

CFTC Letter No. 97-89**October 27, 1997****Division of Trading & Markets**

Re: Section 4m(1); Request for Relief from Commodity Pool Operator and Commodity Trading Advisor Registration

Dear :

This is in response to your letter dated April 22, 1997, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your letters dated June 30, 1997 and October 1, 1997; facsimiles dated July 11, 1997, August 6, 1997 and August 13, 1997; and telephone conversations with Division staff. By your correspondence, you request on behalf of A , the managing member of the Fund, relief from registration as a commodity pool operator (CPO) and commodity trading advisor (CTA) under Section 4m(1) of the Commodity Exchange Act (Act¹) in connection with A s involvement with the Fund.²

Based upon the representations made in your correspondence, we understand the relevant facts to be as follows. The Fund was organized as a limited liability company under the laws of Delaware on January 1, 1995 in order to serve as a private investment vehicle for B and members of his family ("T Family"). The Fund invests primarily in securities of United States and foreign issuers but, as an incidental part of its balanced portfolio strategy, intends to invest in commodity interests.

The managing member of the Fund is A , who has known B and been involved in the financial affairs of the T Family since March 1994. A has been involved in the investment banking field since 1978. From 1986 to 1994, he was an investment banker with U , where he most recently was a principal in mergers and acquisitions. A provides securities trading advice to the Fund, and you represent that any commodity interest trading advice that he provides to the Fund will be solely incidental to his provision of securities advice to the Fund. A is not registered with the Commission in any capacity, is not subject to statutory disqualification under section 8a(2) or 8a (3) of the Act³ and does not provide commodity interest trading advice to any other person.⁴

The Fund currently has more than \$98 million in assets, of which more than 99 percent is beneficially owned by the T Family. The Fund has five members ("Current Members"), all of whom receive daily statements, quarterly unaudited reports and annual statements that are

prepared and reviewed by an outside accounting firm. Specifically, the Current Members are:

(1) The "V Trust", which has invested all of its assets in the Fund and must approve all Fund investments in excess of \$5 million. As of June 30, 1997, the value of V's Trust account in the Fund was \$90.9 million. B, the settlor, sole beneficiary and trustee of V Trust⁵, is a qualified eligible participant, as defined in Rule 4.7(a)(1)(ii).

(2) The "W Trust", which has invested all of its assets in the Fund. As of June 30, 1997, the value of the W Trust's account in the Fund was \$990,582. B is the settlor of the W Trust, and his daughter D is the sole beneficiary. E, D's aunt, is the trustee of the W Trust.

(3) The "X Trust", which has invested all of its assets in the Fund. As of June 30, 1997, the value of the X Trust's account in the Fund was \$5.8 million⁶. B is the settlor and sole beneficiary of the X Trust⁷. A is the trustee of the X Trust.

(4) A, who is an accredited investor as defined in Regulation D under the Securities Act of 1933, as amended.⁸ As of June 30, 1997, the value of A's account in the Fund was \$540,741.

(5) C, who assists A with analytical and trading support for the Fund. He is a managing director of S and met B in April 1995 when he was president of Y, a registered investment adviser. C, an accredited investor, has worked in the investment banking and fund management areas for the past sixteen years. As of June 30, 1997, the value of C's account in the Fund was \$181,419.

In order to address certain estate planning and tax issues as they arise, B may wish, through an estate planning or tax-favored vehicle such as a trust, to make additional or alternative investments in the Fund from time to time for the T Family ("New Member"). You request that the Fund be permitted to accept such an investment from a New Member without being required to seek confirmation from the Division that the Fund would not become a pool and A would not become a CPO if the Fund accepted such an investment from a New Member.

Based upon the foregoing representations, the Division will not recommend that the Commission take any enforcement action against A under Section 4m(1) of the Act for failure to register as a CPO and as a CTA in connection with his involvement with the Fund.⁹ The Division further

confirms that this no-action position will not be affected by the investment of a New Member in the Fund, provided that any such New Member is a member of the T family.

The relief issued by this letter does not excuse A from compliance with any other applicable requirements contained in the Act¹⁰ or the Commission's regulations issued thereunder. For example, he remains subject to the antifraud provisions of Section 40 of the Act,¹¹ to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations and all other applicable provisions of Part 4.

This letter is based upon the representations that you have made to us. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this regard, we request that you notify us immediately in the event that the operations or activities of A or the Fund, including the composition of its membership, change in any way from those as represented to us. Further, this letter represents the position of the Division only. It does not necessarily represent the views of the Commission or any other division or office of the Commission.

If you have any questions concerning this correspondence, please contact me or Barbara Stern Gold, Assistant Chief Counsel, at (202) 418-5450.

Very truly yours,

Susan C. Ervin

Acting Director

¹ 7 U.S.C. §6m(1) (1994).

² Your April 22 letter also requested relief pursuant to Rule 4.13, which exempts certain persons from registration as a CPO. However, by your June 30 letter, you modified your request to, among other things, eliminate any reference to Rule 4.13. Commission rules referred to herein are found at 17 C.F.R. Ch. I (1997).

Your April 22 and June 30 letters further requested relief on behalf of S and C, an MCM employee. However, you have since withdrawn this portion of your request because S and C will not be acting as commodity pool operators (CPOs) or commodity trading advisors (CTAs) with respect to the Fund.

³ 7 U.S.C. §12a(2) or 12a(3) (1994).

⁴ S, which is jointly owned by B and A, provides general market research and other services, such as recordkeeping, accounting, office space, trading-related support and other back-office functions, to the

Fund.

⁵ The V Trust was established under the laws of the state of California. In response to staff inquiries, you explain that, under California state law, a trust that provides for one or more successor beneficiaries after the death of the settlor is not invalid, merged or terminated where there is one settlor who is the sole trustee and sole beneficiary during the settlor's lifetime.

⁶ You state that it is anticipated that the X Trust will withdraw approximately \$5 million from the Fund in the near future for the purpose of making other investments.

⁷ The X Trust is a grantor retained annuity trust.

⁸ See 17 C.F.R. § 230.501 (1997).

⁹ Cf. Rule 4.14(a)(5), which provides that a person is not required to register as a CTA if the person is exempt from registration as a CPO and the person's commodity interest trading advice is directed solely to, and for the sole use of, the pool(s) for which it is so exempt.

¹⁰ 7 U.S.C. § 1 et seq. (1994).

¹¹ 7 U.S.C. § 60 (1994).