

CFTC Letter No. 98-67**September 15, 1998****Division of Trading & Markets**

Re: Rule 4.7(a) -- Request for Exemptive Relief to Treat Certain Employees of the CPO as QEPs

Dear :

This is in response to your letter dated January 12, 1998, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your facsimile dated March 23, 1998 and telephone conversations with Division staff. By your correspondence, you request on behalf of "P", a registered commodity pool operator ("CPO") and commodity trading advisor ("CTA"), that the Division permit "P", in connection with its operation of "Q" and "R", as well as any additional Rule 4.7 exempt pools operated or advised by "P" (collectively the "Funds"), to treat two employees of "P" as if they satisfy the qualified eligible participant ("QEP") criteria of Rule 4.7(a).¹

Based upon the representations made in your correspondence, we understand the facts to be as follows. By letter dated April 14, 1997, the Division permitted "P", in connection with "P's" operation of the "S", a Rule 4.7(a) exempt pool, to treat "A" and "B" (the "Non-QEP Employees"), employees of "P" who do not satisfy the QEP criteria, as QEPs. "P" now requests relief so that it may allow the Non-QEP Employees to participate in the Funds.

"P" serves as the CPO of "Q" and "R", which were established in October 1993 and September 1993, respectively. Pursuant to Notices of Claim for Exemption under Rule 4.7(a), interests may be sold only to QEPs.² "P" now seeks an exemption to permit the Non-QEP Employees to participate in the Funds.

In support of your request, you have provided the following information:

(1) "A" is a Vice President, the Chief Financial Officer and a registered associated person of "P". "A" oversees "P's" operations, finances, administration and compliance. He is a member of "P's" investment committee and in this role is responsible for selecting investment advisers to manage the assets of "S", "Q", "R" and any other Fund. "A" holds a Bachelor's degree in accounting from "T" and has substantial financial and

accounting experience. Prior to joining "P", "A" was employed as an accountant by the accounting firm of "U" from 1990 until 1991, as an accountant by the entertainment company "V" from 1991 until 1992 and as the assistant manager for financial reporting by the investment firm of "W" from 1992 until joining "P" in 1994. He has successfully completed both the National Commodities Futures ("Series 3") and the General Securities Representative ("Series 7") examinations, is licensed as a certified public accountant and is an accredited investor pursuant to Regulation D of the Securities Act of 1933.

(2) "B" is the Director of Research and a research analyst for "P". "B's" responsibilities require that she evaluate the merits of various independent investment advisers and investment programs selected by "P" in connection with its management of the assets of "S", "Q", "R" and any other Fund. "B" also is a member of "P's" investment committee. "B" holds a Bachelor's degree in accounting from the University of "X" and has substantial financial and accounting experience. Prior to joining "P", "B" was employed as a senior accountant by the accounting firm of "Y" specializing in audits of broker-dealers and futures commission merchants from 1992 until joining "P" in 1995. She has successfully completed the Series 7 examination, is licensed as a certified public accountant and had an annual income last year of approximately \$100,000 and a net worth of \$100,000.

Further, you represent that each Non-QEP Employee will consent in writing to being treated as a QEP prior to investing in the Funds and that each Non-QEP Employee will have access to all of the books and records relevant to an investment in each Fund in which it seeks to participate.

Based upon the foregoing representations, it appears that granting your request would not be contrary to the public interest and the purposes of Rule 4.7(a). Accordingly, by the authority delegated to it under Rule 140.93(a)(1), the Division hereby grants "P" an exemption such that it may continue to claim relief pursuant to Rule 4.7(a) with respect to "S", "Q" and "R", notwithstanding investment by the Non-QEP Employees, and to treat the Non-QEP Employees as QEPs. Further, by the authority delegated to it under Rule 140.93(a)(1), the Division hereby grants "P" an exemption to permit it to treat the Non-QEP Employees as QEPs for the purpose of investing in any other Fund which "P" currently operates or advises and continues to operate or advise in the future. These exemptions are, however, subject to the condition that at the time a Non-QEP Employee seeks to invest in another Fund, he or she must be employed by "P" in a position that is the same or substantially the same as that which he or she currently holds.³

This letter does not excuse "P" from compliance with any otherwise applicable

requirements contained in the Commodity Exchange Act ("Act")⁴ or in the Commission's regulations issued thereunder. For example, "P" remains subject to all antifraud provisions of the Act and of the Commission's regulations, 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. Moreover, this letter is applicable to "P" solely in connection with its operation of "S", "Q", "R" and any other Fund, as discussed above.

This letter, and the exemptions granted herein, are based upon the representations you have made to us and are subject to compliance with the condition set forth above. Any different, changed or omitted material facts or circumstances might render these exemptions void. You must notify us immediately in the event the operations or activities of "P" or a Fund, including the composition of investors, change in any material way from those as represented to us.

If you have any questions concerning this correspondence, please contact Charles O'Brien, an attorney on my staff, at (202) 418-5450.

Sincerely,

I. Michael Greenberger

Director

¹ Although your letter was styled as a request for a no-action letter, we have treated it as a request for exemptive relief. Commission rules referred to herein are found at 17 C.F.R. Ch. I (1998).

² "P" filed a Notice of Claim for Exemption pursuant to Rule 4.7(a) on behalf of "Q" on October 18, 1993 and "R" on January 5, 1994.

³ If an employee has been promoted to a position of greater responsibility, he or she may continue to be treated as a QEP for purposes of investing in other Funds.

⁴ 7 U.S.C. § 1 *et seq.* (1994).