

**CFTC Letter No. 99-45****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 October 26, 1998 to the Division of Trading and Markets ( Division ) of the Commodity Futures Trading Commission ( Commission ), as supplemented by your letters dated December 23, 1998, February 16, 1999 and July 30, 1999 and telephone conversations with Division staff, whereby you request our interpretation that X will not become a commodity pool within the meaning and intent of Rule 4.10(d)(1)<sup>1</sup> if it trades commodity interests and that V will not become a commodity pool operator ( CPO ) within the meaning and intent of Section 1a(4) of the Commodity Exchange Act ( Act<sup>2</sup>) as a result of operating U . 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.<sup>3</sup> For the reasons set forth below, we will grant the request.

***Facts***

Based upon the representations made in your correspondence, we understand the facts to be as follows. U is a limited liability company which operates as a private investment fund. As of June 30, 1999, it had a net asset value of approximately \$87 million. The members of U are V , A , his wife B and C , a long-time colleague and employee of A . V is the managing member of U . The partners of V are A and B , each holding a ten percent interest, and an irrevocable trust for the benefit of the three children, holding an eighty percent interest. A is the general partner of V . C is a special limited partner of V solely for the purpose of receiving a return on a particular investment that V has made with his assistance. V receives no compensation for acting as the managing member of U , and U is the only fund operated by V . Interests in U will not be assigned, will only be transferred to a member s spouse, lineal descendant or the spouse of a lineal descendant, or to a trust for the benefit of such a spouse, lineal descendant or spouse of a lineal descendant and will not be transferred for consideration (e.g., interests will be transferred by gift).

A has been registered as a CPO since June of 1982 and he has more than thirty years experience in investment activities. Among other things, he has managed numerous private investment partnerships.

C has been registered as a CPO since May of 1987 and he has been a business associate of A since 1980. From 1973 through 1983 he held executive positions with various banks and finance companies. He has been affiliated with Y, of which A served as the president and sole shareholder, since 1983 and has been a general partner of W and X, of which A served as the managing general partner. C is an attorney and a qualified eligible participant, as that term is defined in Rule 4.7(a).

### *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.<sup>4</sup> In adding the CPO and CTA definitions to the Act,<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

In light of this discretion, and in connection with its adoption of Rule 4.10(d), 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.<sup>8</sup> 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.<sup>9</sup>

Based upon your representations, among others, that: (1) each member of U, including V, its managing member, effectively is an immediate family member of or a long-time business associate of another member; (2) two of the three non-managing members of U are registered CPOs and have been so registered for more than ten years each; and (3) the third non-managing member is the spouse of one of the two other non-managing members, 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 V to register as a CPO. Accordingly, the Division will not recommend that the Commission commence any enforcement action against V for failure to register as a CPO under Section 4m(1) of the Act if U trades commodity interests.

This letter does not excuse U or V from compliance with any other applicable requirements contained in the Act or in the Commission's regulations thereunder. For example, each remains subject to all applicable antifraud provisions of the Act and to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the regulations. Moreover, this letter is applicable to V solely in connection with its serving as the managing member of U.

This letter, and the no-action position provided herein, are based upon the representations you have made to us. Any different, change or omitted material facts or circumstances might render this letter void. You must notify us immediately in the event the activities of U or V 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 of any other office or division of the Commission. If you have any questions concerning this correspondence, please contact Barbara S. Gold, Assistant Chief Counsel, at (202) 418-5450.

Very truly yours,

I. Michael Greenberger

Director

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

<sup>2</sup> 7 U.S.C. §1a(4) (1994).

<sup>3</sup> 7 U.S.C. §6m(1) (1994).

<sup>4</sup> Section 1a(4) of the Act defines the term commodity pool operator to mean:

[A]ny 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.

<sup>5</sup> Section 1a(5) contains the definition of the term commodity trading advisor, which is not at issue here.

<sup>6</sup> See H.R. No. 93-975, 93d Cong., 2d Sess. 79 (1974).

<sup>7</sup> *Id.* at 29.

<sup>8</sup> 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.

<sup>9</sup> *Id.*