COMMODITY FUTURES TRADING COMMISSION
2033 K Street, NW, Washington, DC 20581
(202) 254 - 8955
(202) 254 - 8010 Facsimile

DIVISION OF
TRADING AND MARKETS

94-36

March 17, 1994

Re: Request for No-Action Position

Dear :

This is in response to your letters dated September 8 and October 13, 1993, as supplemented by telephone conversations with Division staff, in which, on behalf of (the "Operator"), a registered commodity pool operator ("CPO"), you request confirmation that the Operator may continue to operate (the "Pool") as a Rule 4.7[1/] exempt pool if it admits certain persons as participants in the Pool in the circumstances set forth below.

Based upon the representations made in your letter, as supplemented, we understand the pertinent facts to be as follows. The Pool presently has twenty-six million dollars in assets. The Pool's participants are qualified eligible participants ("QEPs") as defined in Rule 4.7, and the Operator has filed a notice of claim for exemption pursuant to Rule 4.7 with respect to the Pool.[2/] "X" is the general partner ("General Partner") of the Operator and "A" is the sole shareholder of the General Partner. The Operator would like to permit certain persons ("Selected Investors") who are not QEPs but who have expressed an interest in investing in the Pool to participate in the Pool. These persons are: (1) immediate family members of "A", i.e., his wife, children, parents and immediate in-laws ("Family Members"); (2) three key employees of the General Partner who hold positions at the presidential or vice presidential level, are actively involved in the operation of the Pool, are familiar with its operation and the risks associated therewith and whose annual

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1/ Commission rules referred to herein are found at 17 C.F.R. Ch. I (1993). Pursuant to Rule 4.7 the CPO of a pool whose participants are qualified eligible participants may claim relief from certain Part 4 requirements by filing a notice of claim for exemption.

2/ The notice was filed on March 17, 1993.

compensation exceeds $100,000 ("Key Employees")[3/]; (3) the profit-sharing plan of the General Partner ("Plan"); and (4) three Key Professional Advisors, two of whom are attorneys and one of whom is an accountant, and who are accredited investors as defined in Regulation D, 17 CFR 230.501, helped organize the Pool and are familiar with its operations and the risks associated with an investment therein. The Plan, an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, has approximately one million dollars in assets and is open to any full-time employee of the General Partner who has been employed by the General Partner for at least six months. The Plan is a self-directed plan, which currently has three investment options: a money market fund, a bond fund and an equity fund. Each participating employee makes its own decision as to which fund(s) it should invest in. Several employees of the General Partner have asked if the General Partner would make the Pool a fourth option for participating employees. There are currently five employees who are eligible to participate and who do participate in the Plan. They are the president, the chief financial officer and the three traders of the General Partner. Two other employees of the General Partner who are not currently eligible to participate in the Plan because they have been employed by the General Partner for less than six months will be eligible next year if they remain employed by the General Partner. One of these employees is a trader and the other is a secretary and administrative assistant. No existing Plan participant has, and no future Plan participant is expected to have, an annual salary lower than $40,000.

You represent that with respect to each Selected Investor the Operator will: (1) waive its incentive fee (currently 25% of the Pool's net trading profit) with respect to all funds invested in the Pool by the Selected Investor[4/]; (2) waive the requirement for 30 days prior notice of withdrawals of funds from the Pool (Selected Investors will be required only to give seven days prior notice); (3) waive the $1 million minimum investment re-

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[3/] They are "A", the president of the General Partner, and two vice presidents, one of whom is the senior trader for the Pool and the other being the chief financial officer of the General Partner. You represent that no Key Employee will be permitted to invest in any year more than fifty percent of his or her annual compensation for the preceding year.

[4/] Selected Investors will, however, be charged their share of the management fee, which is used to pay the Pool's operating expenses.

quirement; and (4) provide the Selected Investor with the reports required by Commission Rule 4.22.[5/]

Subject to certain conditions, Rule 4.7 makes available an exemption from certain Part 4 requirements to the CPOs of pools sold only to QEPs. Based upon your representations, the Division will not recommend that the Commission take any enforcement action against the Operator if it continues to operate the Pool as a Rule 4.7 exempt pool and admits the Family Members, Key Employees and Key Professional Advisors as Pool participants under the terms and conditions set forth above. With respect to the Plan, you have represented that it is a self-directed plan open to any person who has been a full-time employee of the General Partner for at least six months, without regard to financial or other qualifications.[6/] You have not provided the Division with any special circumstances that would warrant treating the Plan as a QEP. However, because the Plan's participants are employees of the General Partner some of whom have asked to be given the option to allocate part of their Plan assets to the Pool, the Division will not recommend that the Commission take any enforcement action against the Operator if the Pool is offered as an investment option under the Plan. This position is, however, subject to the conditions that: (1) the Operator complies with Rules 4.21, 4.22 and 4.23 with respect to the Plan; (2) at the time Plan participants are notified that the Pool has been made an option under the Plan, the Plan trustee provides the Pool Disclosure Document to each Plan participant who is not a QEP; and (3) each non-QEP Plan participant who elects to allocate assets to the Pool is provided with amendments to the Pool Disclosure Document as set forth in Rule 4.21 and with the Pool's periodic and annual reports as set forth in Rule 4.22.

This letter is based on the representations provided to us and is subject to compliance with the condition set forth above. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event the operations or activities of the Operator change in any way from those as represented to us.

5/ The Pool's other investors will be fully informed of the special treatment received by the Selected Investors in the Pool.

6/ As noted above, however, the General Partner does not expect that any employee eligible to participate in the Plan will have an annual salary of less than $40,000.

We note that this letter pertains solely to certain requirements of Rule 4.7 and does not excuse the Operator from compliance with any other applicable requirements contained in the Commodity Exchange Act, 7 U.S.C. § 1 et seq. (1988 & Supp. 1992) ("Act"), or in the Commission's regulations issued thereunder. For example, the Operator remains subject to the anti-fraud provisions of Section 4o of the Act, 7 U.S.C. § 6o (1988 & Supp. 1992), to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations, 17 C.F.R. Parts 15, 18 and 19 (1993), and to all other provisions of Part 4. Further, this letter is applicable to the Operator solely in connection with its operation of the Pool.

This letter represents the views of this Division only and does not necessarily represent the views 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 France M.T. Maca, an attorney on my staff, at (202) 254-8955.

Very truly yours,

Susan C. Ervin
Chief Counsel