

CFTC Letter No. 00-09**December 22, 1999****Exemption****Division of Trading & Markets**

Re: Rules 4.7(a) and 4.7(b); -- Request for Exemptions to Permit Certain Employees to Invest in Rule 4.7 Exempt Pools, to Treat the Exempt Pools as Qualified Eligible Clients, and from the Ten Percent Limitation on Assets Invested in Exempt Pools

Dear :

This is in response to your letter dated October 2, 1998 to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your facsimile transmission dated February 3, 1999 and telephone conversations with Division staff. By your correspondence, you request an exemption from Rule 4.7(a)¹ on behalf of "X", a registered commodity pool operator ("CPO") and commodity trading advisor ("CTA"), that will serve as the operator of and advisor to a commodity pool to be organized under the name the "Fund", so that the "X" may treat certain employees of the "X" and its affiliates,² for purposes of investment in the Fund, as if they satisfy the qualified eligible participant ("QEP") criteria of Rule 4.7(a). You also request an exemption from the ten percent investment limitation of Rule 4.7(a)(1)(ii)(B)(2)(xi) (the "Ten Percent Limitation") in connection with the "X's" operation of the Fund and from Rule 4.7(b) so that the Fund may be treated as if it satisfies the qualified eligible client ("QEC") criteria of Rule 4.7(b). Finally, you request the same relief with respect to the operation of any commodity pools to be established in the future for which the "X" will serve as CPO and CTA and for which the same category of investors, as described herein, would be eligible to participate (the "Future Funds").

Based upon the representations you made in your correspondence, we understand the facts to be as follows. The Fund may invest directly in commodity interests or indirectly through investments in other commodity pools. The "X", which intends to file a Notice of Claim for Exemption under Rules 4.7(a) and (b) with respect to its operating and advising the Fund, is not forming the Fund for the purpose of participating in any specific Rule 4.7 (a) exempt pools.

Interests in the Fund will be sold solely to QEPs and to other individuals who do not qualify as QEPs ("the Proposed Non-QEP Participants") but each of whom: (1) is an

“accredited investor” based solely on the net worth or income requirements of Rule 501 under Regulation D under the Securities Act of 1933;³ (2) has a minimum of five years of experience, other than in a clerical, secretarial or administrative capacity, within the financial services industry; and (3) qualifies as a “knowledgeable employee” within the meaning of Rule 3c-5 under the Investment Company Act of 1940.⁴

In support of your request, you represent that the “X”: (1) 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 Fund and in the Future Funds; (2) will obtain a waiver of the Ten Percent Limitation from each of the Proposed Non-QEP Participants with respect to their investments in the Fund and the Future Funds; and (3) will obtain the prior written consent of the Fund and the Future Funds to be treated as a QEC.

The purpose of Rule 4.7 is to “reduc[e] unnecessary regulatory prescriptions for CPOs offering pool participations only to person who, based upon the qualifying criteria in the . . . rule, do not appear to need the full protections offered by the Part 4 framework.”⁵

Based upon the foregoing, it appears that granting your request would not be contrary to the public interest or the purposes of Rules 4.7(a) and (b). Accordingly, by the authority delegated to it under Rule 140.93(a)(1), the Division hereby grants the “X” an exemption such that it may: (1) treat the Proposed Non-QEP Participants as QEPs and continue to claim relief pursuant to Rule 4.7(a) notwithstanding the investments of the Proposed Non-QEP Participants in the Fund and any Future Funds; (2) invest more than ten percent of the fair market value of the assets of the Fund and any Future Funds in other Rule 4.7(a) exempt pools; and (3) treat the Fund and any Future Funds as a QEC, notwithstanding the investments of the Proposed Non-QEP Participants. Further, by this authority, the Division exempts the “X” and the CPO of any commodity pool in which the Fund or the Future Funds invest from the Ten Percent Limitation.

This letter does not excuse the “X” 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 “X” 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 “X” solely in connection with its serving as the operator of and advisor to the Fund and the Future Funds, 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 “X”, the Fund or the Future Funds change in any material way from

those as represented to us.

If you have any questions concerning this correspondence, please contact Helene D. Schroeder, 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 The affiliates are: the “Corporation”, the “X’s” holding company; the subsidiaries of the Corporation; and other entities that would qualify as an “affiliate” of the “X” as that term is defined in Regulation D under the Securities Act of 1933. *See* 17 C.F.R. § 230.501(b) (1999) (“An *affiliate* of, or person *affiliated* with, a specified person shall mean a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.”)

3 17 C.F.R. § 230.501(a) (1999). To qualify as an “accredited investor” under Regulation D, a natural person must have either: (1) an individual net worth or joint net worth with the person’s spouse in excess of \$1 million, *id.* at § 230.501(a)(5); or (2) an individual income in excess of \$200,000 in each of the two most recent years or joint income with the person’s spouse in excess of \$300,000 and a reasonable expectation of reaching the same income level in the current year. *Id.* at § 230.501(a)(6).

4 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.

5 57 Fed. Reg. 3148, 3150 (Jan. 28, 1992).