

DE Shaw & Co

39th Floor, Tower 45
120 West Forty-Fifth Street
New York, NY 10036

(212) 478-0000
FAX (212) 478-0100

00-11
6

COMMENT

May 1, 2000

Ms. Jean A. Webb
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

Received CFTC
Records Section

OFFICE OF THE SECRETARIAT
00 MAY 8 PM 12 26

RECEIVED
C.F.T.C.

Dear Ms. Webb:

We welcome the opportunity to comment on the proposed changes to Commodity Futures Trading Commission Rule 4.7 that were published in the Federal Register on March 2, 2000.

We endorse the Commission's efforts to broaden the scope of Rule 4.7, eliminate some of the unnecessary limitations currently in the Rule, and incorporate into the Rule many of the letter exemptions granted by the Commission staff in the past, particularly the letter exemptions that appear to require much redundant work from the staff and applicants for these letter exemptions. The provisions to coordinate Rule 4.7 with exemptions available under the rules of the Securities and Exchange Commission, the inclusion of general exemptions for "insiders" CPOs and CTAs, the elimination of the "Ten Percent Limitation," and the other proposed enlargements of the Rule would result in strong improvements to the Rule. In addition, the reorganization of the Rule would make the Rule more "user friendly." Accordingly, we encourage the Commission to adopt the proposed changes to Rule 4.7.

00 MAY 8 PM 3 24

RECEIVED
C.F.T.C.

While we do have some suggested modifications to the proposal, we would prefer that the Rule be adopted as is, if consideration of these modifications would require a re-proposal and new comment period for the Rule or would entail extensive delay in the adoption of the proposed changes to the Rule. Our suggested modifications to the proposal are as follows.

1. Non-United States Person—Proposed Rule 4.7(a)(1)(iv)(D)

Under the Proposed Rule, the term "Non-United States person" is limited to pools where non-"Non-United States persons" hold less than 10 percent of the ownership interests. We believe that the Commission should also include in the definition of "Non-United States person" a pool that is not subject to US income tax and that has owners who only are either QEPs (for purposes of Proposed Rule 4.7(a)(2)), QECs (for purposes of Proposed Rule 4.7(a)(3)), or "Non-United States persons." For a pool that is a mix of US tax exempt investors and non-US investors and that is not subject to US taxation, we believe the 10 percent limit is arbitrary and unnecessary. It is our understanding that numerous US tax exempt organizations invest in non-US pools and generally understand that these non-US pools are subject to very limited (if any) oversight from US regulators. In addition, we believe that non-US investors in these pools are sophisticated—even if not QEPs or QECs—and generally understand these entities are not subject to the full panoply of US regulation. Accordingly, we believe that the level of regulation under Rule 4.7 for exempt pools is sufficient in these cases.

We recognize that, where US participation in an offshore pool is extensive, the Commission may wish to apply more US regulation to these pools. The effect of the Proposed Rule, however, is to place US CPOs operating these pools at a competitive disadvantage with respect to non-US CPOs. For example, a non-US CPO may be able to obtain more funds from Non-United States persons while obtaining the same amount of funds from US investors as a US CPO would. Thus, if the non-US CPO and US CPO would operate their pools with the same amount of US

funds, the non-US CPO would satisfy the 10 percent limitation and would either be operating an exempt pool or, very possibly, be operating a pool without regard to the Commission's jurisdiction. The US CPO, on the other hand, would be subject to the full scope of US regulation. In addition, we re-emphasize the points made above that the investors in these non-US pools understand their pools are subject to very limited (if any) oversight by US regulators, and that the level of regulation afforded under Rule 4.7 is sufficient in these cases.

2. Family Members—Proposed Rule 4.7(a)(2)(i)(H)(5)(ii)

The limitation on family members being treated as QEPs—"[t]he family member is a qualified eligible participant only for the purposes of this paragraph (a)(2)(i)(H)(5)"—makes the Proposed Rule unnecessarily opaque. While the Commission has sought to explain the intent of this provision in footnote 78 to the release containing the Proposed Rule, we believe the Commission should clarify the Proposed Rule itself. For example, contrary to the implication of the provision quoted above, we believe that a family member of a QEP should be considered a QEP for purposes of determining whether an entity seeking QEP status is owned entirely by QEPs. See Proposed Rule 4.7(a)(2)(i)(L); see also Proposed Rule 4.7(a)(3)(i)(D) (an exempt pool is a QEC).

The Commission should consider a similar change to Proposed Rule 4.7(a)(3)(i)(B)(5)(ii).

4. Transferees of Insiders—Proposed Rule 4.7(a)(2)(i)(H)

Investment Company Act Rule 3c-5, which defines "knowledgeable employees," also includes transferees by gift or bequest. The provisions of Proposed Rule 4.7(a)(2)(i)(H) do not contain a similar provision. We believe that the Commission should include such a provision, because these types of transfers do not appear to raise serious "investor protection" issues beyond anti-fraud concerns (which are still covered by the antifraud rules notwithstanding Rule 4.7; see, for example, Commission Rule 4.15) and requests for relief of this type are likely to involve the type of routine, redundant work that the proposed changes to Rule 4.7 are designed to avoid.

The Commission should consider a similar change to Proposed Rule 4.7(a)(3)(i)(B).

5. Trusts—Proposed Rule 4.7(a)(2)(i)(I)

If the Commission elects not to address our Comment 4 above, then we note the following comment.

We believe that "insiders" benefiting from Proposed Rule 4.7(a)(2)(i)(H)(1)-(4) should be able to set up "family trusts" to hold investments in the insiders' exempt pools, even though the trust may have been formed for the purpose of investing in the pool. While such an insider might seek to rely on Proposed Rule 4.7(a)(2)(i)(L) for such an investment vehicle, we believe these insiders should be permitted to establish trusts for the benefit of persons not covered by Proposed Rule 4.7(a)(2)(i)(H)(5) (immediate family members only) and allow these trusts to participate in their exempt pools.

The Commission should consider a similar change to Proposed Rule 4.7(a)(3)(i)(C).

6. CTAs Advising Non-US Persons and Non-QECs—Proposed Rule 4.7(a)(3)(i)(A)(2)(i)

Under the Proposed Rule for exempt accounts, a Non-United States person is treated as a QEC if its CTA provides advice exclusively to QECs, including Non-United States persons. The Commission states that it has restricted QEC status for Non-United States persons in this manner because "where the CTA directs or guides the accounts of persons who are QECs and persons who are not QECs . . . [r]equiring the CTA also to comply with th[e] Disclosure Document and recordkeeping requirements with respect to its clients who are Non-United

States persons should not impose any additional burden on the CTA, since these are requirements with which it already is subject to compliance." While this may be true where the trading program and solicitation documents for non-QECs and Non-United States persons are substantially the same, we believe this frequently will impose a significant burden on CTAs where the trading programs and solicitation documents are different, requiring significant additional work for the CTA in what is likely to be a very different context. Accordingly, we believe that, if Proposed Rule 4.7(a)(3)(i)(A)(2)(i) were to be retained at all, it should be limited to those cases where the CTA is employing substantially the same trading program for Non-United States persons and non-QECs.

We also have elected to respond to one of the Commission's questions in the proposal:

7. The Commission requested comments on the revision to Rule 4.7 imposing a "reasonable belief" requirement in order to treat Non-United States persons as QEPs. In response to this request, we note that we do not object to the addition of the "reasonable belief" standard in this context, with the understanding that CPOs and CTAs have latitude in determining how to obtain a "reasonable belief," whether by statements from the investor or its agent or by other means. In addition, we note that we generally prefer a standard under which a pool or client's exempt status is not jeopardized by innocent errors, which the "reasonable belief" standard seems to address. On the other hand, we would object to the Commission imposing a vague "sound business practice" standard (which may be suggested by the Commission's justification for the "reasonable belief" requirement), because it introduces too much uncertainty into the exemption, and appears to carry too great a risk of "regulation by enforcement action."

We appreciate this opportunity to comment on this Proposed Rule and commend the Commission's efforts to streamline regulation.

Sincerely,



Steven Jay Seidemann
Managing Director---General Counsel