

**CFTC Letter No. 99-20****January 11, 1999****Exemption****Division of Trading & Markets**

Re: Request for Extension of Time to Distribute and File Annual Reports

Request for Relief from Books and Records  
Location Requirement

Dear :

This is in response to your letter dated October 1, 1997, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by [additional correspondence] and telephone conversations between or among you, "A" and "B" and Division staff.<sup>1</sup> Pursuant to your correspondence, you request, on behalf of "P", that the Division provide various relief from Commission Rule 4.7(a),<sup>2</sup> as set forth below.

Based upon the representations made in your correspondence, we understand the facts to be as follows. "P" is a registered CPO.<sup>3</sup> "P" currently serves as the CPO of and investment adviser to sixteen private investment funds ("Funds"). Additionally, "P" serves as the registered CTA of and investment adviser to the Account, a master retirement trust for a pension plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). "P" has filed notices of claims for exemption under Rule 4.7(a) with respect to two of the Funds: "Q" and "R".<sup>4</sup>

"P" operates the Funds as "funds of funds" whereby the assets of each Fund are invested in limited partnerships, limited liability companies, group trusts, investment companies and private offshore funds ("Investee Vehicles"). "P" invests the assets of the Account in other Investee Vehicles and separately managed accounts. The Investee Vehicles are operated and advised by persons who are not affiliated with "P". The Investee Vehicles may trade commodity interests.

You request relief on behalf of "P" such that: (1) "P" be granted an extension of time in which to distribute and file the annual reports of certain Funds; and (2) "P" may satisfy the

requirement as to the location of books and records under Rule 4.7(a)(2)(iv) if the required books and records are kept by the trustees, administrators and custodians of the Funds.<sup>5</sup> These requests are addressed separately below.

### I. Request for Extension of Distribution and Filing Date for Annual Reports

You have requested an extension of time in which to comply with the annual report requirements of Commission Rule 4.7(a)(2)(iii) in connection with "P's" operation of certain Funds. Rule 4.7(a)(2)(iii) requires that the CPO of a 4.7 Exempt Pool file with the Commission and the National Futures Association ("NFA") and distribute to each pool participant an annual report containing the financial information specified by the rule within 90 calendar days after the end of the pool's fiscal year. You have requested that the Division grant a 45 day extension in which to distribute and file annual reports for the following Funds, which invest in domestic Investee Vehicles: "Q", "U", "V", "W", "X" and "Y" ("Domestic Funds"). Additionally, you have requested a 90 day extension in which to distribute and file annual reports for the following Funds that invest in foreign Investee Vehicles: "Z", "PP", "QQ", "RR", "SS" and "TT" ("Foreign Funds").

As noted above, each Fund is organized as a "fund of funds" that invests its assets in other investment funds (the "Sub-Funds"). Each Fund has a calendar year as its fiscal year, such that the annual report will be for the period ending December 31 of the report year. With respect to the annual report required under Rule 4.7(a)(2)(iii), you represent that because each Fund operates as a fund of funds, "P" must rely on the Investee Vehicles to provide audited financial statements before "P" is able to prepare and finalize the Funds' audited financial statements. "P" is unable to obtain the audited financial information from each Investee Vehicle in sufficient time to meet the March 31 deadline for filing the Funds' audited financial reports. In this regard, you represent that while an additional 45 days from the close of the fiscal year is sufficient with respect to preparing the Domestic Funds' annual reports, preparation of the annual reports of the Foreign Funds requires a greater period of time. You represent that "P" at times has not received certified annual reports from the offshore Investee Vehicles in which the Foreign Funds invest until close to or after 135 days from the close of "P" Funds' fiscal year. You state that among the reasons for this delay may be idiosyncrasies of the Investee Vehicle itself or the jurisdiction in which it is domiciled, the need for auditors to visit more locales than is typical in domestic investment vehicles and, in some instances, the fact that there may be relatively fewer qualified certified public accountants available to audit the offshore vehicles.

In light of the foregoing, you request relief from Rule 4.7(a) so that "P" may distribute to the Funds' participants and file with the Commission and the NFA the annual reports of the Domestic Funds within 135 days after the end of the Domestic Funds' calendar year (on May 15) and the annual reports of the Foreign Funds within 180 days after the end of the Foreign Funds' calendar year (on June 30), rather than 90 days after year-end as

specified in Rule 4.7(a)(2)(iii). In support of your request, you state that the investors in the Funds will receive quarterly reports in accordance with Rule 4.7(a)(2)(iii) within 30 days following the end of each calendar quarter, including the fourth quarter, and that estimated monthly Fund performance is available from "P" to investors upon request.

Based upon your representations, it appears that granting an exemption would not be contrary to the public interest or the purposes of Rule 4.7(a). Accordingly, by the authority delegated to it under Rule 140.93(a)(1), the Division hereby grants "P" an exemption with respect to the filing of annual reports, to the extent of permitting distribution and filing of annual reports of the Domestic Funds within 135 days after their year end and of the Foreign Funds within 155 days after their year end. With respect to the exemption for the Foreign Funds, the Division has found, based upon its experience in this area, that 155 days (90 days provided in the rule plus an additional 65 day extension) generally is sufficient time for the CPO of a "fund of funds" that invests in offshore investment vehicles to complete, distribute and file an annual report. This relief is, however, subject to the conditions that: (1) current and prospective investors in the Domestic and Foreign Funds are informed of the fact that the receipt of the Funds' annual reports will not occur within the 90-day time period specified in Commission Rule 4.7(a)(2)(iii), but instead will occur within 135 or 155 days, as the case may be; and (2) the investors in the Funds will receive quarterly reports in accordance with Rule 4.7(a)(2)(iii) within 30 days following the end of each calendar quarter.

## II. Request for Location of Books and Records Relief

You also request that the Division provide a partial exemption to "P" from the requirements in Rules 4.7(a)(2)(iv) in connection with its operation of the Funds and 4.7(b)(2)(ii) in connection with its providing commodity interest trading advice to the Account that a CPO and CTA, respectively, maintain certain books and records at its main business office in accordance with Rule 1.31. Specifically, you represent that "P" will maintain at its main business office the original periodic and annual reports required to be sent to pool participants pursuant to Rules 4.7(a)(2)(ii) and 4.7(a)(2)(iii). However, "P" requests an exemption from Rules 4.7(a)(2)(iv) and 4.7(b)(2)(ii) such that the originals of other books and records related to the operation of the pool (such as subscription documents and documents related to the Funds' investments in underlying Investee Vehicles) may be maintained by the trustees, administrators or custodians of the Funds and the Account. You represent that "P" will maintain copies of such other books and records at its main business office. In support of your request, you explain that "P" employs various banks to serve as custodian of the assets of the Funds. In addition, due to "P's" limited number of employees, "P" employs various entities to perform certain administrative services for the Funds.

In further support of your request, you have provided the Division with copies of letters from [the custodians, administrators and trustees] to "P", whereby each states that it agrees

to provide the Commission, NFA, the United States Department of Justice and their representatives with access to the records of each "P" Fund and the Account in its possession and control. It is the Division's understanding that [the custodians, administrators and trustees] each will maintain and make available the records of the "P" Funds and the Account in its possession on the same basis as "P" would be required to do under the Commodity Exchange Act ("Act")<sup>6</sup> and the Commission's regulations if it maintained such records.<sup>7</sup>

Based upon the foregoing, it appears that granting the requested relief would not be contrary to the public interest or the purposes of Rule 4.7(a). Accordingly, pursuant to the authority delegated by Rule 140.93(a)(1) and subject to the conditions specified herein, the Division hereby exempts "P" from the requirements of Rules 4.7(a)(2)(iv) and (b)(2)(ii) applicable to the Funds and the Account such that "P" may maintain its original books and records, other than those required under Rules 4.7(a)(2)(ii) and (a)(2)(iii), at the offices of the trustees, administrators and custodians of the Funds and the Account as described above. This exemption is, however, subject to the conditions that: (1) "P" notify the Division if the location of any original books and records changes from that as represented to us; (2) "P" remains responsible for ensuring that all books and records required by Rules 4.7(a)(2)(iv) and (b)(2)(ii) are maintained in accordance with Rule 1.31 and for assuring their availability to the Commission, NFA and any other agency authorized to inspect such books and records, in accordance with the Act and the Commission's regulations issued thereunder;<sup>8</sup> (3) within forty-eight hours after a request by a representative of any of the foregoing, "P" will obtain the original books and records from the appropriate administrator, trustee or custodian and provide them for inspection at "P's" main business office, if the representative chooses to inspect them there; and (4) "P" discloses in any solicitation materials provided to investors in the Funds and the Account the location of those books and records that are kept at offices other than those of "P" - i. e., at the offices of a Fund's or the Account's administrator, trustee or custodian, as the case may be.

The relief granted in this letter relieves "P" solely from compliance with certain requirements of the Commission's rules as set forth above and does not excuse it from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. Thus, for example, "P" remains subject to all antifraud provisions of the Act, 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 letter applies solely with respect to "P's" operation of the Funds and the Account, as discussed above.

This letter, and the exemptions granted herein, are based upon the representations provided to us and are subject to compliance with the conditions stated above. Any different, changed or omitted material facts or circumstances might render these

exemptions void. You must notify us immediately in the event that the operation of "P", any Fund or the Account, change in any material way from those represented to us.<sup>9</sup> Further, this relief is prospective only. Nothing herein should be construed as limiting in any way the Commission's ability to institute enforcement proceedings or other action against "P" for any past violation of the Act or Commission regulations.

If you have any questions concerning this correspondence, please contact Lawrence T. Eckert, an attorney on my staff, at (202) 418-5430.

Very truly yours,

I. Michael  
Greenberger

Director

<sup>1</sup> "A" and "B" are partners in the law firm of "UU", which "P" has engaged as outside counsel in connection with your request.

<sup>2</sup> Commission rules referred to in this letter are found at 17 C.F.R. Ch. I (1998).

<sup>3</sup> It also is an investment adviser registered under the Investment Advisers Act of 1940.

<sup>4</sup> Commission records indicate that these filings were received by the Commission. "P" also filed a notice of claim for exemption under Rule 4.7(a) with respect to "S" and "T". You state that both funds have since been terminated.

<sup>5</sup> You also have requested: (1) that "P" be permitted to operate certain Funds pursuant to Rule 4.7(a) and the Account pursuant to Rule 4.7(b) after filing notices of claim for exemption for the Account and those Funds for which notices have not previously been filed ("P" has provided investors in those Funds operated in the United States with 21-day notice offering such investors the right to redeem their investments within three months); (2) that certain Funds hereafter may be operated pursuant to a claim for exemption from Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11) after filing the notice specified by Advisory No. 18-96 for claiming such relief; and (3) that the "C", an investor in certain of the Funds, may be treated as if it satisfies the qualified eligible participant ("QEP") criteria of Rule 4.7(a), and that, with respect to "P's" operation of such Funds, "P" be granted relief from the ten percent investment limitation set forth in Rule 4.7(a)(1)(ii)(B)(2)(xi) (the "Ten Percent Limitation"). As Division staff has discussed with "P's" counsel, the Division does not provide relief retroactively. Accordingly, the Division is declining to provide specific relief herein with respect to the first two of these requests. We note, however, that should "P" file for the relevant Funds or the Account the appropriate notices under Rule 4.7(a), 4.7(b) or Advisory 18-96 in a manner consistent with Rules 4.7 or the Advisory, "P" would

be entitled to take advantage of the relief provided by such rules and the Advisory on a prospective basis. With respect to the third request (concerning treating the IRA as a QEP), you have indicated that the IRA has requested to withdraw as of December 31, 1998 from the "P" Funds in which it is invested. Accordingly, "P" has withdrawn its request that the IRA be treated as a QEP. Your letter further indicated that, after December 31, 1998, "P" will file a notice of claim for exemption under Rule 4.7(a) for each of the Funds in which the IRA currently participates.

<sup>6</sup> 7 U.S.C. § 1 et seq. (1994).

<sup>7</sup> Thus, for example, the records would be maintained and available for inspection pursuant to Rule 1.31 at the offices of "XX", "VV" and "WW", in accordance with all of the provisions of Rule 1.31 including, without limitation, provisions relating to the time and manner of the production of records.

<sup>8</sup> See, e.g., Section 4n(3)(a) of the Act, 7 U.S.C. § 6n(3)(a), and Rules 1.31, 4.23 and 4.33 of the Commission's regulations.

<sup>9</sup> For example, you must notify us immediately if "P's" arrangement whereby "XX", "VV" and "WW" act as the trustees, administrators and custodians of, and maintain certain records of, the Funds and the Account changes in any material way or differs in any material respect from that described herein.