

**CFTC Letter No. 00-08****January 12, 2000****Exemption****Division of Trading & Markets**

Re: Rule 4.7(a) – Request for Exemption to Permit Knowledgeable Employees to Invest in a Rule 4.7 Exempt Pool

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Dear :

This is in response to your letter dated September 23, 1999 to the Division of Trading and Markets (“Division”) of the Commodity Futures Trading Commission (“Commission”), as supplemented by your electronic mail transmission dated October 7, 1999, a facsimile transmission dated January 4, 2000, and telephone conversations with Division staff. By your correspondence, you request an exemption from Rule 4.7(a)<sup>1</sup> on behalf of the “Manager”, a registered commodity pool operator (“CPO”) that serves as the CPO of the “Pool”, so that the Manager may treat certain of its employees, for purposes of investment in the Fund, as if they satisfy the qualified eligible participant (“QEP”) criteria of Rule 4.7 (a).

Based upon the representations you made in your correspondence, we understand the facts to be as follows. The Pool is operated pursuant to an effective Claim for Exemption under Rule 4.7(a), filed on \_\_\_\_\_. Thus, interests in the Pool may be sold solely to QEPs. The Manager requests exemptive relief to permit it to treat each of its employees who now, or may in the future, qualify as a “knowledgeable employee” within the meaning of Rule 3c-5 under the Investment Company Act of 1940 as QEPs with respect to an investment in the Pool.<sup>2</sup> Specifically, with respect to current employees for which the Manager is making this request, you represent that \_\_\_\_ of these employees are “knowledgeable employees” as defined in Rule 3c-5(4)(i) because they are “Executive Officers” of the Manager as defined in Rule 3c-5(3), and that the remaining \_\_\_\_\_ employees are “knowledgeable employees” of the Manager as defined in Rule 3c-5(4)(ii). In support of your request, you represent that the Manager will obtain the prior written consent of each proposed non-QEP participant to be treated as a QEP for the purpose of investing in the Pool.

In further support of your request, you state that:

We believe that ‘knowledgeable employees’ of the Manager, because of their active participation in the management of the Pool’s operations and investments, including commodities investments, do not need the protections of the Act and may appropriately be treated as QEPs. Without the relief requested in this letter, however, we would be required to apply for and justify exemptive relief separately for each “knowledgeable employee,” submitting additional letters as employees are hired or promoted. We believe it is appropriate, and much more efficient, to address the entire class of “knowledgeable employees” in a single exemptive letter. Stated differently, we do not believe that the Commission should require any additional information about an employee, other than his or her status as a “knowledgeable employee,” to conclude that QEP treatment is appropriate.

We also believe that the Commission’s treatment of key employees should be consistent with their treatment by the Securities and Exchange Commission under the Investment Company Act. The “knowledgeable employee” standard set forth in Rule 3c-5 is designed to facilitate investments in private investment pools by key employees who have the knowledge, experience and access to information to evaluate the merits and risks of their investments and to monitor and influence investment activities and performance. This purpose is substantially identical to the Commission’s purpose in granting exemptive relief with respect to employees who may be treated as QEPs.<sup>3</sup> Given the nearly identical interests of the SEC and the CFTC in this area of regulation, it seems inappropriate that they should arrive at different answers to the simple question of which employees of an investment fund are appropriately exempted from the protective provisions of their respective regulations.

Based upon the foregoing, it appears that granting your request would not be contrary to the public interest or the purposes of Rule 4.7(a).<sup>4</sup> Accordingly, by the authority delegated to it under Rule 140.93(a)(1), the Division hereby grants the Manager an exemption such that it may treat the proposed non-QEP participants, as well as any employee who may in the future qualify as a “knowledgeable employee” within the meaning of Rule 3c-5, as QEPs and continue to claim relief pursuant to Rule 4.7(a) notwithstanding the investments of these non-QEP participants in the Pool.

This letter does not excuse the Manager from compliance with any otherwise applicable requirements contained in the Commodity Exchange Act (the “Act”) or in the Commission’s regulations thereunder. For example, the Manager remains subject to all antifraud provisions of the Act and the Commission’s regulations, the reporting requirements for traders set forth in Parts 15, 18, and 19 of the regulations, and all other

provisions of Part 4. Moreover, this letter is applicable to the Manager solely in connection with its serving as the CPO of the Fund, as discussed above.

This letter, and the exemption granted herein, are based upon the representations you have made to us. 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 the Manager or Fund change in any material way from those as represented to us.

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

Very truly yours,

John C. Lawton

Acting Director

1 Commission rules referred to herein are found at 17 C.F.R. Ch. I (1999).

2 17 C.F.R. § 270.3c-5 (1999). As defined therein, a “knowledgeable employee” with respect to a “Covered Company” or an “Affiliated Management Person” is:

(i) An Executive Officer, director trustee, general partner, advisory board member, or person serving in a similar capacity, of the Covered Company or an Affiliated Management Person of the Covered Company; or

(ii) An employee of the Covered Company or an Affiliated Management Person of the Covered Company (other than an employee performing solely clerical, secretarial or administrative functions with regard to such company or its investments) who, in connection with his or her regular functions or duties, participates in the investment activities of such Covered Company, other Covered Companies, or investment companies the investment activities of which are managed by such Affiliated Management Person of the Covered Company, *provided that* such employee has been performing such functions and duties for or on behalf of the Covered Company or the Affiliated Management Person of the Covered Company, or substantially similar functions or duties for or on behalf of another company for at least 12 months.

A “Covered Company” is defined as a Section 3(c)(1) Company or a Section 3(c)(7) Company. *See* Rule 3c-5(a)(2) under the ICA. An “Affiliated Management Person” of the Covered Company means “an affiliated person, as such term is defined in section 2(a)(3) of the Act [15 U.S.C. 80a-2(a)(3)], that manages the investment activities of a Covered Company.” *See* Rule 3c-5(a)(1) under the ICA. Section 2(a)(3) of the ICA, 15 U.S.C. 80a-2(a)(3)(1994), defines an “affiliated person” of another person as:

(A) any person directly or indirectly owning, controlling, or holding with power to vote 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof.

Rule 3c-5 further provides that “[f]or purposes of this definition, the term ‘investment company’ as used in section 2(a)(3) of the Act includes a Covered Company.”

3 The purpose of Rule 4.7 is to “reduc[e] unnecessary regulatory prescriptions for CPOs offering pool participations only to persons who, based upon the qualifying criteria in the . . . rule, do not appear to need the full protections offered by the Part 4 framework.” 57 Fed. Reg. 3148, 3150 (Jan. 28, 1992).

4 Indeed, the Division is currently developing for consideration by the Commission a proposal that would add, among other persons, “knowledgeable employees” as defined in Rule 3c-5 to the definition of a QEP.