COMMODITY FUTURES TRADING COMMISSION
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93-47

DIVISION OF
TRADING AND MARKETS

May 12, 1993

Re: Request for Relief from Commodity Pool Operator Requirements

Dear :

This is in response to your letter dated February 1, 1993, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by telephone conversations with Division staff. By your letter you request, on behalf of your client, "A", relief from certain commodity pool operator ("CPO") requirements in connection with the operation of "B", "C" and "D" (each a "Fund" and collectively the "Funds"), each a commodity pool organized as limited partnerships under the laws of the State.

Based upon the information contained in your letter, as supplemented, we understand that the facts are as follows. "A", a registered commodity pool operator ("CPO"), is the "Administrative General Partner" and CPO of "B", "C" and "D". Under the provisions of the partnership agreements and the Disclosure Documents for each Fund, "A", as the Administrative General Partner, is responsible for soliciting and accepting funds, securities or other property for the purpose of purchasing interests in the Funds. In addition, "A" is responsible for handling the business of the Funds, including supervising the activities of all other partners, officers, employees and agents in connection with the operation of the Funds.

"E", "F" and "G" are co-general partners of and act as the trading advisors to "B", "C" and "D", respectively. "E", "F" and "G" (each an "Advisor") are registered commodity trading advisors ("CTAs") and registered CPOs. Under the provisions of the partnership agreements and the Disclosure Documents, each Advisor is designated as the "Trading General Partner" of its respective Fund and is delegated the responsibility for making all commodity trading decisions on behalf of its respective Fund. The Disclosure Document for each of the Funds contains all of the prescribed information concerning CTAs for "E", "F" and "G", respectively.

In a letter dated February 9, 1993, the Division noted that the Disclosure Documents for the Funds failed to designate the

Advisors as co-CPOs. Inasmuch as each Advisor is a co-general partner of its Fund, each Advisor would be required to be designated as a CPO of its Fund, absent the relief requested in your letter of February 1, 1993.[1/] You have requested relief because you do not wish to designate the Advisors as co-CPOs of their respective Funds and list each Advisor as a co-CPO for purposes of each Fund's Disclosure Document.

You represent that, although each Advisor is a general partner of its respective Fund, all CPO functions (e.g., solicitation and acceptance of subscriptions, day-to-day management of the pool, overseeing redemptions, determining investor suitability) are, in the case of each Fund, performed by "A". In addition, each Fund's partnership agreement, which is attached to each Fund's Disclosure Document as "Exhibit A," specifically delegates all managerial responsibility for each Fund to "A". Specifically, the partnership agreement for each Fund provides that the "partnership shall be managed by the Administrative General Partner and the conduct of the Partnership's business shall be controlled and conducted solely by the Administrative General Partner in accordance with [the partnership] Agreement." The partnership agreement for each Fund also provides, among other things, that the Administrative General Partner: shall make the offering of units and shall make arrangements for the sale of the units as it deems appropriate; shall accept the delivery of the subscription agreements; and "shall have and may exercise . . . all powers and rights necessary [and] proper . . . to effectuate and carry out the purposes, business and objectives of the Partnership . . ." including the authority to enter into contracts and agreements with commodity brokerage services and commodity trading advisory services. Accordingly, you conclude that since each Fund's partnership agreement affirmatively delegates these responsibilities to "A", the partnership agreement limits the authority of the respective Advisor so as to preclude the Advisor from performing any functions as a CPO with respect to the Funds.

In addition, you represent that the sole motivation for including each Advisor as a co-general partner of its respective Fund is to distinguish each Fund from each other Fund so as to avoid "publicly traded" status for federal income tax purposes and to avoid the potential for the Funds being treated as corporations for tax purposes and thus subject to double income taxation. Moreover, you represent that, other than having certain technical voting powers required of all general partners under Delaware law, none of the Advisors performs any managerial functions other than

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1/ See Interpretive Letter 75-16, [1975-77 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 20,104 (Oct. 15, 1975).

acting as the CTA of its respective Fund and, in this capacity, trading the Fund's assets.

In support of the request, "A" has represented that, within 30 days of the date of this letter, it will supply the Division with a written acknowledgment ("Acknowledgment") stating that it will accept joint and several liability for any violations of the provisions applicable to CPOs under the Commodity Exchange Act ("Act")[2/] and the Commission's regulations promulgated thereunder[3/] committed by "E", "F" and "G" in their capacity as co-general partners of "B", "C" and "D", respectively.

In addition, you represent that, although "A" is specifically delegated all managerial responsibilities under the partnership agreement for each Fund, it has agreed to amend the Disclosure Document for each Fund to incorporate a restrictive provision ("Restrictive Provision") which explicitly states that each Advisor is precluded from performing any functions as a CPO with respect to its respective Fund.[4/] You have agreed to incorporate the Restrictive Provision into each Fund's next Disclosure Document Supplement, which will be distributed to all existing and prospective participants of the Funds.[5/] In addition, you have agreed to provide existing participants with information about the Restrictive Provision in the next periodic account statement.

In light of (1) the fact that each Advisor is in fact registered as a CPO; (2) "A"'s execution of the Acknowledgment of liability, as described above; (3) "A"'s managerial responsibilities under the partnership agreements and Disclosure Documents; and (4) "A"'s agreement to incorporate the Restrictive Provision into the next Disclosure Document Supplement for each Fund, the

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2/ 7 U.S.C. §§ 1-26 (1988), as amended by the Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590.

3/ Commission rules referred to herein are found at 17 C.F.R. Ch. I (1992).

4/ The Restrictive Provision must state that "E", "F" and "G" will not exercise discretion, supervision or control over or take part in: (1) the solicitation, acceptance or receipt of funds or property to be used for purchasing interests in their respective Funds, or (2) the investment, use or other disposition of funds or property of their respective Funds, except in their capacity as CTAs of their respective Funds.

5/ The last supplement to the Disclosure Document is dated February 18, 1993. It is anticipated that the next supplement will be distributed some time in the early fall.

Division will not deem "E", "F" and "G" to be CPOs of their respective Funds and will not recommend that the Commission take any enforcement action against "A", "E", "F" and "G" for failing to name "E", "F" and "G" as co-CPOs of the Fund.

This position is, however, subject to the condition, as the Restrictive Provision will state, that "E", "F" and "G" refrain from exercising discretion, supervision or control over or taking part in: (1) the solicitation, acceptance or receipt of funds or property to be used for purchasing interests in the "B" Fund, the "C" Fund and the "D" Fund, respectively, or (2) the investment, use or other disposition of funds or property of their respective Funds, except in their capacity as CTAs of their respective Funds.

The position taken in this letter does not excuse "A", "E", "F" or "G" from compliance with any other applicable requirements contained in the Act or in the Commission's regulations promulgated thereunder. For example, each remains subject to the anti-fraud provisions of Section 4o of the Act,[6/] and to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations. Moreover, this position is solely applicable in connection with the operation of the Funds.

We further note that the position taken herein is based upon the representations made in your letter, and is subject to compliance with the conditions stated 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 the operations of the Funds or the responsibilities of the Advisors change in any way from those as represented to us. In addition, the position taken herein is that of the Division of Trading and Markets only and 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

6/ 7 U.S.C. § 6o (1988).