

CFTC Letter No. 00-65**May 16, 2000****Other Written Communication****Division of Trading & Markets**

Re: Section 4m(1) of the Act -- Request for Retroactive CPO
Registration No-Action Position on behalf of "A" and "B"

Dear :

This is in response to your letter dated April 4, 2000 to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"). By your letter you request that the Division provide assurance that it will not recommend that the Commission commence any enforcement action based upon various failures to register under Section 4m(1) of the Commodity Exchange Act¹ as a commodity pool operator ("CPO") in light of certain past events outlined in your letter and involving "A" and "B" and certain entities established and operated by them.

It has been the Division's long-standing practice to refrain from issuing no-action or exemptive letters with retroactive application. This practice is consistent with the Commission's recent language (in connection with the adoption of Rule 140.99²) that:

As proposed and as adopted, paragraph (b)(3) states that a request must relate to a proposed transaction or activity and that, absent extraordinary circumstances, Letters will not be issued based upon past transactions or activities. This stricture is consistent with longstanding Commission staff policy. Commenters expressed concern that persons who become aware that ongoing activities raise issues under the Act or Commission rules would have no recourse under this provision. The Commission disagrees. In the absence of extraordinary circumstances, a Letter issued with regard to ongoing activities will be prospective in terms of its coverage (and will not cover past activities or transactions).³ Thus, a Letter will not ordinarily relieve the person for whose benefit it is issued from the consequences of non-compliance that pre-dates the Letter.

Requests for Exemptive, No-Action and Interpretative Letters. 63 Fed. Reg. 68175, 68176, col.3 (December 10, 1998).

Accordingly, the Division is unable to grant your request for a no-action position.

In the same December, 1998 adopting release for Rule 140.99, however, the Commission further stated:

Nevertheless, persons (or their counsel) who become aware that their activities are not in compliance with the Act or Commission rules are urged to contact the staff as soon as possible. Although the staff generally reserves the right to refer prior violations for enforcement action in appropriate situations, the good faith demonstrated by efforts to regularize non-complying activities on a "going forward" basis will be carefully considered.

If you have any questions concerning this correspondence, please contact Chris Cummings, an attorney on my staff, at (202) 418-5445.

Very truly yours

John C. Lawton
Acting Director

1 7 U.S.C. § 6m(1) (1994).

2 Rule 140.99 establishes procedures for the filing of requests for issuance of exemptive, no-action and interpretative letters from the Commission's staff.

3 In a footnote to this text, the Commission stated that:

One commenter pointed out that Section 4(c) of the Act expressly provides for retroactive relief and asserted that Rule 140.99(b)(3) is inconsistent with Section 4(c) in this respect. As noted earlier, the provisions of Rule 140.99 do not apply to requests for exemptions under Section 4(c). See also 63 FR 3285, n.5.