State Securities Board

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July 7, 1997

Mr. David J. Stone
Andrews & Kurth L.L.P.
Texas Commerce Tower
600 Travis, Suite 4200
Houston, Texas 77002

Re: Daniel A. Breen, III; DB3 Holdings Corp.; Skiles Partners, L.P.; and Furtherfield Partners, L.P.

Dear Mr. Stone:

This is in response to your letter dated April 29, 1997, and received by this Agency on April 30, 1997, as well as several conversations we have had regarding the issues raised in the letter.

Your letter describes the structuring of a private investment company, or hedge fund, whose investment objective will be to achieve capital appreciation through investments in securities which are traded on organized domestic and international securities markets. You have identified the private investment company as Furtherfield Partners, L.P., a Texas limited partnership (the "Partnership"), whose general partner is Skiles Partners, L.P., also a Texas limited partnership (the "General Partner"). The sole general partner of the General Partner is DB3 Holdings Corp., a Texas corporation (the "Company"), and Mr. Daniel A. Breen ("Breen") is the sole officer and shareholder of the Company. You asserted that the ownership structure is due principally to tax considerations.

You have inquired as to the availability of a no-action recommendation by the staff of the State Securities Board in regard to requiring registration of Breen, the Company, or the General Partner as a dealer/investment adviser and/or agent under Section 12 of the Texas Securities Act for providing investment advice to the Partnership. In support of your request, you have submitted that the Partnership will be composed exclusively of sophisticated investors residing in New York and Texas that will be "accredited investors" as that term is defined under Rule 501(a) of Regulation D under the Securities Act of 1933, making it, according to your term, an "institutional accredited investor" under subparagraph (8) of Rule 501(a).

Sections 109.3(c)(1) and 139.1(b) of the Rules and Regulations of the State Securities Board provide basic guidance as to the scenario you have presented through describing the Partnership. You have also

cited an opinion expressed by this Agency's General Counsel in a letter dated August 1, 1995, directed to Mr. Joel A. Adler of McDermott, Will & Emery. In that letter, Ms. Rada Lynn Potts opined that Section 139.1(b) **does not** operate to render the investment adviser registration requirements of the Act inapplicable to investment advisers who advise "individual accredited investors" as that term is defined in Section 139.16(b)(1). The letter does, however, state that Section 139.1(b) renders the investment adviser registration requirements of the Act inapplicable to those persons who render investment advice only to *entities* described in Section 109.3(c)(1) – "accredited investors" as defined in Rule 501(a)(1)-(4), (7), and (8). My review of the opinion file for which the letter was drafted concludes that the question of the applicability of Rule 501(a)(8) to an entity composed entirely of individual accredited investors was neither posed nor contemplated. Historically, the staff and Board of this Agency have been of the position that an entity composed entirely of individual accredited investors is not equivalent to an "institutional investor."

Two decisive factors in the instant case are: (1) whether the Partnership is an "entity in which all of the equity owners are accredited investors" under Section 501(a)(8), which, you have submitted, the Partnership is, and (2) whether "accredited investors" in that instance can be interpreted to include *individual* accredited investors for the purposes of Section 109.3(c)(1). Our review of the minutes from the meeting at which the State Securities Board adopted Section 109.3 indicates that Section 109.3(c) was intended to provide an exemption for *entities*, **not** for *individuals*. Specifically, subparagraph (1) excludes "any self-directed employee benefit plan with investment decisions made solely by persons that are "accredited investors" as defined in Rule 501(a)(5)-(6); Rule 501(a)(5)-(6) relate only to an individual or "natural person." More clearly, paragraph (3) of Section 109.3(c) directly excludes "individuals" from the application of the exemption.

It is, therefore, our conclusion that in the application of Section 109.3(c) and Section 139.1(b), investment advisers to entities composed of *individual* accredited investors are not exempt from the registration requirements of this Agency. Respectfully, the staff must decline to recommend no action. Therefore, registration of Breen, the Company, or the General Partner (depending on the final structure of the relationship between these entities) will be required for their investment adviser activities relative to the Partnership.

I trust this answers your inquiry. Please feel free to write us if you need further information.

Very truly yours,

DENISE VOIGT CRAWFORD
Securities Commissioner

David Weaver
General Counsel

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