97-20

U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5430
Facsimile: (202) 418-5536

DIVISION OF
TRADING & MARKETS

COMMODITY FUTURES TRADING COMMISSION RECEIVED FOR PUBLIC RECORD
APR 8 3 49 PM '97

March 21, 1997

Re: Rule 4.7(a) -- Request for Confirmation of Previous Rule 4.7(a) Relief and to Allow Additional Partners to be Treated as Qualified Eligible Participants

Dear :

This is in response to your letter dated January 27, 1997, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your letter dated February 14, 1997, and telephone conversations with Division staff. By your correspondence, you request that: (1) the Division confirm the applicability of the no-action position it previously took in connection with the filing by the "General Partner" of a Rule 4.7(a)[1] notice of claim of exemption for the "Pool", notwithstanding the presence in the Pool of certain non-qualified eligible participant ("QEP") investors; and (2) the Division not recommend that the Commission commence enforcement action against the General Partner for failure to comply with Rule 4.7(a) if the General Partner continues to allow four additional non-QEP investors to remain invested in the Pool.[2]

---

1 Commission rules referred to in this letter are found at 17 C.F.R. Ch. I (1996).

2 You also request that the Division confirm that it will not recommend that the Commission take enforcement action solely based upon the General Partner's failure to comply with Rule 4.7(a) if the General Partner accepts future subscriptions in the Pool from non-QEP investors who qualify as "knowledgeable employees" of the Pool or an affiliate of the Pool as that term will be defined by the Securities and Exchange Commission ("SEC"). The term "knowledgeable employees" appears in the National Securities Markets Improvement Act of 1996 (the "NSMIA") as part of an amendment to the Investment Company Act of 1940 that provides for broader relief from investment company regulation. On December 18, 1996, the SEC issued proposed rules that would define the term "knowledgeable employees". These rules are not final. (Indeed, the NSMIA

(continued. . .)

Based upon the representations made in your correspondence, we understand the pertinent facts to be as follows. The Pool has operated since October 1991 as a private investment fund. By letter dated December 29, 1994, the Division granted no action relief to the General Partner with respect to the General Partner's filing of a notice of claim for exemption pursuant to Rule 4.7(a) with respect to the Pool notwithstanding participation in the Pool of twelve non-QEP participants. Eleven of the twelve non-QEP participants were employees of the Pool (the "Non-QEP Pool Employees") who received interests in the Pool primarily through a deferred compensation program.

Several subsequent developments have caused the General Partner to request that Division reaffirm the relief it granted in the December 29, 1994 letter. First, effective January 1, 1996, the Non-QEP Pool Employees ceased being employed by the Pool and became employees of the "Management Company", a management company that renders services to the Pool at the direction of the General Partner.[3] The Non-QEP Pool Employees have the same offices and the same responsibilities after the reorganization as they had held prior to the reorganization. The deferred compensation program was terminated and as a result five of the eleven Non-QEP Pool Employees are no longer investors in the Pool. Second, you, a non-QEP employee of the Management Company, became a partner in the General Partner effective January 1, 1997 and, in connection therewith, became an investor in the Pool. Finally, three trusts that were initial investors in the Pool and were believed to be QEPs subsequently have been determined not to be QEPs because the trustee of each trust is not a QEP.[4]

(...continued)
will not become effective until April 9, 1997.) Accordingly, we decline to consider this request at this time. You may wish to consult with us after the SEC adopts final rules concerning the definition of "knowledgeable employees".

[3] The Management Company was established in order to serve both the Pool and "X", which commenced operations on March 1, 1996.

[4] The trusts were funded by "A", a billionaire and prominent investor, for the benefit of his children. Each trust has a current investment in the Pool of approximately $4.7 million, which represents less than twenty percent of the assets of each trust. Due to the size of the trusts and their relation to "A", the General Partner believed that the trusts met the QEP standard. However, while researching the QEP issue for another potential investor, the General Partner learned that a trust is not a QEP unless the trustee of the trust is a QEP. The General Partner immediately contacted the trustee and was advised by the trustee that he does not satisfy the QEP criteria.

In light of the changes discussed above, you have asked that the Division confirm that the General Partner may rely upon the relief granted in its December 29, 1994 letter. In support of this request, with respect to the six remaining Non-QEP Pool Employees, you represent that they continue to have the same access to information since the January 1996 reorganization as they did when they were employed directly by the Pool. With respect to your investment in the Pool, you represent that you are an "accredited investor," as that term is defined in Regulation D under the Securities Act of 1933, and, for the past two and one-half years, have served as the general counsel for the Pool and Management Company. Finally, with respect to the three non-QEP trusts, you represent the following: (1) "A" was responsible for selecting the trustee of the trusts; and (2) the trustee is an attorney with more than twenty-five years of experience in advising clients in corporate, securities and investment matters.

Based upon the foregoing, it appears that granting your request would not be contrary to the public interest and the purposes of Rule 4.7. Accordingly, the Division confirms that it will not recommend that the Commission take any enforcement action against the General Partner in connection with its operation of the Pool as an exempt pool pursuant to Rule 4.7(a) solely based upon the General Partner continuing to permit you, the six Non-QEP Pool Employees, and the three non-QEP trusts to remain investors in the Pool notwithstanding the non-QEP status of such investors. This relief is, however, subject to the condition that each non-QEP investor consents to being treated as a QEP.

This letter does not excuse the General Partner from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, it remains subject to the antifraud provisions of Section 4o of the Act,[5] to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's rules, and to all otherwise applicable provisions of Part 4.

The position taken herein is based upon the representations made to us and is applicable to the General Partner only with respect to this Pool. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this regard, we request that you notify us immediately in the event that the activities or composition of the Pool or the General Partner differ in any respect from those as represented to us.

Finally, this letter represents the position of the Division of Trading and Markets only. It does not necessarily reflect the views of the Commission or any other office or division of the

---

[5] The Act is found at 7 U.S.C. §§ 1 et seq. (1994).

Commission. If you have any questions concerning this correspondence, please contact me or Teresa Dondlinger Trissell, an attorney on my staff, at (202) 418-5450.

Very truly yours,

Susan C. Ervin
Chief Counsel