CFTC Letter No. 99-46

September 29, 1999

No-Action

Division of Trading & Markets

Re: Request for CPO Registration No-Action Position under Section 4m(1) of the Act.

Request for CTA Registration No-Action Position under Section 4m(1) of the Act.

Dear :

This is in response to your letter dated August 12, 1999 to the Division of Trading and Markets (Division) of the Commodity Futures Trading Commission (Commission), as supplemented by your electronic mail messages dated September 3, 1999 and September 15, 1999 and telephone conversations with Division staff. By your letter you request that: (1) the Division not recommend that the Commission commence any enforcement action for failure to register as commodity pool operators (CPOs) under Section 4m(1) of the Commodity Exchange Act (the Act [1]) against the General Partners (as that term is defined below) of (the Partnership [2]); and (2) the Division not recommend that the Commission commence any enforcement action for failure to register as a commodity trading advisor (CTA) under Section 4m(1) of the Act against (the Adviser [3]).

Facts

Based upon the representations made in your correspondence, we understand the facts to be as follows: The Partnership is a general partnership which invests in a variety of investment limited partnerships and investment limited liability companies. It was established on January 1, 1997. The total assets in the Partnership are in excess of $21.6 million. To date, the Partnership has invested its assets in investment vehicles that invest, either directly or through other investment vehicles, in securities. However, it now seeks to invest in vehicles which may trade commodity interests, such as the Pool.

Each of the Partnership s fourteen general partners (the General Partners) was established for the purpose of carrying out the estate plans, particularly for providing charitable contributions, of brothers A (deceased, survived by his spouse, B), C , D and E and of F , who is the son of E (the Family Members). A was and each of the remaining Family

Members is a QEP. B also is a QEP. Specifically, the General Partners and the Family Members are as follows:

	Name of General Partner	Family Member Who Established General Partner
Foundations:	I	A
	II	C
	III	F
	IV	D
Charitable Remainder Trusts:	I	E
	II	
	A	
Endowments:	Various Endowment Trusts	E

A Family Member is a director or trustee of each foundation, except Foundation I, in which case B is a director. B and the children of one of the Family Members are the trustees of one of the charitable remainder trusts and the children of another Family Member are the trustees of the other charitable remainder trust. E serves as a trustee of each of the various endowment trusts. Moreover, in establishing the foundations, charitable remainder trusts and the endowment trusts, a Family Member has established the purposes of the applicable entity. Each of the foundations and endowments have approximately $2 million to $16 million in assets. One of the charitable remainder trusts has approximately $12.6 million in assets and the other charitable remainder trust has approximately $680,000 in assets. In support of your request, you represent that: (1) none of the General Partners nor any Family Member is subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Act[4]; (2) all General Partners have equal access to the books and records of the Partnership; and (3) the Partnership will accept no new General Partners except those that may be established by a Family Member for estate planning purposes and of which the Family Member will be the grantor and a director or trustee.

The Adviser is registered as an investment adviser under the Investment Advisers Act of 1940. The sole business of the Adviser is to make all of the investment decisions for, and

manage the assets of, the Partnership and other family partnerships. In this regard, each General Partner has entered into an investment advisory agreement with the Adviser whereby the General Partner has delegated to the Adviser investment authority with respect to the General Partner. On matters not specifically delegated to the Adviser that must go to the General Partners for a vote (*e.g.*, if the General Partners wished to remove the Adviser), each General Partner has a vote based upon its percentage interest in the Partnership. The sole director of the Adviser is G , who also serves as the Adviser s President and Chief Investment Officer. He has been employed by the Adviser and Company (the Company), its parent, since February 4, 1985.

The Adviser is wholly owned by, and is responsible to the board of directors of, the Company. The sole business of the Company is to provide financial and investment management services to members of the family. There are twenty-nine shareholders of the Company. Twenty-two of the shareholders are a Family Member or a direct lineal descendent of a Family Member. The remaining seven shareholders are the brother of four of the five Family Members and his direct lineal descendents. There are thirteen directors of the Company. Eleven of these directors also are shareholders of the Company and two are the spouses of shareholders of the Company. The remaining two directors are G and H , who also serves as President of the Company. H has been employed by the Company and the Adviser since November 29, 1993. In support of your request, you represent that none of the Adviser, the Company, G or H is subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Act.

Analysis

The term commodity pool is not defined in the Act. Rather, it was taken from the language of the term commodity pool operator in Section 1a(4) of the Act.[5] In adding the CPO and CTA definitions to the Act,[6] and the corresponding registration requirement in Section 4m (1) of the Act, Congress intended to establish the foundation for eliminating certain undesirable practices by unscrupulous operators and advisors who had enticed unsuspecting traders into the markets with, far too often, substantial loss of funds.[7] However, discretion was vested in the Commission by Congress enabling the Commission to exempt from registration those persons who would otherwise meet the criteria for registration . . . if, in the opinion of the Commission, there is no substantial public interest served by such registration.[8]

In light of this discretion, and in connection with its adoption of Rule 4.10(d), the Com

mission stated that [w]hether a particular entity is operated for the purpose of trading commodity interests, and thus is a pool within the scope of Rule 4.10(d), depends on an evaluation of all the facts relevant to the entity s operation.[9] The Commission then

recognized that in the past its staff had issued interpretations of the Part 4 rules and, consistent with that practice, the Commission invited interested persons to seek such staff interpretations of Rule 4.10(d) and of all the other Part 4 rules.[10]

Based upon your representations, among others, that: (1) the General Partners were established by the Family Members for estate planning purposes, particularly for providing charitable contributions; (2) each Family Member was or is a QEP; and (3) all General Partners have equal access to the books and records of the Partnership, it appears that the operation of the Partnership is not the kind of activity Congress and the Commission intended to regulate in adopting the CPO and pool definitions, respectively. Nor is there a substantial public interest to be served by requiring the General Partners to register as CPOs. Accordingly, the Division will not recommend that the Commission commence any enforcement action against the General Partners for failure to register as CPOs under Section 4m(1) of the Act if the Partnership trades commodity interests through the purchase of interests in commodity pools operated by registered CPOs *e.g.*, in the Pool, which is operated by X .

Based upon your representations, among others, that: (1) the sole business of the Adviser is to make all of the investment decisions for, and manage the assets of, the Partnership and other family partnerships; (2) the Adviser is wholly owned by the Company, whose sole business is to provide financial and investment management services to members of the family; (3) each shareholder of the Company is a Family Member, a direct lineal descendent of a Family Member or a brother of four of the Family Members and his direct lineal descendents; (4) nine of the directors of the Company also are shareholders of the Company; (5) two of the directors of the Company are the spouses of shareholders of the Company; and (6) the remaining two directors of the Company have been employed by the Company and the Adviser for over five and one-half years, we similarly do not believe that the conduct of the Adviser is the kind of activity Congress and the Commission intended to regulate. Nor is there a substantial public interest to be served by requiring the Adviser to register as a CTA. Accordingly, the Division will not recommend that the Commission commence any enforcement action the Adviser for failure to register as a CTA under Section 4m(1) of the Act if it provides commodity interest trading advice to the Partnership by selecting commodity pools operated by registered CPOs as vehicles in which the Partnership s assets are invested.

This letter does not excuse the General Partners, the Adviser or the Partnership from compliance with any other applicable requirements contained in the Act or in the Commission s regulations issued thereunder. For example, each remains subject to all applicable antifraud provisions of the Act and to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the regulations. Moreover, this letter is applicable to the General Partners and the Adviser solely in connection with operating and advising, respectively, the Partnership

This letter, and the no-action positions provided herein, are based upon the representations you have made to us. Any different, changed or omitted material facts or circumstances might render this letter void. You must notify us immediately in the event the activities of the General Partners, the Adviser or the Partnership change in any material way from those represented to us.

This letter represents the views of this Division only. It 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 Barbara S. Gold, Assistant Chief Counsel, at (202) 418-5450.

Very truly yours,

John C. Lawton

Acting Director

[1] 7 U.S.C. § 6m(1) (1994).

[2] You also ask that the Division not recommend that the Commission commence any enforcement action against the Family Members (as that term is defined below) if the Family Members do not register as CPOs. However, we do not believe that the Family Members would be acting as CPOs because they are not the general partners of the Partnership. Accordingly, it is not necessary for us to act on this request.

[3] You further ask that the Division not recommend that the Commission commence any enforcement action against the Adviser if none of the General Partners or Family Members registers as a CPO. However, because the Adviser is not the CPO of the Partnership, it is not clear to us why it would need such relief and we similarly are not acting on this request.

Finally, you ask that in connection with the Partnership s contemplated investment in (the Pool), a Rule 4.7 exempt pool, that the Division exempt X , a registered CPO and the CPO of the Pool, from the restriction in Rule 4.7(a)(1)(ii)(B)(*2*)(*ix*) that unless all of the participants in a pool that seeks to invest in an exempt pool are each a qualified eligible participant (QEP), then the CPO of the exempt pool (here, X as the CPO of the Pool) may not accept more than ten percent of the fair market value of the assets of the pool to purchase units in the exempt pool (the Ten Percent Restriction). However, in light of our interpretation below that the Partnership is not a pool, we believe that this request is unnecessary. If the Partnership is not a pool, it may be a QEP under Rule 4.7(a)(1)(ii)(B)(*2*)(*viii)*, which is applicable to, among other persons, a partnership, other than a pool and which does not implicate the Ten Percent Restriction.

[4] 7 U.S.C. § 12a(2) or 12a(3) (1994).

[5] Section 1a(4) of the Act defines the term commodity pool operator to mean:

> [A]ny person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market.

[6] Section 1a(5) contains the definition of the term commodity trading advisor, which is not at issue here, because you have not requested an interpretation that the Advisor is not a CTA.

[7] *See* H.R. No. 93-975, 93d Cong., 2d Sess. 79 (1974).

[8] *Id.* at 29.

[9] 46 Fed. Reg. 26004, 26006. The Commission was responding to arguments that, for example, limited partnerships registered as broker-dealers would not be pools if they occasionally traded commodity interests, committed a limited amount of assets to such trading, and traded commodity interests for hedging as opposed to speculative purposes.

[10] *Id.*