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COMMODITY FUTURES TRADING COMMISSION

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DIVISION OF TRADING AND MARKETS

December 5, 1994

Re: Request for No-Action Relief from CPO Registration

Dear :

This is in response to your letter dated October 11, 1994, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by facsimiles received on November 1, 1994, and November 15, 1994, and telephone conversations with Division staff. By your letter you request that the Division grant you relief from commodity pool operator ("CPO") registration requirements in connection with the operation of the "Fund", as explained more fully below.

Based upon the representations made in your letter, as supplemented, we understand that the facts are as follows. You have been a member of the Chicago Mercantile Exchange ("CME") since 1976. You were a member of the Chicago Board of Trade ("CBT") from 1976 until 1993.^{1/} You were registered as a floor broker ("FB") from 1978 until 1982 and have been continuously registered as a FB since April of 1985. However, except as described below with respect to the Fund, you do not purchase or sell futures contracts for others on an exchange trading floor.

The Fund is a commodity pool organized as a Florida general partnership which has been in operation since approximately May 25, 1993. It is operated by "A", who is exempt from CPO registration under Rule 4.13(a)(1).^{2/} As the Fund's operator, "A" has delivered to each participant ("Participant") the statement required by Rule 4.13(b), has filed the statement with the Commission and the National Futures Association ("NFA") and is operating the Fund in compliance with Rule 4.13.^{3/}

^{1/} Specifically, you sold your CBT membership on August 26, 1993.

^{2/} Commission rules referred to herein are found at 17 C.F.R. Ch. I (1994).

^{3/} Commission records indicate that "A" filed a claim of exemption under Rule 4.13 on May 26, 1993.

Each Participant is a general partner of the Fund and an "accredited investor" as defined under Rule 501(a) of Regulation D of the Securities Act of 1933. The Participants in the Fund, and each Participant's capital contribution, are as follows:

1. "A", who acts as the administrative general partner of the Fund, and who was your college roommate at "Z" from 1968 through 1972. He is an attorney currently practicing in Florida and he has acted as your attorney for the last twenty years. "A" participates in the Fund both individually and through his personal profit-sharing trust. "A's" net worth is over \$3,000,000, his annual income is in excess of \$500,000 and his capital contribution to the Fund is \$60,000, representing approximately two percent of his net worth.

2. "A's" profit-sharing trust (the "Trust"), whose investment in the Fund represents less than ten percent of the Trust's net worth. The Trust's capital contribution is \$80,000.

3. "B", one of "A's" law partners, who also has represented you on certain legal matters over the past eight years. "B" net worth is over \$2,000,000, his annual income is in excess of \$400,000 and his capital contribution to the Fund is \$30,000, representing approximately one and one-half percent of his net worth.

4. "C", who for the past eight years has been one of "A's" law partners. He also has represented you on various legal matters. "C's" net worth is estimated at over \$2,000,000, his annual income is in excess of \$400,000, and his contribution to the Fund is \$30,000, representing approximately one and one-half percent of his net worth.

5. "D", a business partner of "A" and a social acquaintance of yours. "D's" net worth is over \$10,000,000, his annual income is over \$1,000,000, and his capital contribution to the Fund is \$120,000, representing approximately one percent of his net worth.

6. "E", who has been "A's" and your certified public accountant for the past fifteen years. "E's" net worth is over \$1,000,000, his annual income is over \$200,000 and his capital contribution to the Fund is \$60,000, representing approximately six percent of his net worth.

7. "F", who is "E's" uncle and one of your social acquaintances. "F's" net worth is over \$2,000,000, his annual income is over \$200,000 and his capital contribution to the Fund is \$60,000, representing approximately three percent of his net worth.

You have acted as the commodity trading advisor ("CTA") for the Fund since June 1, 1993, pursuant to a written grant of discretionary trading authority. The Fund is the only account that you trade and prior to trading on behalf of the Fund, you traded only for your own account. You represent that you do not provide and have not provided commodity trading advice to any other person or entity within the past twelve months and that you do not hold yourself out to the public as a CTA.^{4/} You claim that you are exempt from CTA registration pursuant to Section 4m(1) of the Commodity Exchange Act ("Act").^{5/}

The Participants in the Fund seek to change the structure of the Fund and form a new limited partnership (the "Proposed Fund") for two reasons. First, the Participants seek to limit their potential liability by changing the form of the commodity pool from a general partnership to a limited partnership. Second, the Participants seek to allow you to participate as an investor in the Proposed Fund. Under the new structure, you would serve as the sole general partner and each of the current Participants would become limited partners. In addition, you would participate in the Proposed Fund as an investor and, as such, you would share in the profits and losses of the Proposed Fund in proportion to your capital contribution. You would continue to act as the CTA for the Proposed Fund in the same manner as you have acted as the CTA for

^{4/} For the purpose of calculating the total number of clients a CTA advises, where the client is other than a natural person, the Division typically "looks through" the client and counts the individual participants therein. Thus, for example, where the client is a limited partnership, the Division generally counts each partner thereof for the purpose of calculating the number of clients the CTA has. Further, the Division views conduct such as the promotion of advisory services through mailings, directory listings, or other conduct designed to initiate, or having the effect of initiating, contact with prospective clients, as evidence of a person "hold[ing] himself out generally to the public" as a CTA, which would render the exemption unavailable. Consequently, unless a person restricts his clients to family, friends and existing business associates, generally he will be viewed as holding himself out to the public as a CTA. See CFTC Interpretative Letter No. 91-9, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,189 (Dec. 26, 1991).

^{5/} 7 U.S.C. § 6m(1) (1988 & Supp. IV 1992). Section 4m(1) of the Act provides an exemption from CTA registration for a person "who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor."

the Fund, and you would continue to receive an incentive fee and reimbursement of expenses based upon your trading of the assets of the Proposed Fund. It is anticipated that the Proposed Fund will be operated in the same manner as the Fund is currently operated.

As you know, as the general partner of the Proposed Fund, you would be required to register as the CPO thereof, absent the relief requested herein.^{6/} In support of your request for relief from CPO registration, you state that you are not subject to statutory disqualification under section 8(a)(2) or 8(a)(3) of the Act. You also represent that all of the questions in the disciplinary history section of the Form 8-R submitted in connection with your FB registration were answered in the negative and that such answers remain current and accurate. The Proposed Fund would be the only commodity pool for which you would be a general partner. No additional participants would be permitted to invest in the Proposed Fund.^{7/}

You further state that each Participant has agreed to allow you to operate the Fund and recognizes that if the relief requested herein is granted, you will not prepare and distribute a disclosure document to them. You also state that each Participant is familiar with you both on a personal and professional level, and also is familiar with your commodity interest trading strategies as a consequence of your trading the Fund's account since approximately June 1, 1993. In addition you state that each Participant understands the risks of trading commodity interests, is knowledgeable and experienced in financial and business matters and could bear the loss of his entire investment without suffering economic hardship.

You claim that the benefits of requiring you to register as a CPO in this instance would be marginal, if any, inasmuch as the Fund has been operating pursuant to Rule 4.13(a)(1) since its inception and the Proposed Fund would be a "mere restructuring" of

^{6/} See Division of Trading and Markets Interpretative Letter 75-16, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,104 (October 15, 1975). You may not claim relief from CPO registration under Rule 4.13(a)(1) because you are a Commission registrant and you will receive compensation for operating the Proposed Fund. You may not claim relief under Rule 4.13(a)(2) because there will be more than \$200,000 in aggregate gross capital contributions to the Proposed Fund.

^{7/} Thus, the investors in the Proposed Fund would be restricted to the following: "A", the Trust, "B", "C", "D", "E", "F", all of whom would be limited partners; and yourself, as the general partner.

the Fund. You contend that all of the Participants already possess information concerning the Fund (as they are all general partners of the Fund) and, consequently, concerning the anticipated operation of the Proposed Fund.^{8/} In further support of your relief request, you agree to comply with the reporting and recordkeeping requirements of Rules 4.22 and 4.23, respectively, in connection with the operation of the Proposed Fund.

Based upon the representations you have made to us, the Division will not recommend that the Commission take any enforcement action against you for failing to register as a CPO in connection with your serving as the CPO and general partner of the Proposed Fund.^{9/} This position is, however, subject to the condition that you provide the Division with written notice of the name of the Proposed Fund at such time when the Proposed Fund is organized.

We note that you remain subject to the antifraud provisions of Section 4o of the Act^{10/} and to all otherwise applicable provisions of the Act and the Commission's regulations thereunder, e.g., the reporting requirements for traders set forth in Parts 15, 18, and 19 of the regulations and Rules 4.20 and 4.41, which apply to each person who comes within the CPO definition, regardless of registration status. Moreover, the position we have taken herein is applicable to you solely in connection with your serving as the CPO and general partner of the Proposed Fund.

^{8/} Each Participant has been receiving monthly account statements reflecting the trading activity of the Fund since its inception. In addition, as a consequence of the relationship between you and each Participant, you represent that you have orally kept Participants apprised about information regarding yourself, including certain information required to be disclosed by Rule 4.21, such as your name and address, your business background, actual or potential conflicts of interests, and your performance record, which also is reflected in the monthly account statements. You also state that the extent of your ownership interest in the Proposed Fund will be disclosed to and agreed upon by the Participants, and that the Participants understand the expenses that will be incurred by the Proposed Fund since the Proposed Fund will continue to be operated in the same manner as the Fund has been operated to date and will incur the same general level of expenses.

^{9/} See Division of Trading and Markets Interpretative Letter No. 93-87, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,853 (August 12, 1993).

^{10/} 7 U.S.C. § 6o (1988 & Supp. IV 1992).

The position taken in this letter is based upon the representations that have been made to us and is subject to compliance with the condition set forth above. Any different, changed or omitted facts or conditions might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event that your activities or those of the Proposed Fund, including its membership composition, change in any way from those as represented to us. Further, this letter represents the position of this Division only. It does not necessarily represent the views of the Commission or any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact me or Tina Paraskevas Shea, an attorney on my staff, at (202) 254-8955.

Very truly yours,

Susan C. Ervin
Chief Counsel