UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

June 4, 2008

Sent by fax

The Hon. Lewis A. Kaplan
United States District Judge
Southern District of New York
United States Courthouse
New York, New York 10007

Re: CSX Corp. v. The Children's Inv. Fund Mgmt, L.L.P., et al., 08-Civ. 2764

Dear Judge Kaplan:

We are writing at the request of Brian G. Cartwright, General Counsel of the Securities and Exchange Commission, in response to your letter of May 22, 2008 to him.

In responding to the Court, the Division will follow the Commission's practice, as amicus curiae, of addressing legal, and not factual, issues. As we understand this case, the disputed legal issues presented by both of the Court's questions involve the circumstances under which a person is a beneficial owner of stock held by another person. In this case, the defendant, The Children's Investment Fund Management, L.L.P., an investment fund, was the long party in cash-settled total return equity swap transactions with various bank counter-parties.[1] The plaintiff CSX Corporation, the issuer of the stock that was the subject of the equity swaps, is suing the investment fund for allegedly violating Section 13(d), claiming that the fund became the beneficial owner of the shares of the issuer's stock that the banks purchased to hedge their risks with respect to the swaps.

1. Your first question asks whether the investment fund had beneficial ownership of the issuer's shares held by the counterparty banks. Rule 13d-3 defines a "beneficial owner" as including a person who, directly or indirectly, has or shares "voting power" or "investment power" through "any contract, arrangement, understanding, relationship or otherwise." "Voting power" includes "the power to vote, or to direct the voting of" a security. "Investment power" includes "the power to dispose, or to direct the disposition of" a security. The issuer in this case argues that, regardless of whether the investment fund had any arrangement, understanding or relationship with any of the counterparty banks concerning voting power or investment power,

1) When we refer to swap agreements in this letter, we are referring to total return equity swap agreements that may be settled only in cash.

the investment fund was the beneficial owner of the shares held by the counterparty banks because it had voting power and/or investment power over those shares by virtue of certain economic incentives. The investment fund, in contrast, argues that economic incentives do not constitute a sufficient basis for establishing any such powers.

The Division disagrees with the issuer's legal interpretation. We note at the outset that a distinction should be drawn between the scope of the statute and the scope of the Commission's rule. The Division believes that Rule 13d-3, properly construed, is narrower in coverage than the statute. As a general matter, economic or business incentives, in contrast to some contract, arrangement, understanding, or relationship concerning voting power or investment power between the parties to an equity swap, are not sufficient to create beneficial ownership under Rule 13d-3.[2] We start with the recognition that a standard cash-settled equity swap agreement, in and of itself, does not confer on a party, here the investment fund, any voting power or investment power over the shares a counterparty purchases to hedge its position. In our view, that conclusion is not changed by the presence of economic or business incentives that the counterparty may have to vote the shares as the other party wishes or to dispose of the shares to the other party. While such incentives may exist, when the counterparty chooses to act in these areas in circumstances where it is unconstrained by either legal rights held by the other party or by any understanding, arrangement, or restricting relationship with the other party, it is acting independently and in its own economic interests. The more reasonable interpretation of the terms "voting power" and "investment power" as used in the Rule, which are based on the concept of the actual authority to vote or dispose or the authority "to direct" the voting or disposition, is that they are not satisfied merely by the presence of economic incentives.[3]

2. Your second question is "what mental state is required to establish the existence of a plan or scheme within the meaning of Rule 13d-3(b)." Rule 13d-3(b) provides (emphasis added):

> Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device with the purpose or effect of divesting such person of beneficial ownership of a security or preventing the

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2) The staff does not address the factual question of whether the investment fund in this case had some contract, arrangement, understanding or relationship with its counterparties regarding the voting or disposition of the issuer's shares.

3) The Division recognizes that mere possession of the legal right to vote or dispose of securities may not be determinative of who is a beneficial owner of such securities inasmuch as another person may have the power, by various means, to direct the voting or disposition of shares. An analysis of all the relevant facts and circumstances is essential in order to determine whether a person has the requisite voting or investment power. For example, beneficial ownership may be obtained without having legal title to shares through means such as a transfer of voting power from one beneficial owner to another by grant of an irrevocable proxy. See In re Douglas A. Kass, Exchange Act Release No. 31046 (August 17, 1992). By contrast, as the Commission has previously stated, soliciting and receiving "revocable proxy authority (subject to the discretionary limits of Exchange Act Rule 14a-4), without more," will not trigger the beneficial ownership reporting requirements. Exchange Act Release 39538 (January 12, 1998).

vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) or (g) of the Act shall be deemed for purposes of such sections to be the beneficial owner of such security.

It appears from the trial transcript that you are considering a situation where a party to a swap has both a motive to avoid reporting and also other motives, such as tax and financial considerations. See Tr. Transcript pp. 222-23. Your question concerning mental state then is how significant in the swap-party's mind the motive of avoiding reporting must be for Rule 13d-3(b) to apply and the long swap-party to be deemed a beneficial owner of the shares held by the counter-party.

In the Division's view, the long party's underlying motive for entering into the swap transaction generally is not a basis for determining whether there is "a plan or scheme to evade." Rule 13d-3(b) states that a person is a beneficial owner when that person has used "a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device" with the purpose or effect of divesting himself of beneficial ownership of a security or preventing the vesting of beneficial ownership of a security "as part of a plan or scheme to evade" reporting requirements. The "plan or scheme to evade" language follows the requirement that a person use an arrangement with the purpose or effect of avoiding beneficial ownership. Thus we do not believe the "purpose of effect" phrase defines the mental state necessary for there to be a "plan or scheme."

We believe that the mental state contemplated by the words "plan or scheme to evade" is generally the intent to enter into an arrangement that creates a false appearance. Thus, a person who entered into a swap would be a beneficial owner under Rule 13d-3(b) if it were determined that the person did so with the intent to create the false appearance of non-ownership of a security. The significant consideration is not the person's motive but rather that the person knew or was reckless in not knowing that the transaction would create a false appearance. In this regard, taking steps with the motive of avoiding reporting and disclosure generally is not a violation of Section 13(d) unless the steps create a false appearance.

It is our understanding that neither the Commission, nor the staff of the Division of Corporation Finance, has previously issued public guidance on the issue of the mental state required for Rule 13d-3(b). However, when providing guidance on the use of similar "plan or scheme to evade" language in other Commission rules,[4] the Commission has stated that a transaction falls within that language if it was a sham, i.e., involved a contract, arrangement or device used to create a false appearance or an illusion that is contrary to the actual situation.

We cannot rule out the possibility that, in some unusual circumstances, a plan or scheme to evade the beneficial ownership provisions of Rule 13d-3 might exist where the evidence does not indicate a false appearance or sham transaction. No general principle can be designed for all potential future occurrences, and the rare case might present an egregious situation qualifying as

4) Amicus curiae letter brief filed in In Re Healthsouth Securities Litig., No. CV-03-BE-1500-S (N.D. Ala.)

a scheme to evade without also involving the creation of a false appearance of fact. Notwithstanding this reservation, as a general matter, a person that does nothing more than enter into an equity swap should not be found to have engaged in an evasion of the reporting requirements.

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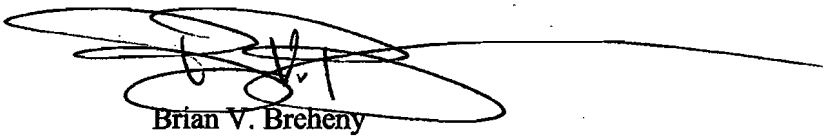
The Division recognizes the significant policy issues raised by the well-publicized use of equity swaps by investors, particularly in the context of business combinations or other change of control transactions. While the Division is considering whether or not to recommend to the Commission that it propose rules to address in a more direct way the use of equity swaps, it remains mindful that the existing regulatory scheme requires disclosure of such equity swaps. Indeed, to the extent a fund is required to report beneficial ownership on Schedule 13D for shares it has directly acquired or has otherwise been deemed to acquire, the fund must disclose any plans or proposals to acquire additional shares under Item 4 of Schedule 13D.

The Division believes that interpreting an investor's beneficial ownership under Rule 13d-3 to include shares used in a counter-party's hedge, absent unusual circumstances, would be novel and would create significant uncertainties for investors who have used equity swaps in accordance with accepted market practices understood to be based on reasonably well-settled law.

Respectfully submitted,



Brian V. Breheny
Deputy Director
Division of Corporation Finance

cc: Counsel for parties and amici