O"[1/] relief from the requirements of Commission Rule 4.7,[2/] permitting "O" to continue to claim exemption under Rule 4.7 from certain disclosure, reporting and recordkeeping requirements otherwise applicable to The Directors Fund Limited Partnership (the "Pool"), notwithstanding that, effective January 31, 1996, certain non-QEPs have purchased Class B units of the Pool. By letter dated August 12, 1993,[3/] the Division granted exemp-

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1/ "O" was previously known as "P", and was a Netherlands Antilles corporation. "O" was recently renamed and was reincorporated in Bermuda.

2/ Commission rules referred to herein are found at 17 C.F.R. Ch. I Part 4 (1995), as amended by 60 Fed. Reg. 38146 (July 25, 1995).

3/ CFTC Interpretative Letter 93-92 [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,858 (August 12, 1993). We also note that by letter dated January 17, 1995 the Division granted relief permitting an investee pool of the Pool to treat the Pool as a QEP and permitting CTAs retained by the Pool to treat the Pool as a qualified eligible client ("QEC") within the meaning of Rule 4.7, notwithstanding the presence of non-QEP participants in

(continued...)

tive relief (the "Prior Relief") permitting "O", as the registered commodity pool operator ("CPO") of the Pool, to claim exemption under Rule 4.7 with respect to the Class B units of the Pool, while continuing to offer Class A units to non-QEPs. Among the conditions to which the Prior Relief was expressly made subject was that no non-QEP would be allowed to purchase Class B units. Accordingly, absent relief, "O's" operation of the Pool will continue to violate both the provisions of Rule 4.7 and the conditions of the Prior Relief.[4/]

Based upon the representations made in your correspondence, we understand the relevant facts to be as follows. The Pool is structured with three classes of units. "O" initially split the Pool's units into Class A and Class B in order to separate QEP participants from non-QEPs, so that the Pool could be offered as a Rule 4.7 exempt pool to large institutional investors (with concomitant cost savings and convenience), while continuing to provide to the Pool's existing and future non-QEP participants the full protections of Part 4 of the Commission's regulations. In granting the Prior Relief, the Division permitted "O" to split the Pool in this fashion, provided "O" complied with certain conditions, including restricting sale of Class B units to QEPs.

By letter dated February 14, 1995, you informed the Division that no new subscriptions would be accepted for Class A units, although existing Class A limited partners would be permitted to purchase additional units. However, you state in your March 11, 1996 letter that "O" intends to add a third class of units (Class C), for which you have filed a notice of claim of exemption under Rule 4.7 contemporaneously with your March 11, 1996 letter. No Class C units have been offered as of the date hereof.

In order to keep the Pool from being treated as a fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA") (and from being held to the standards and restrictions to which ERISA fiduciaries are subject), "O" converted "A's" individual retirement account from Class A participation to Class B, effective

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3/ (...continued)
the Pool. In requesting the January 17, 1995 relief, "O" represented that it would continue to comply with the conditions set forth in the Division's August 12, 1993 letter.

4/ We note that Rule 4.7(a)(3)(iii) provides that an exemption claimed under Rule 4.7 shall cease to be effective upon any change which would cause the CPO for the exempt pool to be ineligible for the relief claimed. The CPO is further required promptly to notify the Commission of any such change.

January 31, 1996, notwithstanding that "A" was not (and is not now) a QEP.[5/] At the same time, "O" also converted to Class B participations the Class A interests of "B", "C" (wife of "A"), "D" and "E" ("A". and "C", and "B", "D" and "E" are collectively referred to as the "Non-QEPs"). You state that in each case, the Non-QEPs consented in advance to the transfer of their interests from Class A to Class B.

You have described the Non-QEPs as follows:

"A", an accredited investor within the meaning of Regulation D[6/] promulgated under the Securities Act of 1933,[7/] is a Vice President of "O" and a Managing Director and principal of a broker-dealer subsidiary of "O" ("Q")). He has been employed by "O" or its affiliates since 1990, prior to which, "A" was employed by "R" for eleven years. Prior to leaving "R", he was a Vice President developing and implementing asset allocation strategies. An active investor in stocks, bonds, mutual funds, commodities and options, "A" holds Class B units of the Pool both through his individual retirement account and in a separate account owned jointly with his wife.

"C" is an accredited investor and holds Class B units with "A" through a "joint tenancy with right of survivorship" account.

"B", an accredited investor, is a Managing Director, an Executive Vice President and the Chief Financial Officer of "O". He is also an Executive Vice President and the Chief Financial Officer of "O's" parent company "S"," formerly known as "T", and an officer and director of various subsidiaries and affiliates thereof. Prior to joining "S" in 1980, "B" was employed by "U" in positions including Assistant Vice President and Unit Head in the Agribusiness Commodities Department. "B" is an active investor in

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5/ Department of Labor regulations provide, inter alia, that where a benefit plan invests in a limited partnership, the limited partnership will not thereby become an ERISA fiduciary if less than 25% of the value of each class of equity interests in the limited partnership is held by "benefit plan investors" (e.g., individual retirement accounts). See 29 C.F.R. § 2510.3-101(a)(2) and (f) (1995).

6/ Regulation D is codified at 17 C.F.R. § 230.501-230.508 (1995). "Accredited investor" is defined at 17 C.F.R. § 230.501(a).

7/ 15 U.S.C. § 77a et seq. (1994).

stocks, bonds, mutual funds and limited partnership interests, and he holds Class B units in his individual capacity.

"D", an accredited investor, is Director of Risk for "O" and the Branch Manager for "Z", an indirect subsidiary of "S". He has been employed by "O" or its affiliates since 1983, and before that he was a senior staff accountant at "V". "D" is an active investor in stocks, mutual funds and commodities, and he holds Class B units in his individual capacity.

"E" is Vice President and the Controller of "S" and of "W", a subsidiary of "S". "E" is also a director of "X" (a subsidiary of "W") and the Chief Financial Officer of "Q". He has been employed by "O" or its affiliates since 1980. "E" was previously employed by "Y" as a senior accountant. "E" is not an accredited investor, although you represent that he is knowledgeable and experienced in financial and business matters.[8/] "E" is an active investor in mutual funds and holds Class B units in his individual capacity.

In support of your request that the Non-QEPs be treated as QEPs, you state that each is associated with "O" or "S", each is a sophisticated investor fully capable of evaluating and assuming the risk of an investment in the Pool as a QEP without the full disclosure, reporting and recordkeeping safeguards of the Commodity Exchange Act (the "Act")[9/] and the Commission's regulations, and each has direct access to all information in "O's" possession regarding the management, operation and performance of the Pool. You represent that each of the Non-QEPs has consented in writing to being treated as a QEP.

Based on the foregoing, and subject to the following conditions, the Division will not recommend that the Commission take any enforcement action against "O" for the following:[10/] (a) continuing to operate the Pool as an exempt pool with respect to the Class B units, notwithstanding that Class B units have been issued to the Non-QEPs; and (b) offering and selling Class C units to QEPs without first notifying the Division that "O" was adding a third

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8/ You state that at the time he acquired Class A units in the Pool "E" was a Vice President of "O" (then known as "P") and by virtue of that position he qualified as an accredited investor.

9/ 7 U.S.C. § 1 et seq. (1994).

10/ The Division emphasizes, however, and as stated below, in providing this relief, we are not excusing "O's" failure to comply with the provisions of Rule 4.7 and certain conditions of the Prior Relief.

class of units for which it intended to claim relief under Rule 4.7. This position is, however, subject to the following conditions: (1) absent relief from the Division, "O" may not offer or issue any additional Class B or Class C (or other) units to persons who do not qualify as QEPs; and (2) "O" will modify 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."

This letter is applicable to "O" solely in connection with its operation of the Pool. Furthermore, this letter does not excuse "O" from compliance with any other applicable requirements contained in the Act, in the Commission's regulations issued thereunder, or in the Prior Relief. For example, "O" remains subject to the antifraud provisions of Sections 4b and 4o of the Act,[11/] to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations, and to Rules 4.20 and 4.41 in connection with its operation of the Pool.

This letter is based upon the representations provided to us and is subject to compliance with the condition 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 "O", the Pool or any of the Non-QEPs change in any way from those represented in your correspondence. Moreover, nothing in this letter should be construed as limiting in any way the Commission's ability to proceed against "O" for any past violation of the Act or of the Commission's regulations thereunder. The no-action relief provided herein is prospective only.

11/ 7 U.S.C. §§ 6b and 6o (1994).

Further, this letter represents the position of the Division of Trading and Markets only. It does not necessarily reflect the views of the Commission or of any other division or office of the Commission. If you have any questions concerning this correspondence, please contact me or Christopher W. Cummings, an attorney on my staff, at (202) 418-5445.

Very truly yours,

Susan C. Ervin
Chief Counsel