

MEMORANDUM

September 24, 1979

TO: The Commission

FROM: Office of the General Counsel

RE: Boston Futures Fund's request for
acceleration of its registration statement

cc Proyer

I. Introduction

On September 12, 1979, Boston Futures Fund ("BFF"), a limited partnership organized to operate as a commodity pool, filed a registration statement under the Securities Act of 1933 ("Securities Act"). The registrant has lifted its delaying amendment, and has requested acceleration of the effective date. 1/

BFF is organized to trade in commodity futures contracts and forward contracts for foreign currencies. BFF may also invest in futures on government securities, GIMA certificates, and commercial paper. The general partner to the BFF fund, Boston Futures Management Corp., is registered with the CFTC as the commodity pool operator. Trading by Boston will be conducted pursuant to the instructions of an independent commodity trading adviser, Elam Management Corporation ("Elam"), registered as an adviser with the CFTC. Elam is not registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"), nor is BFF registered as an investment company under the Investment Company Act of 1940 ("Investment Company Act"). The units of the fund will be distributed by Thomas McKinnon Securities Inc., a registered broker-dealer, which is not affiliated with either BFF or Elam.

In determining whether to grant the requested acceleration, the Commission must address certain fundamental, as yet unresolved, questions raised by this filing concerning the scope of the Commission's jurisdiction over financial futures, in view of the measure of exclusive jurisdiction granted to the Commodities Futures Trading Commission ("CFTC") over futures trading. The capital formation phase of a commodity pool's operations raises questions of the applicability of the Securities Act and the Securities Exchange Act of 1934 ("Exchange Act"). Questions of applicability of the Investment Advisers Act are also raised because the adviser to the commodity pool makes recommendations regarding financial futures. Finally, if BFF restricts its financial futures holdings to less than 40% of fund assets, it may avoid registration under the Investment Company Act. Nevertheless, as the CFTC continues to approve new financial futures contracts, the occasion is likely to arise

1/ We are advised that the registration statement will become effective by October 8, 1979 by lapse of time pursuant to Section 8(a) of the Securities Act of 1933.

soon where BFF or other commodity pools may devote more than 40% of their assets to investing in such futures, thus raising questions of the applicability of the Investment Company Act.

As we discuss below, we believe a strong argument can be made for the applicability of the Securities Act and Securities Exchange Act. Although credible arguments can be made for applicability of the Investment Company and Advisers Acts in certain situations, we have serious reservations with respect to the Commission's chances of prevailing in litigation under these statutes. We believe that testing the Commission's jurisdiction under the 1940 Acts is premature at this point, and the more prudent course would be to seek some accommodation with the CFTC with respect to allocation of jurisdiction over commodity pools trading in financial futures, and their advisers. If the Commission chooses this course, there are four alternative approaches that the Commission can take, which we discuss in the latter part of this memorandum.

II. Securities Act and Exchange Act

As noted above, BFF has filed a registration statement with the Commission under the Securities Act. The Commission has taken the position that the capital raising activities of commodity pools constitute the issuance of securities, as defined in the Securities Act, whether interests in these pools take the form of stock in a corporate entity or certificates of interest in a limited partnership. ^{2/} And, although not completely free from doubt, we believe that issuance of securities by a commodity pool is not subject to the exclusive jurisdiction of the CFTC. ^{3/} Thus, absent the availability of an exemption from registration under the Securities Act, we believe that the issuance of these securities are required to be registered with the Commission under that Act. Further, issuers of these securities are subject to the continuing reporting requirements of the Exchange Act.

Although the CFTC has taken the position that the operation of a commodity pool is subject to its exclusive jurisdiction, it has left open the question of whether the organizational stage may be subject to the federal securities laws. ^{4/} Accordingly, if the Commission seeks to reach some agreement with the CFTC as to the allocation of jurisdiction over commodity pools, we believe it is quite likely that the CFTC will expressly acquiesce to the applicability of the Securities Act and the Exchange Act.

^{2/} See, e.g., Prepared Statement of the Honorable Harold M. Williams, Chairman, SEC, Before the Subcomm. on Conservation and Credit of the House of Representatives Comm. on Agriculture concerning H.R. 10285, at 25 (Feb. 22, 1978).

^{3/} 7 U.S.C. § 2.

^{4/} See CFTC Interpretive Letter No. 77-14, Comm. Fut. L. Rep. [CCH] ¶ 20,486 (Sept. 16, 1977); 44 Fed. Reg. 1918, 1922 n. 19 (Jan. 8, 1979).

III. Advisers Act and BFF

As noted above, Elam, BFF's trading adviser, is registered with the CFTC and not with the Commission, even though it will advise on investments in financial futures. Elam will not, however, recommend investments in any traditional securities. Under the advisory agreement, Elam will be paid a monthly fee equal to 1/3 of 1% of BFF's net asset value as of the last day of the month plus a quarterly incentive fee equal to 15% of BFF's advisory profits. 5/ Because this compensation method would violate Section 205 of the Advisers Act, BFF's acceleration request raises the issue of the applicability of that Act to a commodity trading adviser recommending investments in financial futures. 6/

Under the Advisers Act, an adviser is required to register with the Commission if it engages in the business of advising others as to the value of securities or as to the advisability of investing in securities. 7/ Although not completely free from doubt, a commodity trading adviser advising as to financial futures--e.g., government securities, GMA certificates, and commercial paper--would arguably be advising on investments in securities since financial futures are either an "interest in" or a "right to * * * purchase" a security. 8/

But even though these instruments constitute securities, the exclusive jurisdiction conferred upon the CFTC by the Commodity Exchange Act ("CEA"), as amended in 1974, raises a question as to the Commission's jurisdiction under the Advisers Act. Under the CEA, the CFTC is granted

exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and trans-

5/ Advisory profits are defined as the excess (if any) of the Net Asset Value as of the end of the quarter over the highest Net Asset Value at the end of any preceding quarter (i.e., the last quarter on which an incentive fee was payable), after (i) deducting from the latter the incentive fee for such preceding quarter and (ii) adjusting for all redemptions, subtractions and distributions from and all additions to net assets subsequent to such preceding quarter. In calculating the first incentive fee payable, initial Net Asset Value shall be the Net Asset Value at the commencement of trading after deducting selling commissions and organization and offering expenses.

6/ It should be noted that Elam is not advising anyone as to the purchase or sale of interests in the pool. The underwriter of BFF's offering is Thomas McKinnon Securities Inc., a registered broker-dealer.

7/ Sections 202(a)(11) and 203(a) of the Advisers Act.

8/ Section 202(a)(18) of the Advisers Act.

actions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission * * *. provided * * * that, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their responsibilities in accordance with such laws. 9/

Despite this broad grant of exclusive jurisdiction, a plausible argument may be made for the continued applicability of the Advisers Act to a commodity trading adviser making recommendations with regard to financial futures. By its terms, the CFTC's exclusive jurisdiction is confined to "accounts, agreements, * * * and transactions" and does not extend to persons or entities. Thus, advisers on financial futures may be subject to the concurrent jurisdiction of the CFTC and the Commission. This approach draws some support from the legislative history of the Commodities Futures Trading Commission Act of 1974 ("CFTC Act") 10/ which indicates that Congress did contemplate some overlap of jurisdiction between the CFTC and the Commission. 11/ Accordingly, it is possible to argue that the CFTC's exclusive jurisdiction has no preemptive effect in specific areas where the CFTC has been given no substantive authority. For example, under this approach, the Commission would not be ousted of jurisdiction to enforce the performance fee prohibition of Section 205 of the Advisers Act, since no analogue is included in the CEA. Moreover, our review of the legislative history of the 1974 amendments to the CEA discloses that Congress never considered the question of performance fees for commodity trading advisers.

The Commission could also argue that an adviser who gives advice as to futures, whether or not such futures are within the exclusive jurisdiction of the CFTC, is providing negative advice as to investing in traditional securities.

9/ 7 U.S.C. § 2.

10/ Public Law 93-463, H.R. 13113 (Oct. 23, 1974).

11/ House Comm. on Agriculture, Commodities Futures Trading Commission Act of 1974, on H.R. 13113, H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 28-29 (1974); 120 Cong. Rec. 34736-37 (Oct. 9, 1974) (remarks of Rep. Poage). However, this argument is weakened by subsequent congressional pronouncements which disapprove of any overlap in jurisdiction. See text accompanying note 14 infra.

And, therefore, such an adviser may be subject to regulation under the Investment Advisers Act. 12/

Nevertheless, the strong statutory language in the grant of exclusive jurisdiction as well as the legislative history of both the CFTC Act and the reauthorization of the CFTC by the Futures Trading Act of 1978, 13/ would make it very difficult for the Commission to prevail in any attempt to extend the requirements of the Advisers Act to commodity trading advisors. The grant of exclusive jurisdiction to the CFTC under the CEA is followed by a savings clause addressed to the preservation of the Commission's jurisdiction. However that savings clause is qualified by the proviso "except as hereinabove provided," which strongly suggests that the CFTC's jurisdiction, where it overlaps with that of the Commission, is preemptive. Further, there are many references in the legislative history to Congress' intent to preempt the jurisdiction of the

12/ The problem with this argument is that it appears to prove too much. Its logical implication is that any person giving financial advice, unless specifically exempted, must register under the Investment Advisers Act regardless of the subject of his financial advice. It is questionable that Congress intended the Commission to regulate such a potentially large universe of financial strategies other than securities.

13/ Public Law 95-405, S.2391 (Sept. 30. 1978).

14/ See. e.g., Senate Comm. on Agriculture and Forestry, Commodity Futures Trading Commission Act of 1974, on H.R. 13113, S. Rep. 93-1131, 93d Cong., 2d Sess. 23 (1974):

The Committee wished to make clear that where the jurisdiction of the Commodity Futures Trading Commission is applicable it supersedes state as well as Federal agencies.

Conference Report, Commodity Futures Trading Commission Act of 1974, on H.R. 13113, H.R. Rep. 93-1383, 93rd Cong., 2d Sess. 25 (1974):

The clarifying amendments make clear that (a) the [CFTC's] jurisdiction over futures contract markets or other exchanges is exclusive and includes the regulation of commodity accounts, commodity trading agreements and commodity options; (b) the Commission's jurisdiction where applicable supersedes state as well as Federal agencies.

See also 120 Cong. Rec. 34995 (Oct. 10, 1978) (remarks of Senator Talmage); Senate Comm. on Agriculture, Nutrition and Forestry, Reauthorization of the Commodity Futures Trading Commission, on S. 2391, S. Rep. 95-850, 95th Cong. 2d Sess. 22 (1978) (Hereinafter cited as "Senate Report 95-850"). House Comm. on Agriculture, Commodity Exchange Act Extension and Amendments on H.R. 10285, H.R. Rep. 95-1181, 95th Cong., 2d Sess. 13 (1978).

Commission and state authorities in those areas regulated by the CFTC. Indeed, Congress, in reauthorizing the CFTC through passage of the Futures Trading Act of 1978, specifically rejected the Commission's attempt to eliminate the CFTC's exclusive jurisdiction over futures on equity as well government and other debt securities. 15/ The Senate Report on S. 2391 explained that:

The committee understands the basis of the Securities and Exchange Commission proposal and appreciates the interest of the Department of the Treasury in ensuring the integrity of markets for Government securities. However, the basic conclusion reached in 1974 that there should be a single regulatory agency responsible for futures trading is as valid now as it was then.

* * *

The vesting of jurisdiction to regulate commodity futures trading in more than one agency would only lead to costly duplication and possible conflict of regulation or over-regulation. 16/

Thus, with respect to the applicability of Section 205 of the Advisers Act, the CFTC or a commodity trading adviser may be able to persuade a court that the legislative scheme of the CEA is comprehensive and that Congress intended the CFTC to occupy the field with regard to the regulation of commodity trading advisers. 17/ The fact that Congress did not impose a specific regulatory requirement similar to Section 205, it could be argued, means only that Congress intended to leave compensation fees unregulated except for common law agency principles. This argument draws additional support from the fact that while the CFTC does not have specific authority in other areas—e.g., suitability and margin—it is clear that the Commission or other authority may not impose its own standards.

Thus, we believe that in litigation involving applicability of the Advisers Act to a commodity trading adviser who recommends financial futures, there is a significant likelihood that the Commission would not prevail. The risks of litigating such a case would be somewhat decreased where a commodity trading adviser could be shown also to have made a small percentage of positive recommendations involving traditional securities. However, in the case of Elam, the adviser appears to work entirely in the commodities field.

15/ Senate Report 95-850, supra note 14 at 19-23.

16/ Id. at 22-23.

17/ See 7 U.S.C. § 6(n)

Finally, the Commission should note that the risk of litigating an Advisers over commodity trading advisers under that Act. Rather, a judicial opinion Act case involving financial futures goes beyond the question of jurisdiction in such litigation may also produce unfortunate dicta which may undermine our future litigating positions with regard to the registration of commodity pools under the Securities Act and the continued application of the Exchange Act to those pools. And, of additional concern, any judicial language on exclusive jurisdiction may adversely affect the Commission's position with regard to the Kansas City Board of Trade ("KCBT") proposal for designation as a contract market for trading a stock index future.

IV. Investment Company Act

As we have discussed, the BFF situation may not immediately present an Investment Company Act problem if BFF is willing to restrict its investments in financial futures to 40% of fund assets. Nevertheless, it is unclear whether BFF is willing to make such a commitment. And, in any event, we understand that several other pools, some of which may meet the assets test for registration under the Investment Company Act, may file Securities Act registrations with the Commission in the near future.

A commodity pool may fall under the requirements of the Investment Company Act if it engages, or proposes to engage, primarily in the business of investing in securities, or if it engages, or proposes to engage, in the business of investing in securities having a value exceeding 40% of the value of the pool's total assets. ^{18/} If a commodity pool plans to invest primarily, or to the extent of 40% of the value of its total assets, in financial futures, it is possible that the commodity pool is subject to the requirements of the Investment Company Act. As noted above with regard to the Advisers Act, such financial futures, we believe, are securities. ^{19/} Again, however, the problem is not a definitional one, but rather arises from the exclusive jurisdiction grant contained in the CEA. ^{20/}

Similar to the arguments in favor of Adviser Act jurisdiction, the Commission could argue that a commodity pool is neither an "account, agreement, or transaction" but instead is an entity outside the scope of the exclusive

^{18/} Investment Company Act, Section 3(a). BFF proposes neither of the above.

^{19/} Id. at Section 2(a)(36).

^{20/} The staff recently issued a no action position for a commodity pool under the Investment Company Act as long as the pool did not invest in financial futures. Reavis & McGrath, Division of Investment Management, File No. 132-3 (April 17, 1979).

jurisdiction of the CFTC. 21/ Further, the Commission could take the position that, commodity pools per se—in contrast to commodity pool operators—are not regulated by the CEA, and, accordingly, Congress did not intend to place such pools under the exclusive jurisdiction of the CFTC. Again, this argument can be bolstered by language in the legislative history of the CFTC Act indicating that Congress contemplated some overlap of jurisdiction in various areas. 22/

Because the sponsor of a pool investing, to any extent, in commodities futures must register under the CEA, it may further be argued that an overbroad construction of the CFTC's exclusive jurisdiction would lead to illogical results, and would permit traditional mutual funds and others a means to circumvent the requirements of the Investment Company Act. For example, if the exclusive jurisdiction provision of the CFTC is rigidly applied, a pool which invests 1% of its assets in futures and 99% in securities would not be subject to the Investment Company Act since the pool operator is subject to registration under the CEA. To support the Commission's position that this could not have been Congress' intent, the Commission could point to Congressional findings in the statute which indicate that Congress was concerned only with the futures trading of such commodity pool operators. 23/ Further, the provision requiring registration of commodity pool operators states that registration is required "in connection with his business as a commodity

21/ Although it can be argued that a commodity pool, like a commodity trading adviser, is an entity not covered by the CFTC's exclusive jurisdiction, a pool itself may be considered an "agreement" involving futures trading and the interests in the pool may be deemed to be "accounts" involving futures trading. This argument may also cut against the Commission's assertions of jurisdiction over the capital formation stage of a commodity pool.

22/ See note 11, supra.

23/ 7 U.S.C. § 6(1)(2):

It is hereby found that the activities of commodity trading advisors and commodity pool operators are affected with a national public interest in that, among other things—

* * *

(2) their advice, counsel, publications, writings, analyses, and reports customarily relate to and their operations are directed toward and cause the purchase and sale of commodities for future delivery on or subject to the rules of contract markets * * *.

pool operator". 24/ The business of a commodity pool operator is noted in the definition as "trading in any commodity for future delivery on or subject to the rules of any contract market." 24/

Nonetheless, the same strong statutory language and legislative history as to exclusive jurisdiction and the comprehensiveness of the CEA pose difficult burdens for the Commission to overcome in litigating the applicability of the Investment Company Act to pools whose assets are primarily devoted to commodity futures, and only secondarily to financial futures. 25/ A preferable Commission litigating position, not presented by the BFF, would involve a pool investing in some traditional securities which, when combined with the investments in financial futures, constitute 40% of the value of the total assets of the pool. Of course, the most preferable case would involve a pool investing primarily, or to the 40% value figure, in traditional securities.

V. Alternatives Available to the Commission

In view of the serious questions discussed above, concerning the scope of the Commission's jurisdiction in this area, we believe that the Commission would be in a particularly difficult position were it to litigate, on the facts as we presently understand them, the applicability of the Investment

25/ 7 U.S.C. § 6(m):

It shall be unlawful for any commodity trading advisor or commodity pool operator, unless registered under this chapter, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor or commodity pool operator * * * .

24/ 7 U.S.C. § 2;

The term "commodity pool operator" shall mean any person engaged in a business which 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, but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.

25/ See pp. 5-7, supra.

Company Act and the Advisers Act to BFF and Elam, or to similarly situated pools and advisers. Because of the stringent requirements of the Investment Company Act, and the performance fee provision of the Advisers Act, we could expect any Commission attempt to require compliance with those Acts to be vigorously opposed. Moreover, the Commission has other regulatory concerns—e.g., its jurisdiction under the Securities Act and Exchange Act—which could be adversely affected by a court decision against the Commission in litigation under the Investment Company Act or Advisers Act. The more prudent course for the Commission, in our view, is to grant acceleration of the BFF registration statement, together with adequate disclosure that the staff believes registration under the Advisers Act may be needed, but to preserve the ability of the Commission later to assert its jurisdictional claims when, and if, it decides to do so. By proceeding in this manner, the Commission would provide itself an opportunity to attempt to reach some accommodation with the CFTC which would eliminate potentially inconsistent or conflicting regulation, while at the same time giving effect to the basic regulatory concerns of both agencies. In addition, this approach would seem to be the fairest to BFF since the staff has in the past allowed several other commodity funds investing in financial futures to accelerate.

As we see it, if the Commission wishes to grant acceleration, but preserve all possible claims of jurisdiction, there are at least four alternative courses available. As one alternative, the Commission by order could exempt financial futures funds like BFF, and their fund advisers, from the Investment Company Act and Advisers Act, respectively, 26/ while at the same time asserting the existence of jurisdiction under those statutes. The public interest finding to support such exemptive orders could be based upon the applicability of the registration, reporting, and other provisions of the Securities Act and Securities Exchange Act, coupled with the applicability of the CFTC's regulations governing commodity pool operators and commodity trading advisers. 27/ Moreover, notwithstanding a commodity trading adviser's exemption under the Advisers Act, the Commission would still retain the ability to invoke the antifraud provisions of Section 206 of that Act.

26/ Section 6(c) of the Investment Company Act empowers the Commission to

"conditionally or unconditionally exempt any person
* * * from any provision or provisions of this title
of of any rule or regulation thereunder, if and to
the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title."

Identical exemptive authority under the Investment Advisers Act is provided the Commission under Section 206A of that Act.

27/ The CFTC's regulations governing commodity pool operators and commodity trading advisers are set forth in 17 CFR Part IV, and were adopted on January 8, 1978. See 44 F.R. 1918 (Jan. 8, 1978).

The difficulty with the exemptive order approach, however, is that commodity pools and their advisers must first apply for exemption. At this point, we cannot predict with confidence that they will do so, particularly since approval by the Commission of any particular exemptive request cannot be assumed. Moreover, use of the exemptive order procedure would involve the Commission in a notice and comment proceeding for each individual application, and would necessitate an ad hoc rather than generic approach to questions of SEC-CFTC regulatory overlap.

A second alternative would involve adoption by the Commission of exemptive rules under the Investment Company Act and Advisers Act. In contrast to the issuance of exemptive orders, discussed above, the Commission's adoption of such exemptive rules would not depend upon application by particular funds or advisers, and would enable the Commission to adopt a generic position through a single notice and comment proceeding. This alternative would also provide the Commission with a measure of flexibility in tailoring exemptive relief. For example, pursuant to its authority under Section 202(a)(11)(F) the Commission could, if it wished, exempt commodity advisers from all provisions of the Advisers Act by adopting a rule to exclude them from the Act's definition of an "investment adviser." Or, the Commission could exempt commodity advisers by rule under Section 206A of the Advisers Act, and, as a result, retain applicability of the antifraud provisions of Section 206. At the same time, an exemptive rule proceeding, of all the alternatives available to the Commission, would likely engender the greatest amount of comment from segments of the securities industry as well as the commodities industry. Consequently, the precise outcome of such a rulemaking proceeding, and any litigation arising therefrom, cannot be predicted at this point.

A third alternative entails issuance of an interpretative release in which the Commission could construe the exemptions under the Investment Company Act and Advisers Act concerning government securities 28/ to encompass futures on government securities as well. While this approach may provide a generic resolution for funds like BFF and their advisers, it would seriously compromise the Commission's traditional position that rights to acquire securities are, themselves, separate securities. If the Commission were to take this approach, it would, for example, provide the securities options exchanges and the Options Clearing Corporation with a basis to argue that options on government securities are not subject to the registration requirements of the Securities Act. Moreover, the interpretative approach would provide, at best, only a partial resolution for commodity funds trading in financial futures. If such funds are engaged "primarily in the business of investing * * * or trading in securities," they are subject to the full panoply of regulation under the Investment Company Act, notwithstanding that their portfolios are confined to government securities. 29/

28/ See Section 3(a)(3) of the Investment Company Act; Section 202(a)(11)(E) of the Investment Advisers Act.

29/ The exemption in 3(a)(3) applies only to the 40% of assets test; under the primary purpose test of 3(a)(1), these pools would still be investment companies.

The fourth alternative available to the Commission is to proceed by issuance of staff no action letters. Through the issuance of no action letters, the Commission staff could express its views on the applicability of the Investment Company Act and Advisers Act to financial futures funds and their advisers. As a discretionary matter, however, the staff could advise the entities that it will not recommend enforcement action by the Commission, as long as the requirements of the Securities Act of 1933 and the Securities Exchange Act of 1934 are complied with, and the funds and their advisers remain subject to the regulation of the CFTC. While such a course is dependent upon the submission of a request by a financial futures fund and its adviser, it is not necessary to obtain notice and comment. Thus, the issuance of one or more no action letters will enable the Commission staff to provide generic guidance to the financial futures community without involving the Commission in what may prove to be a long and arduous exemptive process by rule or order.

Use of a no action approach does pose some potential problems. As a general practice, the staff's no action positions are taken in instances where the described activity does not appear violative of any applicable statutory or regulatory requirement of the securities laws. Here, the staff would be taking a no action position where the law is unsettled and, indeed, where the staff believes that applicable provisions of the Investment Company Act and Advisers Act may be violated. While the staff has on occasion taken no action positions even where violations of the securities laws are perceived, the task of providing rational bases for such positions is a difficult one. This difficulty would be enhanced in cases involving commodity pools and advisers, since the violations cannot be characterized as only technical in nature. In addition, because the no action position would, in effect, amount to an exemption from the 1940 Act, it may also be difficult to rationalize avoidance of the notice and comment procedures required for exemptive rules or orders. Finally, we cannot predict with confidence that judicial review will be unavailable over these no action positions, particularly if considered by the Commission. If review is obtained, its scope would likely be limited to an "arbitrary or capricious" standard, but the absence of a fully developed record could make the Commission's action more difficult to defend.

For the foregoing reasons, we believe the exemptive rule approach—coupled with disclosure in individual registration statements—is the course which would raise the least question as to the Commission's authority, and would likely be the easiest to defend. We are mindful, however, of the pressing time constraints under which the Commission may be required to act, and, therefore, we have no objection to the more expeditious no action approach.

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