KENISA OIL COMPANY

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SEC LETTER

Advisers Act Sec. 202(a)(11)(B)

April 6, 1982

Section 202(a)(11) of the Investment Advisers Act of 1940 ('Act'), in part, defines an 'investment adviser' as

any person, who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities, but does not include . . . (B) any . . . accountant . . . whose performance of such services is solely incidental to the practice of his profession.

You represent that as an offeree representative in connection with the offering of limited partnership interests in an oil and gas partnership, one or more partners of an accounting firm, for compensation, would explain and discuss with prospective investors such matters as the risks of investing in the partnership and the past performance of similar offerings of the general partner of the partnership. Moreover, they would provide such prospective investors with summaries, explanations and other general assistance relating to the limited partnership interests. We believe that these activities would bring such partner or partners of the accounting firm within the definition of 'investment adviser.' See, Miller Companies of Dallas, Texas (pub. avail. February 21, 1975 'Miller.') For this purpose, it is immaterial that their compensation would be paid by the partnership, rather than the prospective investors, or that the prospective investors would be trustees to qualified pension and profit-sharing plans who retain the sole discretion and authority to make investment decisions regarding the assets of the plans.

Also, we believe that the exclusion in section 202(a)(11)(B) would not be available to such partner or partners of the accounting firm who would be included in the offering prospectus as offeree representatives because their activities as such could not be considered solely incidental to the practice of their profession as accountants. See, Miller, supra.

In a March 8, 1982, telephone conversation with Thomas G. Lovett of the Division of Market Regulation, your firm represented that any compensation to the accounting firm in connection with any advice given by it would be on a flat fee basis and would not be contingent upon whether an offeree to whom advice is given purchases the securities. That Division has advised us that, based upon that representation and the facts as represented in your letter, it would not recommend enforcement action to the Commission if one or more of the partners in the accounting firm engage in the described activities without registration as brokers or dealers under sections 15(a) of the Securities Exchange Act of 1934.

Elizabeth T. Tsai
Special Counsel

INCOMING LETTER

February 5, 1982

Mr. Sidney Cimmet
Chief Counsel
Division of Investment Management Regulation
Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549

Dear Mr. Cimmet:

This law firm represents Kenisa Oil Company, an Illinois general partnership the partners of which are Messrs. Kenneth S. Isaacs and Jonathan W. Isaacs. Kenisa Oil Company intends to form an Illinois limited partnership (hereinafter referred to as the 'Partnership') to engage in the business of buying and selling oil and gas leases and related transactions. In connection with the offering of the limited partnership interests, we have been asked whether one or more partners of an accounting firm may be included in the offering prospectus as an offeree representative where it performs the services described below, and whether such offeree representative must be registered as an investment advisor pursuant to the Investment Advisors Act of 1940 (the 'Act').

The services to be rendered by one or more partners of the accounting firm as an offeree representative will be limited to explaining and discussing with prospective investors the following:

(a) Past performance of similar offerings of the general partner of the Partnership;

(b) The risks of investing in the Partnership;

(c) The nature of the intended and proposed investments of the Partnership;

(d) The criteria used by the general partner to evaluate the proposed Partnership investments;

(e) The use and application of the proceeds received from the offering; and

(f) Summarize the terms and provisions of the Partnership agreement.

As an offeree representative, one or more of the partners of the accounting firm will not specifically evaluate the merits and risks of the prospective investment, nor will they value the interests of the Partnership. They will, however, provide plan trustees with summaries, explanations and other general assistance relating to the Partnership investment.

Assuming that on or more partners of an accounting firm meet the definition of an offeree representative as provided in Rule 146, we request your advice as to whether an offeree representative who performs the services described above but, who does not advise the offeree as to whether to invest in the particular investment is also within the definition of Section 202(a)(11) of the Act which defines an investment advisor as:

'Any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . .'

Rule 146 does not appear to require that the offeree representative make an investment recommendation to the offeree, but rather, that the offeree representative, together with the offeree, must be capable of evaluating the merits and risk of the prospective investment. Specifically, we request advice as to whether one or more partners of an accounting firm could perform the specific services described above without making recommendations as to the purchase or sale of an investment.

Additionally, we request advice as to whether an offeree representative to trustees of qualified pension and profit-sharing plans must also be registered under the Act where the plan trustees retain the sole discretion and authority to manage and administer the plan and make investment decisions regarding plan assets.

It is our view that one or more partners of an accounting firm can perform the services described above without recommending or advising the offerees whether or not such investment should be purchased. We believe that the definition of an offeree representative in Rule 146 encompasses accounting firms where it can be shown that they have such knowledge and experience in financial and business matters that they alone, or together with the offeree, are capable of evaluating the merits and risks of the investment without making a specific recommendation as to whether such investment should be purchased or sold. Additionally, it should be noted that one or more of the partners of the accounting firm are not in the business of regularly advising others, either directly or otherwise as to the value of securities or as to the advisability of investing in securities. Furthermore, compensation received as an offeree representative will be paid by the issuer and not by the offerees. Finally, the accounting firm does not hold itself out to the public as an investment advisor except to the extent it is an offeree representative in connection with this particular limited partnership offering.

The Act provides an exemption for an accountant whose performance of such investment advisory services is solely incidental to the practice of his profession (Section 202(a)(11)(B)). We believe that if accounting firm is subject to the Act, that the exemption from registration provided for accountants would be applicable under these circumstances.

In view of the fact that the offeree representative will be working with offerees who are plan trustees of qualified pension and profit-sharing plans, and the fact that the plan trustees will retain the sole discretion and decision making authority as to whether or not to invest in the limited partnership interests, we believe one or more of the partners of the accounting firm will not be giving advice of the type contemplated by the Act.

We would appreciate your advice with respect to this matter and a determination of the applicability of the Investment Advisors Act of 1940 and Securities and Exchange Act of 1934. Any interpretations or recommendations you feel are appropriate would be appreciated. If you have any questions or need further information, please do not hesitate to contact the undersigned.

Yours very truly,

KAMENSKY & LANDAN
Marvin Kamensky