

CFTC Letter No. 99-43**September 15, 1999****No-Action****Division of Trading & Markets**

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

Dear :

This is in response to your letter dated July 2, 1998 to the Division of Trading and Markets (Division) of the Commodity Futures Trading Commission (Commission), as supplemented by your facsimile transmissions dated August 18, 1998 and January 7, 1999 and telephone conversations with Division staff. By your correspondence, you request confirmation of your view that: (1) the Partnership will not become a commodity pool within the meaning and intent of Rule 4.10(d)(1) ¹ if it invests in commodity pools; and (2) the Partnership's general partner, the General Partner, will not become a commodity pool operator (CPO) or a commodity trading advisor (CTA) within the meaning and intent of Section 1a(4) or 1a(5) of the Commodity Exchange Act (the Act ²), respectively, as a result of its operating and advising the Partnership. The staff has elected to treat your request as a request for a no-action position from the CPO registration requirements of Section 4m(1) of the Act. ³ For the reasons set forth below, we will grant the request.

Facts

Based upon representations made in your correspondence, we understand the facts to be as follows. The Partnership, a limited partnership, was formed on January 1, 1996 to serve as an investment vehicle for the immediate members of the X family. It was funded with the proceeds from the sale of the family's pharmaceutical business. To date, the X family has invested approximately \$26 million in the Partnership. The Partnership is comprised of the General Partner and ten limited partners.

The limited partners of the Partnership consist of four natural persons and six trusts. The natural persons are A, his sons B and C, and D. Each of these natural persons, with the exception of D, is a qualified eligible participant (QEP) and a trustee of one or more of the trusts. The beneficiaries of all of the trusts are lineal descendants of A. Specifically, the beneficiaries are: E, the daughter of A; her two minor children; and the three minor

children of her brothers, B and C .

D , the remaining limited partner and the only participant who is not a lineal descendant of A (other than A himself), is a CPA and a long-term advisor to the X family. He served as treasurer and chief financial officer of the X family business from April 1983 until the business was sold in 1994. The X family invited D to participate in and assist in managing the Partnership based on his extensive financial background and the trust they reposed in him after a fifteen-year business relationship. Though not a QEP, D has a net worth of approximately \$800,000. He has invested \$335,000 in the Partnership, which represents approximately 1.3% of the Partnership s total assets.

The General Partner of the Partnership, being itself a limited partnership, has as its general partner, Y . B , C and D each own a 33% limited partnership interest in the General Partner and are the shareholders, directors, and officers of Y . The General Partner receives an annual fee equal to 1% of the Partnership s assets and 20% of the Partnership s net profits. Additionally, the Partnership is the sole collective investment vehicle that trades commodity interests that the General Partner will operate.⁴

Discussion

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, 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.⁶ 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.⁷

In light of this discretion, and in connection with its adoption of Rule 4.10(d)(1), the Commission 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.⁸ 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.⁹

Based upon your representations, among others, that: (1) each member of the Partnership, including the General Partner, effectively is an immediate family member or a long-term business associate of another member; and (2) the Partnership is the sole collective investment vehicle that trades commodity interests that the General Partner will operate, 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 Partner to register as a CPO. Accordingly, the Division will not recommend that the Commission commence any enforcement action against the General Partner for failure to register as a CPO under Section 4m(1) of the Act if the Partnership trades commodity interests.

We further find that the General Partner will become a CTA as defined in Section 1a(5) of the Act because it will be providing advice to others about the advisability of trading commodity interests for compensation or profit. However, in advising the Partnership, the General Partner may rely upon the exemption from CTA registration set forth in Section 4m(1) of the Act¹⁰ based upon your representations that: (1) the General Partner will not hold itself out to the public as a CTA; and (2) the General Partner will be providing advice to less than fifteen persons, *i.e.*, four natural persons and six trusts (the beneficiaries of which are six natural persons).

This letter does not excuse the Partnership or the General Partner from compliance with any otherwise 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 the Commission's regulations and the reporting requirements for traders set forth in Parts 15, 18, and 19 of the regulations. Moreover, this letter is applicable to the General Partner solely in connection with its operating and advising the Partnership.

This letter, and the no-action position 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 that the activities of the Partnership or the General Partner 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 any other office of the Commission. If you have any questions concerning this correspondence, please contact Helene D. Schroeder, an attorney on my staff, at (202) 418-5450.

Very truly yours,

I. Michael Greenberger

Director

¹ Commission rules referred to herein are found at 17 C.F.R. Ch. I (1998).

² 7 U.S.C. §§ 1a(4) and 1a(5) (1994), respectively.

³ U.S.C. § 6m(1) (1994).

⁴ Because the General Partner receives this compensation for purposes other than reimbursement for the ordinary administrative expenses of operating the pool, the General Partner does not qualify for the exemption from CPO registration set forth in Rule 4.13(a)(1) for a person, who, among other things, operates only one pool at any time and does not receive any compensation for operating the pool, except reimbursement for the ordinary administrative expenses of operating the pool.

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

any 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 See H.R. No. 93-975, 93d Cong., 2d Sess. 79 (1974).

⁷ *Id.* at 29.

⁸ 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.

⁹ *Id.*

¹⁰ This Section provides an exemption from registration to any CTA who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than 15 persons and who does not hold himself out generally to the public as a CTA.