

CFTC letter No. 04-13**April 14, 2004****Interpretation****Division of Clearing and Intermediary Oversight**

Re: Rule 4.13(a)(3) – Request for Interpretation Permitting Exempt CPOs To Admit

Non-United States Persons That Are Not Accredited Investors

Dear :

This is in response to your letter dated December 10, 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 January 9 and January 26, 2004, and by telephone conversations with Division staff (“correspondence”).^[1] By your correspondence, you request that the Division confirm that a commodity pool operator (“CPO”) claiming exemption from registration under new Rule 4.13(a)(3)^[2] may permit Non-United States persons^[3] to participate in pools operated pursuant to such exemptive relief, regardless of whether such Non-United States persons meet the investor sophistication requirements of Rule 4.13(a)(3)(iii).

On August 8, 2003, the Commission announced adoption of two new exemptions from the CPO registration requirement: Rules 4.13(a)(3) and 4.13(a)(4).^[4] Exemption is available under Rule 4.13(a)(3) where the CPO complies with certain trading restrictions and admits as pool participants persons whom the CPO reasonably believes at the time of investment meet one of the following criteria: (1) an “accredited investor” as defined in Rule 501 under the Securities Act of 1933;^[5] (2) a trust formed by an accredited investor for the benefit of a family member; (3) a “knowledgeable employee” as defined in Rule 3c-5 under the Investment Company Act of 1940 (“ICA”);^[6] or a “qualified eligible person” (“QEP”) as defined in Commission Rule 4.7(a)(2)(viii)(A).^[7]

Exemption under Rule 4.13(a)(4) does not entail trading restrictions, but imposes a higher investor sophistication requirement. Under this rule, the CPO may admit as pool participants, among others, persons whom the CPO reasonably believes at the time of investment are Non-United States persons.^[8]

Absent the interpretation you have requested, Rule 4.13(a)(3) would require that Non-United States persons must also meet the investor sophistication criteria listed above – *e.g.*, that they are accredited investors – before a CPO claiming exemption under that rule can admit them into the CPO’s pool. However, as you note, a CPO claiming exemption under Rule 4.13(a)(4) may admit Non-United States persons to a pool that is not subject to trading restrictions, *regardless* of those persons’ income, net worth or other indicia of financial sophistication.

The Division believes that your request is consistent with the intent and purpose of Rule 4.13(a)(3) – *i.e.*, to provide relief from the requirement to register where the specific disclosure, recordkeeping and reporting safeguards that result from registration are not needed.^[9] Accordingly, for purposes of determining whether a CPO qualifies for exemption from registration under Rule 4.13(a)(3), the Division confirms to you that the CPO need not consider whether Non-United States person participants meet one of the investor sophistication criteria of Rule 4.13(a)(3)(iii).

This letter does not excuse a CPO claiming exemption under Rule 4.13(a)(3) from compliance with any other applicable requirements contained in the Commodity Exchange Act (the “Act”)^[10] or in the Commission’s regulations issued thereunder. For example, such CPO remains subject to all antifraud provisions of the Act^[11] 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 is based upon the representations made to us. Any different, changed or omitted material facts or circumstances might render this interpretation void. 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,

James L. Carley
Director

^[1] You submitted the December 10, 2003 letter in connection with your representation of several clients in the futures industry, including several funds organized and operated as commodity pools.

^[2] Adoption of Rule 4.13(a)(3) was announced at 68 Fed. Reg. 12622 (August 8, 2003), available on the Internet at <http://www.cftc.gov/files/foia/fedreg03/foi030808a.pdf>. Unless otherwise noted, all other Commission rules referred to herein are found at 17 C.F.R. Ch. I (2003).

^[3] “Non-United States person” is defined in Commission Rule 4.7(a)(1)(iv).

^[4] Both rules were adopted simultaneously. *See the Federal Register* and Internet references cited above.

[5] 17 C.F.R. §230.501 (2003).

[6] 17 C.F.R. §270.3c-5 (2003).

[7] The persons who are QEPs under Rule 4.7(a)(2)(viii)(A) include the pool's CPO, its advisor and their affiliates, as well as principals and employees of those entities. This is a subset of the QEP definition under Rule 4.7, incorporated by reference into Rule 4.13(a)(3) in order to give equal treatment to "knowledgeable employees" under the securities laws and corresponding persons designated under Commission rules.

[8] A CPO claiming exemption under Rule 4.13(a)(4) may admit: (1) natural persons that are "qualified eligible persons" ("QEPs") as defined in Rule 4.7(a)(2); and (2) non-natural persons that are QEPs under *any* of the definitional criteria of Rule 4.7 *or* "accredited investors" as defined in subparagraphs (a)(1)-(a)(3), (a)(7) and (a)(8) of Securities Act of 1933 Rule 501, 17 C.F.R. §§230.501(a)(1)-(a)(3), (a)(7) and (a)(8) (2003). Because Non-United States persons are defined as QEPs under Rule 4.7(a)(2)(xi), they may be admitted into a Rule 4.13(a)(4) pool, regardless of whether they are natural persons or non-natural persons.

[9] Although you limited your request to Non-United States Persons who invest in pools organized and operated outside the United States, the Division believes that the same analysis should apply regardless of where the pool is organized and operated, because that analysis does not concern, and therefore is not impacted by, the domicile of the pool for which the CPO is claiming relief under Rule 4.13(a)(3) or (a)(4).

[10] 7 U.S.C. §1 *et seq.* (2000).

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