

PUBLIC

28 DEC 1994

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 94-722-CC
Caxton Corporation
File No. 132-3

Your letter of November 3, 1994 requests assurance that we would not recommend that the Commission take any enforcement action under the Investment Company Act of 1940 ("1940 Act") if, as more fully described in your letter, Troye Limited Partnership ("Troye") counts the defined contribution plan sponsored by Caxton Corporation ("Caxton"), Troye's general partner, as a single beneficial owner of Troye's securities for purposes of section 3(c)(1) of the 1940 Act.

According to your letter, Caxton employs approximately 120 people. The company has established the Caxton Corporation Savings & Profit-Sharing Plan (the "Plan"), a participant-directed defined contribution plan qualified under section 401(a) of the Internal Revenue Code and subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The Plan has four trustees, all of whom are senior officers of Caxton. The Plan permits Caxton employees to invest in four options: three investment companies registered under the 1940 Act and Troye. Caxton manages Troye's portfolio, which is invested primarily in securities and commodities. Troye has assets of approximately \$328 million, including approximately \$20 million invested by Caxton employees through the Plan. Caxton receives no management or incentive fees with respect to that portion of Troye's assets contributed by Caxton employees.

Troye is not registered under the 1940 Act in reliance on section 3(c)(1) of the Act, which excepts from the definition of investment company any issuer whose outstanding securities are beneficially owned by not more than 100 persons.¹ As of September 30, 1994, Troye had 43 limited partners, counting the Caxton Plan and four other participant-directed defined contribution plans as single beneficial owners.

In PanAgora Group Trust (pub. avail. Apr. 29, 1994), the staff concluded that, for purposes of determining compliance with the 100-person limit of section 3(c)(1), each participant in a participant-directed defined contribution plan who chooses to invest in a private investment company must be counted as an individual beneficial owner of that company's securities. The PanAgora position would require Troye to count each Caxton employee who has elected to invest in Troye through the Caxton Plan as a beneficial owner of Troye.

¹ Section 3(c)(1) also requires that the issuer is not making and does not propose to make a public offering of its securities. You represent that Troye satisfies this requirement.

The investment vehicle proposed in the PanAgora letter was to be created as an investment vehicle for a variety of plans unaffiliated with the sponsor or the investment vehicle. By contrast, the Caxton Plan participants who invest in Troye are investing in a partnership for which Caxton acts as sponsor, general partner, and investment adviser, and with which Caxton employees have substantial contact and familiarity. You represent that many Caxton employees are involved in the operation of Troye and that all Caxton employees have easy access to those employees and to the four senior Caxton officers who serve as the trustees of the Caxton Plan. Thus, you assert that Caxton Plan participants have complete and accurate information about Troye sufficient to make an informed investment decision, including information regarding Troye's investment objectives, portfolio, and performance.

Based on the foregoing facts and representations, we would not recommend enforcement action² to the Commission if, for purposes of section 3(c)(1), Troye counts the Caxton Plan as a single beneficial owner of Troye's securities.³ Our position applies notwithstanding the addition of new employees under the Caxton Plan, provided that these employees will have the same access to senior management and pertinent information about Troye's operations and investments that current Caxton employees have, as described in your letter.

Because our position is based upon the unique facts and representations in your letter, any different facts or circumstances would likely require a different conclusion. Further, this response expresses the Division's position on

² Our position is based specifically on the relationship between Caxton and Troye and the unusual degree of access Caxton employees have to information about Troye. This letter should not be read as reversing the interpretive position expressed in PanAgora or as agreeing with any other argument set forth in your letter.

³ Our conclusion applies only to the Caxton Plan and does not extend to the other limited partners of Troye that are participant-directed defined contribution plans. Simultaneously with this response, the staff is issuing a letter providing until December 31, 1995 for private investment companies meeting certain conditions to come into compliance with the PanAgora position. Until then, assuming Troye meets the specified conditions, it can continue to count each of those other plans as a single beneficial owner of its securities. No later than December 31, 1995, the other plans must liquidate their investments in Troye, or Troye must count each participant invested in Troye through those Plans as a beneficial owner of Troye for purposes of section 3(c)(1).

enforcement action only and does not purport to express any legal conclusions on the issues presented.

A handwritten signature in cursive script that reads "Barry A. Mendelson". The signature is written in black ink and has a fluid, connected style.

Barry A. Mendelson
Senior Counsel

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Section 3(c)(1)

November 3, 1994

Barbara Green, Esq.
Deputy Director
Division of Investment Management
450 5th Street, N.W.
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ACT ICA of 1940
SECTION 3(c)(1)
RULE _____
PUBLIC
AVAILABILITY Dec. 28, 1994

Re: Caxton Corporation §401(k) Plan - Troye
Limited Partnership

Dear Ms. Green:

On behalf of our client, Caxton Corporation ("Caxton"), we hereby request the staff of the Division of Investment Management to concur in our view that the position taken by the Division in the no action letter concerning PanAgora Group Trust (Apr. 29, 1994) should not preclude continued investment in Troye Limited Partnership ("Troye") by the Caxton Corporation Savings & Profit-Sharing Plan (the "Caxton Plan"), a participant-directed section 401(k) plan.

In the PanAgora letter, the Division took the position that, if a qualified plan which invested in the group trust thereunder consideration allowed plan participants to allocate their individual account balances to the group trust and/or to allocate their investments in the group trust among the various investment options provided by the group trust through its sub-trusts, each individual participant who exercised such choice would be considered to be a beneficial owner of the group trust for the purposes of calculating the 100-beneficial-owner limit imposed by Section 3(c)(1) of the Investment Company Act as a condition of exclusion from "investment company" status and regulation under such Act. As you know, many people interpreted the PanAgora letter as a reversal of the Division's prior published position

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on this issue taken in Intel Corporation (Nov. 18, 1992).

In a subsequent letter to Edward Fleischman of this Firm, the staff delayed the effective date of the interpretive position taken in the PanAgora letter until January 1, 1995. Edward H. Fleischman (June 30, 1994). The staff also requested that interested parties submit information in writing which would aid the Division in clarifying its position concerning the interaction of participant choices of investments in qualified plans and the Section 3(c)(1) exclusion from the definition of "investment company". Specifically, the staff requested that any request for clarification should distinguish the fact pattern submitted from the fact pattern described in the PanAgora letter.

The purpose of this letter is to request that the staff interpret its position in the PanAgora letter in a manner that will permit Troye to continue to count the Caxton Plan as a single beneficial owner for purposes of Section 3(c)(1), even though Troye includes investments by the Caxton Plan pursuant to participant direction. We believe that the factors set forth below distinguish the fact situation which exists at Caxton/Troye from the fact situation described in the PanAgora letter.

Description of Caxton/Troye

At September 30, 1994, Caxton employed approximately 120 people. Caxton is the general partner of Troye, a Connecticut limited partnership which commenced operations in February 1983. The business of Troye is investing in securities and commodities. Caxton has sole discretion over, and responsibility for, Troye's transactions. Caxton itself makes the majority of the trading decisions on behalf of Troye and, in addition, exercises discretionary authority to allocate funds to independent discretionary traders. At September 30, 1994, the assets of Troye exceeded \$328 million.

Troye structured its operations and admitted limited partners in reliance upon the exclusion from the definition of "investment company" permitted by Section 3(c)(1) of the Investment Company Act as interpreted prior to the issuance of the PanAgora letter. Limited partnership interests in Troye were offered in transactions which are exempt from registration under the Securities Act of 1933. Troye has not made, is not making and does not propose to make a public offering of its securities. After giving effect to the attribution principles which must be used for the purposes of Section 3(c)(1) of the Investment Company Act (other than any attribution arising from the application of the PanAgora letter), Troye has fewer than 100 beneficial owners of its securities.

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The Caxton Plan was adopted on or about April 1, 1983 and is intended to be a qualified plan within the contemplation of section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code"). The Caxton Plan is subject to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA").

Four senior officers of Caxton (Caxton's President, its Controller, its Treasurer and its General Counsel), all of whom are sophisticated and knowledgeable in investment matters and all of whom are intimately involved with the affairs of Troye, are the trustees of the Caxton Plan. Troye is one of four vehicles that are made available to participants in the Caxton Plan for investment of their account balances thereunder. These vehicles were all selected by the trustees of the Caxton Plan in the exercise of their ERISA fiduciary duty. While the trustees of the Caxton Plan allow employees to allocate portions of their assets in the Caxton Plan to Troye, neither Caxton nor any of the trustees recommends that any employee elect to make such an allocation. Furthermore, in the case of the Caxton Plan, Caxton has waived the management and incentive fees that Caxton receives with respect to the investments by other limited partners in Troye.

At December 31, 1993, the assets of the Caxton Plan aggregated \$19,759,141 and 118 individuals were participants therein. As pointed out above, the Caxton Plan provides each participant with a number of choices concerning the investment of his or her account balance thereunder and is intended to be a plan described in section 404(c) of ERISA. The current investment choices available to participants in the Caxton Plan are the Fidelity Daily Income Trust, the Fidelity Equity Income Fund, the Fidelity Intermediate Bond Fund and the Troye Limited Partnership.

At September 30, 1994, Troye had 43 limited partners. Of these limited partners, 5 were qualified plans all of which allowed their participants to choose whether or not to have all or a portion of their respective account balances invested in Troye. The aggregate amount of limited partnership interests in Troye owned by all qualified plans at September 30, 1994 was approximately \$31 million, or approximately 9.5% of Troye. The Caxton Plan owned approximately 5.1% of Troye and no other plan owned more than 2.4% of Troye. Since the ownership of Troye by qualified plans is in the aggregate less than 25%, a plan which invests in Troye is deemed, for the purposes of applying the fiduciary responsibility provisions of ERISA, to own its limited partnership interest in Troye but is not deemed to own a undivided interest in the underlying assets of Troye. Department of Labor Regulation 2510.3-101. For the purposes of ERISA,

therefore, the assets of Troye that are attributable to the plan accounts of the individuals who direct their assets into Troye are not "plan assets" and are not subject to the responsibilities and prohibitions imposed upon fiduciaries of employee benefit plans by the provisions of Part 4 of Title I of ERISA.

Distinctions from PanAgora

For the reasons set forth below, we believe that the Caxton/Troye fact pattern differs markedly from the PanAgora situation.

1. In the Caxton/Troye situation, a portion of the assets of the 401(k) plan of the general partner of an investment partnership has been invested for a number of years in such partnership. At all times, significantly less than 25 percent of the assets of Troye were attributable to investments by plans. In contrast, the PanAgora situation involved a newly formed group trust whose target market was unaffiliated participant-directed plans. In fact, by definition, 100% of the assets of a group trust like the PanAgora vehicle, but unlike Troye, must be attributable to investment by qualified plans.

2. The investment vehicle proposed in the PanAgora letter was to be created as an investment vehicle for a variety of plans unrelated to the sponsor of such investment and to each other. By contrast, the Caxton employees who participate in the Caxton Plan invest in a partnership for which Caxton acts as sponsor, general partner and investment advisor and with which the employees of Caxton have substantial contact and familiarity. The Division has previously expressed concern that participants in many defined contribution plans do not receive sufficient information to make an informed investment decision concerning direction of their plan account balances. In the Caxton/Troye situation, many Caxton Plan participants are intimately involved in the operation of Troye and all personnel have access to the trustees of the Caxton Plan. Thus, informational concerns in the Caxton/Troye situation are significantly different from those in the PanAgora situation, where unaffiliated plans were involved and personal contact was missing.

3. The group trust described in the PanAgora letter was intended to be a so-called plan asset entity within the contemplation of the Department of Labor regulations. Troye is not a plan asset entity since ownership of Troye by benefit plans is not considered to be "significant" under such regulations. Thus, the Department of Labor, the agency which is charged by law with regulating the investment activities of employee benefit plans, has determined that, in the case of Troye and other

similarly situated entities, no regulation based upon the plan asset "look through" is appropriate or necessary. The Commission and the Department of Labor have publicly stated that they are currently engaged in a joint study concerning the relationship of so-called 404(c) plans and the various securities laws. At the least it would appear to be premature to preclude participation by the Caxton Plan in Troye, and to require redemption of the interests in Troye held for years by the Caxton Plan, before the completion of that joint study, before any resulting determination that the principal task of regulation in situations such as Troye's should lie with the Commission, and before the effective date of any required enabling legislation.

4. The investment in Troye by the Caxton Plan represents substantially less than 10% of Troye. Congress, in enacting Section 3(c)(1)(A), established a 10% "bright line" test in order to require a look-through for the purposes of the Section 3(c)(1) exclusion. Where a plan like the Caxton Plan is affiliated with a Section 3(c)(1) entity that does not hold plan assets, we believe that the traditional application of Section 3(c)(1) to such plans, as set forth in Intel, is more appropriate than the complete "look through" approach of PanAgora.

5. In the PanAgora letter, the commingled investment vehicle under consideration was a new vehicle that had no investors or investments. Thus, in the PanAgora situation, there was no hardship imposed upon either an existing issuer or its existing investors. By contrast, in the Caxton/Troye situation over one half of Caxton's employees have elected to place portions of their Caxton Plan account balances in Troye. All of these employees have participated in Troye through this election for at least three years, and in many cases for a longer period of time. Moreover, as mentioned above, in the case of the Caxton Plan, Caxton has waived the management and incentive fees it receives from other limited partners of Troye. Therefore, the application of the PanAgora letter in the Troye/Caxton situation will impose a substantial hardship by requiring Caxton's employees to ignore (and withdraw from) the otherwise available investment vehicle with which they and the trustees are most directly involved and which is being made available free of charge.

6. Application of the PanAgora position specifically to Caxton/Troye would create the following anomalous result. Currently, the Caxton Plan is a limited partner of Troye, for which Caxton acts as general partner and trading adviser. Instead, Caxton could manage the portions of the Caxton Plan as a separate managed account, without registering as an investment adviser and without the securities laws mandating any additional

disclosure or providing any greater protections to the Caxton Plan or its participants. In fact, the Caxton Plan and its participants currently have greater protection and benefits by virtue of having limited liability as a limited partner in Troye and the ability to participate in a portfolio of investments made available by Troye's size but which would not be possible for a single smaller managed account.

7. Many qualified plans are undertaking investment activities which cannot be accomplished through an investment company. For instance, the Investment Company Act restricts the ability of a registered investment company to purchase securities on margin, to effect short sales, to engage in futures transactions and to engage in certain option strategies. In contrast, ERISA permits and many plans do, trade on margin, effect short sales, buy and sell options and trade futures without being subject to such restrictions. Applying the PanAgora letter to the Caxton/Troye situation would effectively preclude the participants from participating in these types of investments.

Because plan fiduciaries, even in a plan which provides for participant direction, have an overriding responsibility to examine, approve and monitor the investment alternatives made available, investment by a person in a private investment company through a plan provides that individual with more protection than he or she would have if that individual was able to, and did, invest individually. Thus, the application of the PanAgora position to Caxton/Troye would frustrate the purposes of section 404(c) of ERISA and would deprive Caxton's employees of the ability, with an overlay of ERISA protection, to participate in the nontraditional but modern and ERISA-complying investments engaged in by Troye at no cost to the employee.

Conclusion

On the basis of the foregoing, we advise you of our opinion that the Division's position in the PanAgora letter should not preclude continued investment in Troye by the Caxton Plan, and we request that the Division advise us whether it concurs in our conclusion.

This is an extremely important issue for the employees of Caxton. We shall be pleased to discuss this issue in greater detail at your convenience and to submit any further information that you might require. Since the effective date of the PanAgora letter is now January 1, 1995, we would appreciate your prompt consideration of this letter.

Barbara Green, Esq.
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Thank you for your consideration in this matter.

Very truly yours,
ROSENMAN & COLIN,

By: Edward A. Levin
A Partner

cc: Scott Bernstein, Esq.