

CFTC letter No. 03-34**October 9, 2003****Exemption****Division of Clearing and Intermediary Oversight**

Re: Rule 4.13(a)(3) – Request for Relief from Requirement that All Pool Participants Be Accredited Investors

Dear :

This is in response to your letter dated August 28, 2003, to the Division of Clearing and Intermediary Oversight (the “Division”) of the Commodity Futures Trading Commission (the “Commission”), as supplemented by your e-mail messages dated August 29, September 2, September 10, and September 11, 2003 and by telephone conversations with Division staff. By your correspondence, you request on behalf of “X” relief from the requirement in Commission Rule 4.13(a)(3)^[1] that each participant in a pool operated by a person claiming exemption from the requirement to register as a commodity pool operator (“CPO”) must be an “accredited investor” (“AI”) as defined in Rule 501(a)^[2] under the Securities Act of 1933.

Based upon the representations made in your correspondence, we understand the facts to be as follows. “X” is a general partner of “Y”. While “X” currently is registered under Section 4m(1)^[3] of the Commodity Exchange Act (the “Act”) as a CPO, it wishes to withdraw from registration and claim an exemption from CPO registration under Rule 4.13(a)(3). However, one of the current participants in “Y” is not an AI.

The participant in question is a foundation (the “Foundation”) formed for charitable purposes by a group of family members, each of whom is an AI.^[4] In support of your request, you represent that: (1) the Foundation was not established for any particular donee, and it is authorized to donate to any public charity; (2) the assets of the foundation exceed the minimum investment amount for “Y” (\$1.5 million) but are less than the amount required for certain AI categories (\$5 million);^[5] and (3) the family members themselves are invested in “Y”.^[6]

Based on the foregoing representations, the Division does not believe it would be contrary to the public interest or the purpose of Rule 4.13(a)(3) to issue the requested relief because, like a trust formed by an AI for the benefit of a family member (an eligible participant under Rule 4.13(a)(3)), the Foundation was established by AIs seeking a return on money they have earmarked for the benefit of others. Accordingly, the Division will not recommend that the Commission commence any enforcement action against “X” for failure to comply with the requirements of Rule 4.13(a)(3) if “X” withdraws from registration as a CPO, claims exemption under Rule 4.13(a)(3) in connection with the operation of “Y” and permits the Foundation to continue as a participant in “Y”.

The no-action position taken in this letter does not excuse “X” from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder. For example, “X” remains subject to all antifraud provisions of the Act^[1] and the Commission’s regulations, to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission’s regulations, and to all applicable provisions of Part 4.

This letter, and the no-action position taken herein, are based upon the representations made to us. Any different, changed or omitted material facts or circumstances might render this position void. You must notify the Division immediately in the event that the operations or activities of “X”, the Foundation or “Y” change in any respect from those as represented to us. Further, this letter represents the position of this Division only. It does not necessarily represent the position of the Commission or of any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact me or Christopher W. Cummings, Special Counsel, at (202) 418-5445.

Very truly yours,

Jane Kang Thorpe
Director

^[1] The Commission recently amended Part 4 of its regulations. *See* 68 Fed. Reg. 47221 (August 8, 2003). All other Commission rules referred to herein are found at 17 C.F.R. Ch. I (2003).

^[2] 17 C.F.R. §230.501(a) (2003).

^[3] 7 U.S.C. §6m(1) (2000).

^[4] The Foundation has been a participant in “Y” since July 1, 2003. It was set up to teach the family members’ children about “giving back to the community.”

^[5] As of September 11, 2003 the current value of the Foundation was \$1,567,000.

^[6] Since July 1, 2003 the family members have been invested in “Z”, which currently invests all of its assets in “Y”.

Under Rule 501(a)(8), “[a]ny entity in which all of the equity owners are accredited investors” is itself

an accredited investor. Although all of the family members are AIs the Foundation itself does not have “equity owners.”

[7]

See, e.g., Sections 4b and 4o, 7 U.S.C. §§6b and 6o (2000).