## Letter from the Division of Investment Management to Section 13(f) Confidential Treatment Filers

**Section 13(f) Confidential Treatment Requests**

June 17, 1998

Dear [Section 13(f) Confidential Treatment Filer]:

Recent events have focused significant attention on the obligation of institutional investment managers to file quarterly reports with the Commission on Form 13F under Section 13(f) of the Securities Exchange Act of 1934 ("Exchange Act") and the ability of those managers to obtain confidential treatment for information filed on the Form. 1

Form 13F is used by institutional investment managers that exercise investment discretion over accounts holding certain equity securities having an aggregate fair market value of at least $100 million on the last trading day of any month of any calendar year. Questions have been raised both about the Commission's obligation to make Form 13F information public, and the criteria used by the Division of Investment Management ("Division"), under delegated authority from the Commission, when evaluating an application for confidential treatment of that information ("CT Application").

We are writing this letter to inform investment managers with Section 13(f) reporting obligations of the position of the Division regarding Form 13F confidential treatment requests. The Division's position is that these requests can be granted only under certain limited circumstances.

The Division is concerned that many Form 13F filers have concluded that confidential treatment of information contained on Form 13F will be granted automatically upon a superficial showing of need. Such a conclusion is erroneous. Under the Exchange Act and the Freedom of Information Act ("FOIA"), which set out the requirements under which the Commission may grant confidential treatment for Form 13F information, such treatment is available only in those instances in which an investment manager demonstrates in its CT Application that confidential treatment is in the public interest. As discussed more fully below, a CT Application must be limited to securities holdings that fall into one or more of the narrowly defined categories established by legislation or by the Commission, and the bases for seeking confidential treatment must be fully substantiated in the CT Application itself. The Division will deny any CT Application that does not provide the Division with a sufficient basis upon which to evaluate the request.

Set out below is a brief summary of the legislative history of Section 13(f) and the governing statutory authority, followed by a discussion of the general requirements that apply to a CT Application. We then discuss certain requirements that apply to a CT Application for an ongoing program of acquisition or disposition. This letter also clarifies the staff's position on the confidentiality of a CT Application itself.

**Discussion**

**Background**

In 1975, Congress enacted Section 13(f) to increase the public availability of information regarding the purchase, sale, and holdings of securities by institutional investors. Under that section, an investment manager that exercises investment discretion with respect to accounts holding certain equity securities having an aggregate fair market value of $100 million or more must file quarterly reports of those holdings on Form 13F. Section 13(f) mandates that the Commission tabulate the information appearing in the quarterly reports and disseminate the information to the public.

The wording and legislative history of the statute make clear Congress' intent that Section 13(f) information be promptly disseminated to the public. Congress also recognized that, in some instances, disclosure of certain types of information could have harmful effects, not only on an investment manager, but also on the investors whose assets are under its management. To balance these competing interests, Section 13(f)(3) authorizes the Commission to delay or prevent the public disclosure of information as it determines to be necessary or appropriate in the public interest or for the protection of investors.

Congress specified two categories of securities information that the Commission, upon request, should exempt from disclosure on reports filed under Section 13(f): (1) information that would identify securities held by the account of a natural person or certain estates or trusts; and (2) information that would reveal an investment manager's program of acquisition or disposition that is ongoing both at the end of a reporting period and at the time that the investment manager's Form 13F is filed. The legislative history of Section 13(f) emphasizes the second of these categories in pointing out that: "[t]he Committee believes that generally it is in the public interest to grant confidential treatment to an ongoing investment strategy of an investment manager. Disclosure of such strategy would impede competition and could cause increased volatility in the market place."2

Under its authority to delay or prevent the public disclosure of certain information in the public interest or for the protection of investors, the Commission has supplemented the categories of information specified by the Congress with two other categories of information that are eligible for confidential treatment. Those other categories are: (1) open risk arbitrage positions; and (2) investment strategies that utilize block positioning.

**General Requirements for a CT Application**

Under Commission rules, an institutional investment manager must provide a sufficient factual basis in its CT Application to support a confidential treatment request for securities holdings that are required to be disclosed on Form 13F. Rule 24b-2 under the Exchange Act, which sets out the procedures for requesting confidential treatment for information required to be filed under the Exchange Act, requires that the CT Application include "a statement of the grounds of objection [to public disclosure] referring to, and containing an analysis of, the applicable exemption(s) from disclosure under the Commission's rules and regulations adopted under the Freedom of Information Act."3 In meeting this requirement, the CT Application must include a description of the investment strategy used by the manager (whether it is an ongoing program of acquisition or disposition, block positioning, etc.), as well as an analysis supporting the applicable exemption. A CT Application that does not provide the Division with a sufficient basis to evaluate the request or that provides only conclusory or generalized information will be denied.

**Form 13F Instructions**

General Instructions D.2.a.-e. to Form 13F apply to an investment manager seeking confidential treatment for information contained on the Form based upon a claim that the subject matter is confidential, commercial or financial information. These instructions are specifically designed to elicit pertinent information from the investment manager to support its request. A CT Application must contain complete and accurate information in response to these instructions to allow the Division to evaluate fully the request.

**Confidentiality Period Must Be Reasonable**

The Commission is required to delay or prevent disclosure of Form 13F information only to the extent necessary to protect the public interest. Rule 24b-2(b)(2) requires that the applicant justify the time period for which confidential treatment is sought. Every CT Application, therefore, should request confidential treatment only for the limited period of time necessary to effectuate the investment manager's strategy. The CT Application must support the time period for which confidential treatment is requested, in the context of the particular trading strategy involved.

**Requirements for Programs of Acquisition or Disposition**

In the Division's experience, the majority of investment managers that have not sufficiently supported in writing their confidential treatment requests have claimed to have ongoing programs of acquisition or disposition. In the past, when dealing with such requests, the Division has permitted an investment manager to supplement its CT Application when the manager did not include sufficient information to support the request. In the future, the Division's review generally will be limited to information included in the CT Application, and those applications that fail to substantiate their requests will be denied.

The General Instructions to Form 13F seek information, in addition to that described above, concerning at least four elements that are particularly relevant to the Division's assessment of a CT Application for an ongoing program of acquisition or disposition. A CT Application that does not provide enough information to satisfy these elements will be denied. These elements are as follows:

**Investment Manager Must Have a Specific Program**

First, a CT Application for a program of acquisition or disposition must detail the specific investment program being followed, including information regarding the measures taken during that quarter toward effectuating the program, and information regarding the program's ultimate objective. In describing the steps taken toward effectuating the program, the investment manager should include information about purchases or sales of the security that took place during the quarter. The CT Application must also distinguish the securities holdings that are in a program of acquisition from those that are in program of disposition. The Division believes that information regarding market transactions typically provides strong support for the existence of a program of acquisition or disposition. Mere indications, however, that the manager's overall position in a security had changed during a quarter are, by themselves, insufficient because this information would not necessarily indicate that the transaction(s) were made pursuant to a program of acquisition or disposition within the meaning of Form 13F.

As discussed in more detail below, General Instruction D.2.d. requires that the investment manager demonstrate the likelihood of substantial harm to its competitive position by the public disclosure of its securities positions. In the Division's view, in general, until such time as the manager begins buying or selling securities, it would be difficult to demonstrate harm to the manager because, without publicly reported changes in manager's holdings, the public would be unable to determine whether the manager intended to buy additional shares, sell shares, or continue to hold the existing position.

**Program Must Be Ongoing**

Second, the investment manager must follow General Instruction D.2.c., which requires that the program of acquisition or disposition be ongoing both at the end of the quarter and at the time of the filing. A CT Application should therefore provide information that is sufficient to demonstrate that the program continues through the date of the filing. As an example, the manager might indicate in its CT Application whether any purchases or sales of the security took place between the end of the quarter and the time of the filing.

**Disclosure Would Reveal the Investment Strategy**

Third, as discussed in General Instruction D.2.b., the investment manager must demonstrate that disclosure of the securities positions would reveal the manager's investment strategy. In meeting this requirement, a CT Application must include information demonstrating how the purchases or sales of particular securities that took place during the quarter relate to the manager's overall

investment strategy for the securities, and how the public would be able to discern the manager's strategy based on public disclosure of those purchases or sales.

**Demonstrable Harm from Disclosure**

Finally, General Instruction D.2.d. requires that the investment manager demonstrate that the failure to grant the request for confidential treatment would present a likelihood of substantial harm to the manager's competitive position. In meeting this requirement, a CT Application should analyze how the disclosure of the information would affect the underlying securities holdings. An investment manager should discuss whether its ability to acquire or liquidate a securities position, in the context of the market for those securities, is likely to be impaired if its investment strategy were made known to the public. It may be difficult, for example, for an investment manager to justify the need for confidential treatment when disposing of a small position in a widely held company, because it would typically be unlikely that the public's awareness of that investment manager's strategy would materially affect the price of those securities.

General Instruction D.2.c. requires an investment manager to provide information indicating whether the existence of the investment strategy may otherwise be known to the public. CT Applications should affirmatively state that information regarding the investment program is not publicly available. Information regarding the investment manager's strategy that is already publicly available cannot satisfy the requirements for confidential treatment because additional disclosure of that information would not result in harm to the manager. If, for example, an applicant requesting confidential treatment for an ongoing program of acquisition or disposition has indicated publicly that it is or may be acquiring or disposing of the security for which confidential treatment has been requested, the matter will be deemed not to be confidential and that portion of the confidential treatment request will be denied.

**Confidentiality of the CT Application**

A request for confidential treatment that is granted by the Division under Rule 24b-2 under the Exchange Act will extend to all documentation submitted in connection with the confidential treatment request, including the CT Application itself. 4 A CT Application filed according to the instructions to that rule is afforded the same protection as the confidential information that is the subject of the request, if granted. Because CT Applications which include a request for confidential treatment for the application itself, and which are granted, obtain at least the same degree of protection as the underlying securities positions, a request for the CT Application made under the FOIA will be denied.5

**Implementation**

As discussed above, the Division has amended its procedures for reviewing CT Applications, and will no longer notify filers of deficiencies in their applications and request further information. The Division believes that investment managers may need additional time to consider the guidance described in this letter and prepare their CT Applications. Therefore, the following implementation schedule will apply:

- CT Applications for the quarter ended June 30, 1998 should be filed within 45 days after the end of the quarter, as provided in Rule 13f-1 under the Exchange Act, and may, at an investment manager's option, satisfy the standards as discussed in this letter;

- CT Applications for the quarter ended September 30, 1998 and for all subsequent quarters should be filed within 45 days after the end of the relevant quarter, and must satisfy the standards as discussed in this letter; and

- CT Applications pending with the Division, for which the Division neither has granted nor denied confidential treatment, and CT Applications for the quarter ended June 30, 1998 for

which an investment manager opted not to satisfy the standards as discussed in this letter, may be amended until the close of business on September 30, 1998. Thereafter, all CT applications pending with the Division will be evaluated based on the guidance provided in this letter.

Investment managers should follow the procedures set out in Rule 24b-2 when filing any amendments. Any questions regarding this letter, or Section 13(f), or the status of any particular application for confidential treatment of Form 13F information, should be directed to the Division's Office of Chief Counsel at (202) 942-0660.
Very truly yours,

Douglas Scheidt
Associate Director and Chief Counsel

**Footnotes**

1 In one such case, numerous press accounts reported, based, it would appear, on information contained on an institutional investment manager's Form 13F, that the manager had liquidated its holdings in a publicly traded company. These press accounts triggered a temporary, but significant, decline in the price of the company's securities. Later press accounts indicated that the earlier stories were inaccurate and attributed the confusion about the investor's holdings to the operation of the Commission's rules on confidential treatment of information filed on Form 13F. See, e.g., Norris, A Misinterpretation of a Buffett Filing Stings Wells Fargo, N.Y. Times (Aug. 22, 1997) at A1; Fromson, SEC Disclosure Exemption Questioned, Wash. Post (Aug. 23, 1997) at C1; Mixup Sheds Light on Confidential Stock Buys, Chicago Sun-Times (Aug. 25, 1997) at 43.

2 Report of Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 87 (1975).

3 Rules adopted by the Commission under the federal securities laws, including Rule 24b-2 under the Exchange Act, require, among other things, that a CT Application contain an analysis of the applicable FOIA exemption. For example, Exemption 4 of the FOIA states that "trade secrets and commercial or financial information obtained from a person and privileged or confidential" may be withheld from disclosure.

4 This represents a change in the Division's policy. The Division is aware that Form 13F filers previously may have had a concern that the CT Application itself would not be afforded confidential treatment based upon a 1983 Commission release stating that, in general, requests for confidential treatment are not protected under the FOIA. Release No. FOIA-65, May 5, 1983, 48 F.R. 21112. The Commission's Office of the General Counsel recently has advised the Division that Release No. FOIA-65 applies only to requests for confidential treatment submitted under the FOIA, 17 CFR § 200.83 (1997), and not to CT Applications made pursuant to Rule 24b-2 under the Exchange Act. Applicants filing under Rule 24b-2, therefore, should not fail to include relevant information in the CT Application based upon a concern that the request itself may be disclosed. Investment managers should also request confidential treatment for the CT Application itself under Rule 24b-2.

5 The FOIA specifies the procedures for appealing a denial. See generally 17 CFR § 200.80 (1997).