

IN THE MATTER OF THE PETITION OF

"X"

FOR A DECLARATORY RULING

Doc# 5683, Effective August 5, 1993

Pursuant to RSA 541-A:1, IV; 541-A:2, I(d); 541-A:2, II(b); and PART Rev 209 of the New Hampshire Code of Administrative Rules, "X" (the "Petitioner"), _____, through its attorneys, _____, petitioned the Department of Revenue Administration with respect to the definition of "qualified investment company", RSA 77-A:1, XXI.

Petitioner has requested the following determinations:

- A. The contemplated activities of "Y" (the "Trust"), as described in this letter, will constitute only "investment activities and those incidental to or in support of such activities" within the meaning of RSA 77-A:1, XXI.
- B. Accordingly, provided the Trust makes the timely certification referred to in RSA 77-A:1, XXI, the Trust will be a "qualified investment company" for all New Hampshire tax purposes.
- C. The Trust will remain a qualified investment company, even though the Trust's Managing Trustees may amend the Trust's non-fundamental investment policies from time to time, as long as any such amendment does not cause the Trust to become an operator of ... projects or otherwise to engage in the active conduct of any business other than the investment activities described in this letter.

Petitioner has made the following representations:

- 1. The Petitioner in this matter is "X", in its capacity as Administrative Trustee of the Trust. "X"'s federal taxpayer identification number is _____.
- 2. This petition refers to New Hampshire RSA 77-A, Business Profit Tax, specifically RSA 77-A:1, XXI ("qualified investment company").
- 3. The Trust will be established as a New Hampshire investment trust. It will function as an investment partnership that will make primarily long-term investments primarily in independently owned and operated ... facilities ("... projects") in [place] and [place]. The Trust may also invest in companies that have ... operations or related operations. During such times as the funds of the Trust are not invested in such investments, the Trust may invest such funds in short-term investments such as certificates of deposit, repurchase agreements, and U.S. government obligations.
- 4. The Trust would be an investment company under the Investment Company Act, except for the exemption provided by section 3(c)(1) thereof.
- 5. Under Section 2.1 of its Declaration of Trust, and under Section 1 of its "Investment Objectives, Policies, Procedures and Restrictions" (the "Investment Policies"), the Trust is expressly required to limit its activities to "investment activities and those incidental to or in support of such activities."
- 6. The Trust is designed to be a private investment vehicle for affiliates of F and other investors (the "Beneficiaries"). It is intended to be classified as a partnership for federal income tax purposes, and to function solely as an investment vehicle. The negotiation,

structuring, and monitoring of the Trust's investments will be carried out by the its investment manager, "...", an affiliate of "X", as well as by other service providers hired on a project by project basis, such as lawyers, consultants, and engineers.

7. The initial investors in the Trust (the "Lead Beneficiaries") will have a greater ability than subsequent investors to influence the investment activities of the Trust, as each will be entitled to appoint one of the Trust's Managing Trustees, who will be in overall charge of the Trust's affairs, and one member of the Trust's Project Review Board, which will review and approve investment proposals made by the investment manager regarding the Trust's investments. It is expected that there will be either three or four Lead Beneficiaries.

8. Under Section 2(e) of its Investment Policies, the Trust may not act as the principal sponsor of a ... project, but rather will supply capital to projects developed by other qualified parties. In connection with making an investment, the Trust (or its investment manager) may review the credentials of developers; review and approve the terms of ... contracts; require that environmental or similar studies be commissioned; require that insurance or other contracts be put in place to mitigate political, exchange rate, and other investment risks; assist in finding other sources of financing; and otherwise take an active role in the structuring of the financing of the power project, in each case solely in its capacity as an investor.

9. Once an investment is in place, the Trust's investment manager or other representatives of the Trust may monitor the progress of construction and the performance of the ... project, as well as other factors, such as economic conditions affecting the region. The Trust expects to own significant equity or debt stakes in the projects in which it invests, and accordingly will monitor the operations and success of its investments closely.

10. The legal and financial form of the Trust's investments will depend on the nature and location of the ... project and the terms that the Trust can negotiate. Some of the Trust's investments may consist of debt securities, including convertible debt. Most of the Trust's investments are expected to constitute equity. Such equity investments are generally expected to be structured as limited partnership interests or similar interests that will permit pass-through of the project's tax deductions and losses to the Beneficiaries for U.S. federal income tax purposes.

11. As an investment vehicle, the Trust is expected not to invest as a general partner or to be part of a contractual joint venture that owns a ... project directly. In other words, it will endeavor to make its investment, and to avoid unlimited liability for the project's debts, through the purchase of investment securities, including limited partnership interests. But because local corporate, partnership, and investment law in many ... and ... countries is different from that of the U.S., the actual form of the Trust's investments cannot be known in advance. Regardless of the legal form of the entity or venture in which the Trust invests, it will earn its return from the investment of capital, not the provision of services or goods, and it will structure its interest in a project so that it does not exercise day-to-day management or general operating control of the underlying business.

12. The Trust documents contemplate that certain of the Lead Beneficiaries may sponsor or co-invest in ... projects in which the Trust may invest, or may contract to provide services to a ... project, including services as general operator of the ... project. In such cases, such Lead Beneficiaries would be acting for their own account, and would be paid by the ... project at arm's length rates. Such Lead Beneficiaries would not be acting on behalf of the Trust in any such capacity.

13. It is expected that pension plans subject to ERISA will make a significant investment in the Trust. In that event, the Trust is expected to be operated as a "venture capital operating company" ("VCOC") within the meaning of the regulations of the Department of Labor included at 29 CFR 2510.3-101(d). To meet this requirement, it is contemplated that the Trust's investments will be structured so that at least 50% of the Trust's assets (valued at cost) will

be invested in securities of companies with respect to which the Trust has "management rights" as described in such regulations.

14. Such rights are generally contractual rights to substantially participate in or substantially influence the conduct of the management of the company in which the investment is made. Such rights must be more significant than the covenants ordinarily found in privately purchased debt instruments of established and creditworthy companies.

15. The Trust will be considered to have such rights under ERISA with respect to a company if it has:

(a) the right to designate a member of the company's board, to inspect and copy the company's books and records, to inspect properties, to receive financial statements, to receive materials sent to the board, and to consult with and advise the company's management on matters relating to the business and affairs of the company; or

(b) (i) the right to have observers attend meetings of the company's board, to inspect and copy books and records, to inspect properties, and to receive financial statements; (ii) rights that effectively permit the Trust to prevent major actions such as dividends, mergers, significant acquisitions or dispositions of assets, issuances of significant amounts of debt, redemption of common equity, and material amendments of the company's charter; and (iii) the right to receive operating reports and budgets and to consult with the management of the company on matters such as: significant changes in management personnel and compensation or employee benefits, introduction of new lines of business, important acquisitions of plant and equipment, significant research and development programs, purchasing or selling of important licenses and concessions, and the proposed compromise of any significant litigation.

It is not contemplated that the Trust will necessarily have rights in respect of all or most of the matters listed under clauses (ii) and (iii) above; the extent to which the Trust obtains such rights will be a function of arm's length negotiations in each investment transaction. In order to be confident that it will qualify as a VCOC, the Trust will routinely exercise its rights with respect to one or more of the portfolio companies from which it has obtained such rights, devoting substantial resources to such efforts.

16. The rights described in paragraph 15 will not afford control or direction on a continuing basis by the Trust of the day-to-day business operations of the ... projects in which it invests, or permit the Trust to operate as a holding company that manages such day-to-day business operations. In its capacity as an investor, however, the Trust will oversee each investment and may, in appropriate cases or to the extent necessary to preserve its investment, exercise such rights to influence, intervene in, or control temporarily the day-to-day management of a ... project. Such exercise will be in furtherance of the Trust's role as an investor in the ... project.

17. The Trust's investment objectives and fundamental investment policies set forth in its Investment Policies may be amended only with the vote of 66-2/3% in interest of the Beneficiaries and a majority vote of Managing Trustees, including the affirmative vote of all of the Managing Trustees appointed by Lead Beneficiaries. Certain other policies, referred to as "non-fundamental investment policies," may be amended only upon a majority vote of Managing Trustees, including the affirmative vote of all of the Managing Trustees appointed by Lead Beneficiaries.

18. The Managing Trustees may amend the Trust's non-fundamental investment policies from time to time in order to take advantage of evolving market conditions and ... project investment opportunities. Any such amendment would not, however, cause the Trust to become an operator of ... projects or otherwise to engage in the active conduct of any business other than the investment activities described in this letter.

In view of the foregoing representations and specifically based upon them, the Department of Revenue Administration finds the following:

1. The contemplated activities of the Trust, as set forth in the representations above, will constitute only "investment activities and those incidental to or in support of such activities" within the meaning of RSA 77-A: 1, XXI.
2. If the Trust makes the timely certification referred to in RSA 77-A: 1, XXI, the Trust will be a "qualified investment company" for all New Hampshire tax purposes.
3. The Trust will remain a qualified investment company, even though the Trust's Managing Trustees may amend the Trust's non-fundamental investment policies from time to time, as long as any such amendment does not cause the Trust to become an operator of ... projects or otherwise engage in the active conduct of any business other than the investment activities described in this letter.

Stanley R. Arnold, Commissioner