



U.S. COMMODITY FUTURES TRADING COMMISSION

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DIVISION OF
TRADING & MARKETS

~~96-76~~
96-75

September 4, 1996

Re: Request to Treat Employee Partnership as a Qualified Eligible Participant under Rule 4.7(a)

Dear :

This is in response to your letter dated July 3, 1996, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your letter dated July 16, 1996, the letter of "A", your associate, dated August 22, 1996 and telephone conversations among you, "A" and Division staff. By your July 3, 1996 letter you request on behalf of (the "Managing Member"), an applicant for registration as a commodity pool operator ("CPO"), confirmation that the Managing Member may claim relief under Rule 4.7(a)^{1/} with respect to the operation of (the "Pool"), despite the fact that an investor in the Pool will not be a qualified eligible participant ("QEP"), as that term is defined in the rule. In addition, you request on behalf of the Managing Member relief from the restriction in Rule 4.7(a)(1)(ii)(B)(2)(xi), which would prevent the Pool from investing more than ten percent of its assets in other pools for which the CPOs thereof have claimed relief under Rule 4.7 ("Rule 4.7 Exempt Pools"). The Pool and the Managing Member are affiliated with "V" or its subsidiaries (collectively, "Y").^{2/}

Based upon the representations contained in your July 3, 1996 letter, as supplemented, we understand the relevant facts to be as follows. The Pool, a limited liability company organized under the laws of the State of Delaware, is itself a QEP and was not formed for the purpose of investing in Rule 4.7 Exempt Pools. The Managing Member, also a limited liability company organized under Delaware law, will be responsible for the investment decisions and

^{1/} Commission rules referred to herein are found at 17 C.F.R. Ch. I (1996).

^{2/} Commission records indicate that these subsidiaries include "W", a registered securities broker/dealer and futures commission merchant, and "X", a registered CPO and commodity trading advisor ("CTA").

operations of the Pool. It has two members: "B", who has been employed by "Y" since 1984 and who currently holds the position of Executive Assistant to the Chairman of "V", and "C", who has been employed by "Y" since 1987 and who currently is a Managing Director and Director of Re-Engineering of "V". "B" and "C" each have applied for registration as an associated person of the Managing Member.

The Pool will be funded from three sources: certain senior employees of "Y", who qualify individually as QEPs; "Y" proprietary capital; and a senior employee investment partnership, ("U"), which has total assets in excess of \$5,000,000 and was not formed for the purpose of investing in the Pool. Participation in the "U" is limited to "Y" employees. Specifically, it consists of forty-five "Y" senior management officials, and will consist of no more than sixty such persons,^{3/} with the following characteristics. Each partner in the "U" must have sole, final or other substantial responsibility as a senior manager "for either the trading, research, investment banking, asset management, finance or legal operations" of "Y". While each such partner will be an accredited investor as defined in Regulation D under the Securities Act of 1933, not all will be QEPs. Each official will receive, before investing, an offering memo which describes possible investments that could be made by the "U" "including investments in funds that provide access to other portfolio managers" and the risks of such investments. The general partner of the "U", "Z", which makes the investment decisions for the "U", is owned by "V". To date, the "U" has invested in two cable television companies, a bio-technology company and an offshore re-insurance company. The "U" now desires to invest more than ten percent of its assets in the Pool.

The Pool will be operated as a "fund of funds." However, absent the requested relief the Managing Member will not be able to treat the "U" as a QEP because the "U" wishes to invest more than ten percent of its assets in the Pool but contains some non-QEP participants. Further, absent the requested relief, the CPO of any Rule 4.7 Exempt Pool could not accept more than ten percent of the Pool's assets as an investment in its pool. In support of your request, you state that the general partner of the "U" "will have ready access to information pertinent to the "U's" investment in the Pool."

Based upon your representations, it appears that granting the requested relief would not be contrary to the public interest and the purposes of 4.7(a). Accordingly, the Division will not recommend that the Commission take any enforcement action for failure to comply with Rule 4.7 against: (1) the Managing Member of the Pool if the Managing Member claims relief pursuant to Rule

^{3/} You represent that "the "Y" Organization" has more than 16,000 employees worldwide.

4.7(a), notwithstanding investment by the "U" in the Pool, and treats the "U" as a QEP; and (2) the Managing Member or the CPO of any Rule 4.7 Exempt Pool in which the Pool becomes a participant based solely upon the Pool's investment of more than ten percent of its assets in a Rule 4.7 Exempt Pool. This relief is, however, subject to the condition that, on behalf of the "U", the general partner of the "U" consents in writing to the "U" being treated as a QEP.

By investing in a fund (the Pool) that in turn will invest in funds that trade commodity interests (the Rule 4.7 Exempt Pools), the "U" itself would be a commodity pool. Absent relief, "Z": (1) as the general partner of the "U", would be required to be registered as CPO; and (2) as the person who makes the investment decisions for the "U", would also be required to be registered as a CTA. In support of such relief, we note your representations (stated above) concerning the investor criteria and the offering memorandum of the "U" and the affiliation of the Pool and the Managing Member with "V". Further, you represent that: (1) neither "Z" nor any principal thereof is subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Commodity Exchange Act (the "Act");^{4/} (2) "Z" will provide an investor in the "U", upon request, with access to the Partnership's books and records; and (3) neither "Z" nor any director or officer thereof serves as a CPO of any other commodity pool or as a CTA to any other person.^{5/} Based upon the foregoing, the Division will not recommend that the Commission take any enforcement action against "Z" under Section 4m(1) of the Act^{6/} for failure to register as a CPO or CTA.

We note that this letter relieves the Managing Member solely from compliance with certain requirements of Rule 4.7(a) and does not excuse it from compliance with any other applicable requirements contained in the Act or the Commission's regulations issued thereunder. Similarly, this letter relieves "Z" solely from compliance with the registration requirements of Section 4m(1) of the Act. Thus, for example, each remains subject to the antifraud provisions of Section 4o of the Act^{7/} and the reporting requirements for traders set forth in Parts 15, 18, and 19 of the Commission's regulations, and the Managing Member remains subject to all other applicable requirements of Part 4. Further, this letter is being issued solely in connection with the investment of the "U" in the Pool. Thus, although you also have requested relief

^{4/} 7 U.S.C. §12a(2) or 12a(3) (1994).

^{5/} In fact, the sole purpose of "Z" is to serve as the general partner of the EE Partnership.

^{6/} 7 U.S.C. §6m(1) (1994).

^{7/} 7 U.S.C. § 6o (1994).

from Rule 4.7(a) such that other subsequently formed "Y" employee partnerships may invest more than ten percent of their assets in the Pool, the Division will consider the availability of relief for any such subsequently formed partnership on its own merits as the situation arises.^{8/}

This letter is based upon your representations and is subject to compliance with the condition stated above. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this regard, we request that you notify us immediately in the event that the operations or activities of the Managing Member, the Pool, "Z" or the "U", including the composition of the investors in the foregoing entities, change in any way from those as represented to us. This letter represents the position of the Division only. It does not necessarily represent the views of the Commission or any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact me or Barbara S. Gold, Assistant Chief Counsel, at (202) 418-5450.

Very truly yours,

Susan C. Ervin
Chief Counsel

^{8/} Our consideration may also address relief from CPO and CTA registration for the operator and advisor of such partnership.