



COMMODITY FUTURES TRADING COMMISSION

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DIVISION OF
TRADING AND MARKETS

94-63

March 24, 1994

Re: Request to Treat Certain Persons and a Trust
as Qualified Eligible Participants under Rule
4.7

Dear :

This is in response to your letter dated January 24, 1994, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your letter dated March 7, 1994, and by telephone conversations with Division staff. By your letter you request confirmation that "X" or the "Firm", a registered commodity pool operator ("CPO"), may continue to claim relief under Rule 4.7^{1/} in connection with its operation of "Y" or the "Pool" in the event that certain persons and a trust which are not qualified eligible participants ("QEPs"), as defined in Rule 4.7, purchase interests in the Pool.

Based upon the representations made in your letter, as supplemented, we understand that the facts are as follows. "Y" is a limited partnership registered with the Commission as a CPO and a commodity trading advisor ("CTA"). "Y" also is registered with the Securities and Exchange Commission ("SEC") as an investment adviser. Its general partner is "Z". "Y" also is the investment adviser, general partner, CPO and CTA of "Y". "Y", a Delaware limited partnership, commenced operation as an investment partnership on January 1, 1994. It operates pursuant to a multi-manager, multi-strategy investment program and invests principally in equity, fixed income, currency and commodity markets worldwide. "Y" currently has approximately \$21 million under management and all of its limited partners are QEPs. "Y" filed a notice of claim for exemption in connection with its operation of the Pool pursuant to Rule 4.7 by letter dated November 18, 1993.

^{1/} Commission rules referred to herein are found at 17 C.F.R. Ch. I (1993).

Certain individuals who are employees or principals of "Y" and a trust established by a QEP who invests directly in the Pool do not meet the criteria for QEPs (collectively, the "Proposed Investors") but seek to purchase interests in the Pool in the second quarter beginning on April 1, 1994. These non-QEP Proposed Investors are as follows:

(1) You, the General Counsel of "Y". You also are an accredited investor pursuant to Rule 501(a)(5) of Regulation D of the Securities Act of 1933 ("Regulation D").^{2/} Prior to joining "Y" in November of 1993, you were the Associate Regional Administrator, Enforcement, at the Chicago Regional Office of the SEC and had worked for the SEC as an attorney for thirteen years. You also have been an active investor in numerous privately held investment partnerships and in other securities products. In your capacity as General Counsel, you perform, oversee and direct all legal work for the Firm and supervise operations of affiliated broker-dealers. Your advisory role primarily focuses on legal, compliance and managerial issues. You do not make investment decisions on behalf of "Y" or the Pool, although you do have access to information about the investments of the Pool.

(2) "A", one of the limited partners of "Y" and a shareholder of the General Partner. He has thirteen years of investment experience and is a certified financial analyst. "A" has been a senior investment analyst and partner at "Y" for the past three and one-half years and has worked in "Y"'s investment research group for the past seven years. In this capacity, he analyzes potential investment options for the clients of the Firm and formulates recommendations regarding investment alternatives on behalf of "Y". As a Firm partner, he reviews the financial operations of the Firm and participates in long-term strategic planning. "A" has extensive involvement in "Y"'s financial matters and has access to all information regarding the Pool, although he does not make investment decisions on behalf of the Pool.^{3/} Prior to joining "Y", he was an investment officer with "J" for six years. He also is an accredited investor under Rules 501(a)(5) and (6) of Regulation D and is an active investor in bond and equity securities markets.

(3) The "Trust", an irrevocable trust with approximately \$1.2 million in assets, which is one of the investment and estate planning vehicles of the "B" family. "B", the Trust's grantor, makes all of the investment decisions for the Trust. "B" is a

^{2/} 17 C.F.R. § 230.501(a)(5)(1993).

^{3/} "X" retains subadvisors to make investment decisions on behalf of the Pool.

limited partner of and a portfolio manager for "Y". In this capacity, he manages and advises the portfolios of the Firm's clients, activity which involves the purchase and sale of securities, voting proxies and making asset diversification decisions. In addition, he is one of the members of the board of directors of the General Partner, a QEP and he invests directly in the Pool. As a Firm partner and director, he reviews the financial operations of the Firm and participates in long-term strategic planning. "B" has thirty-six years of investment experience and has been working for "Y" since 1975. Prior to joining "Y" he was a partner with "E" and a vice-president and manager with "D". "F" is the sole trustee of the Trust. He is the president and a limited partner of "Y" and is directly responsible for making investment decisions on behalf of the Firm. "F" also is one of the members of the board of directors of the General Partner and is himself a QEP. The only beneficiaries of the Trust are "B"'s sons.

(4) "C", who has five years of investment experience and has been employed with "Y" for two years as a portfolio manager and investment analyst. In the latter capacities, he researches investment alternatives on behalf of "Y" and makes investment recommendations to the Firm for securities to be bought and sold. He manages and advises the portfolios of the Firm's clients, activity which involves the purchase and sale of securities, voting proxies and making asset diversification decisions. Prior to joining "Y" he practiced law with "G" in its securities and venture capital area. He also is an accredited investor pursuant to Rule 501(a) (5) of Regulation D.

(5) "H", who has six years of investment experience and is a certified financial analyst. "H" has been employed with "Y" for four years as a portfolio manager and investment analyst. In this capacity, his employment responsibilities mirror those of "C". Prior to joining "Y", "H" was a financial analyst in corporate finance with "I". He also is an active investor in equity securities markets and previously has invested in privately held investment partnerships.

You claim that the Proposed Investors are informed about financial matters in general and have access to all information regarding the Pool.

Based upon the representations made in your letter, as supplemented, the Division believes that your request has merit. With respect to "A", this is because, among other things, he: (1) is a principal of "Y" and a shareholder of the General Partner; (2) has been employed by "Y" in its investment research group for the past seven years and has been a senior investment analyst and partner at "Y" for the past three and one-half years; and (3) participates in formulating the investment direction of the Firm

and making investment decisions on behalf of the Firm. With respect to the Trust, this is because, among other things, "B", who established the Trust on behalf of his children: (1) is a QEP, a principal of and a portfolio manager for "Y"; (2) invests directly in the Pool; and (3) is a member of the board of directors of the General Partner. In addition, "F", the trustee, is the president of "Y" and the primary individual in charge of the management and investment decisions on behalf of the Firm. With respect to you, "C" and "H", this is because, among other things, you appear to be high level employees of the Firm with sufficient investment experience and access to information regarding the Pool.

Accordingly, subject to the condition set forth below, the Division will not recommend that the Commission take any enforcement action against "Y" for failing to comply with the QEP criteria of Rule 4.7 with respect to the Proposed Investors if it allows the Proposed Investors to invest in the Pool and treats the Proposed Investors as QEPs. This position is subject to the condition that you, "A", "C" and "H" consent to being treated as QEPs and that "B" and "F" consent to the Trust being treated as a QEP.

This letter is based on the representations made in your letter, as supplemented, and is subject to compliance with the condition set forth above. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event the operations or activities of "Y" or the Pool change in any way from those as represented to us.

We note that this letter relieves "Y" solely from the QEP criteria of Rule 4.7 with respect to the participation in the Pool of the Proposed Investors, and does not excuse the Firm from compliance with any other applicable requirements contained in the Commodity Exchange Act, 7 U.S.C. § 1 et seq. (1988 & Supp. IV 1992) ("Act"), or in the Commission's regulations issued thereunder. For example, "Y" remains subject to the antifraud provisions of Section 4o of the Act, 7 U.S.C. 6o (1988 & Supp. IV 1992), to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations and to all other provisions of Part 4.

Further, this letter represents the views of this Division only and does not necessarily represent the views of the Commission or of any other office or division of the Commission.

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If you have any questions concerning this correspondence, please contact me or Tina Paraskevas Shea, an attorney on my staff, at (202) 254-8955.

Very truly yours,

Susan C. Ervin
Chief Counsel