

CFTC Letter No. 98-56**June 24, 1998****Division of Trading & Markets****Re: Rule 4.7(a) -- Request for Confirmation of Availability of Prior Relief to Predecessor Firms Request to Treat a Non-QEP Employee as a QEP**

Dear :

This is in response to your letter dated April 3, 1998 to the Division of Trading and Markets (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by telephone conversations with Division staff. By your correspondence, you request on behalf of "X" that the Division: (1) confirm that "X" may rely on three prior letters (the "Prior Letters") from the Division to two predecessor firms to "X"; and (2) permit "X" to treat "A", a "X" Vice President, as a qualified eligible participant ("QEP") in connection with the sale of Class B units of participation in (the "Fund").¹

Based upon the representations made in your correspondence, we understand the facts to be as follows. The Fund has two classes of units: Class A, which is owned by QEPs and Class B, which is owned by QEPs or persons the Division has permitted to be treated as QEPs. "Y", a "W" corporation, was the initial commodity pool operator ("CPO") of the Fund and is the first of the "X" predecessor firms. By letter dated August 12, 1993, the Division permitted "Y" to claim relief under Rule 4.7(a) in connection with the sale of Class B units of the Fund. The Division based this position upon, *inter alia*, representations that the Class B unit holders would all be QEPs and that the Class A, non-QEP unit holders would receive the full protections of Part 4 of the Commission's regulations.

"Y" was renamed "Z" and incorporated in in , thereby becoming the second "X" predecessor firm. By letter dated May 2, 1996, the Division permitted "Z" to treat certain non-QEPs as QEPs in connection with its sale of Class B units in the Fund. By letter dated August 13, 1996, the Division subsequently extended this position to include an additional person. The Division issued the May 2, 1996 and August 13, 1996 letters based upon, *inter alia*, representations that these Class B, non-QEP unit holders: (1) were accredited investors; (2) with one exception, had been employees of "Z" or its affiliates for from 6 to 16 years and, at the time of the May 2, 1996 and August 13, 1996 letters, held senior executive positions with "Z" or one of its affiliates;² and (3) had direct access to all information in "Z's" possession regarding the management, operation, and performance of the Fund.

In of , most of "Z's" assets and business were sold to "X", a then newly-formed subsidiary of "V". Pursuant to this sale, "X" succeeded "Z" as the general partner and CPO of the Fund, and most of "Z's" then key employees, including all of the then non-QEP employees of "Z" with respect to which the Division granted "Z" relief in the May 2, 1996 and August 13, 1996 letters, became employees of "X" in the same or similar capacities.

You first request that the Division confirm that "X" may claim the relief granted in the Prior Letters to "Y" and to "Z". In support of this request, you represent, inter alia, that:

- (1) the material facts and representations set forth in the Prior Letters continue to be accurate, with the exceptions that "X" is now the general partner and CPO of the Fund and that "B", who was one of the Class B, non-QEP unit holders, is no longer affiliated with "X" and is no longer a participant in the Fund; and
- (2) "X" will comply with the conditions in the Prior Letters applicable to its predecessors.

In support of your request that "X" may treat "A", a "X" Vice President, as a QEP for the purpose of purchasing Class B units in the Fund, you represent that "A":

- (1) has been employed by "X" and its predecessors since October 1989, during which time she has been employed in the Trader Recruitment and Development Department, which she currently heads, and where her duties include portfolio design for "X"-managed commodity pools, including the Fund;
- (2) in her capacity as Vice President of "X" an accredited investor under Rule 501(a)(4) of Regulation D³ under the Securities Act of 1933;⁴
- (3) has agreed in writing to be treated as a QEP for purposes of Rule 4.7; and
- (4) has direct access to all books and records relevant to an investment in the Fund.

Based upon the foregoing representations, and subject to the conditions set forth in the Prior Letters, it appears that granting your request would not be contrary to the public interest or to the purposes of Rule 4.7(a). Accordingly, by authority delegated to it under Rule 140.93(a)(1), the Division: (1) confirms that, in connection with its operation of the Fund, "X" may rely on the Prior Letters to "X's" predecessor firms, "Y" and "Z"; and (2) grants "X" an exemption such that it may treat "A" as a QEP for the purpose of selling Class B units in the Fund.

This letter does not excuse "X" from compliance with any otherwise applicable requirements contained in the Commodity Exchange Act ("Act") or in the Commission's regulations issued thereunder. For example, "X" remains subject to all antifraud provisions of the Act 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 other applicable provisions of Part 4. Moreover, this relief is applicable to "X" solely in connection with its serving as the CPO of the Fund, as discussed above.

This letter, and the positions taken herein, are based both upon the representations you have made to us and compliance with the conditions set forth in the Prior Letters. Any different, changed or omitted material facts or conditions might render these positions void. You must notify us immediately in the event the operations or activities of "X" or of the Fund, including the composition of its investors, change in any material way from those represented to us.

If you have any questions concerning this correspondence, please contact David E. Aron, an attorney on my staff, at (212) 418-5450.

Very truly yours,

I. Michael Greenberger

Director

¹ Although this request was styled as a request for a no-action position, we have treated it as a request for exemptive relief.

² One non-QEP participant, "C", was not an employee, but was an accredited investor, was married to an accredited investor employee of "Z", "D", and held her Class B units jointly with her husband. "D" was a Vice President of "Z" and a Managing Director and principal of a "Z" subsidiary.

³ 17 C.F.R. §§ 230.501-230.508 (1997).

⁴ 15 U.S.C. § 77a (1994) et seq.