



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Gary Barnett
Director

CFTC Letter No. 14-104
No-Action
June 20, 2014
Division of Swap Dealer and Intermediary Oversight

RE: Request for No-Action Relief from Commodity Pool Operator Registration under the Commodity Exchange Act for “A”

Dear :

This responds to your letter dated November 6, 2013 (“Correspondence”), to the Division of Swap Dealer and Intermediary Oversight (“DSIO” or “Division”) of the Commodity Futures Trading Commission (“Commission”). You state that you represent the “B” and “C” families (the “Families”), as well as “A”, a corporation formed solely to provide services to the Families, in connection with the Families’ joint investment and administrative activities. By the Correspondence, you request, on behalf of the Families, “A”, and the employees of “A”, no-action relief from the obligation under Section 4m(1) of the Commodity Exchange Act (“CEA”) to register with the Commission as a commodity pool operator (“CPO”), with respect to their investment activities in multiple funds established by the Families (“Funds”).¹

You make the following representations regarding the Families, the operations of “A”, and the Funds in your Correspondence: The Families have been closely linked for several decades, since the two patriarchs, “D” and “E”, who first met as co-workers in 1958, co-founded “F” in 1971, a public company and large retailer in the U.S., of which Mr. “D” and Mr. “E” continue to serve as Co-Chairmen of the company’s Board of Directors. Also, in the early 1970s, the two men began coordinating their investment activities, and each was appointed executor of the other’s estate.

In 1996, after concluding that they and other members of the Families would benefit from obtaining assistance in handling the administrative tasks involved in their joint investment

¹ 7 U.S.C. § 4m(1). Alternatively, you request that the Division find that the Families qualify for the exemptive relief from CPO registration provided by Regulation 4.13(a)(1), notwithstanding that exemption’s requirement that the family or entity “operates only one commodity pool at a time.” 17 CFR 4.13(a)(1)(ii). Because the Division is granting your request for no-action relief, it is unnecessary to address the alternative argument. Both the CEA and the Commission’s regulations may be accessed through the Commission’s website, www.cftc.gov.

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activities as well as in other personal activities (*e.g.*, estate planning or taxes), Mr. “D” and Mr. “E” founded “A”, an S Corporation based in Union, New Jersey, all of whose equity shares are owned by “G”, the son of Mr. “E”. “A’s” Board of Directors includes Mr. “D” and Mr. “E”, as well as “G”.

The Families are “A’s” sole clients, and “A’s” activities are accordingly limited to serving the Families by assisting them with various administrative and logistical functions. “A” currently has eight employees. Three employees make up the client service team, which assists the Families with bill paying, cash flow management, renewal of insurance policies, and the management of home improvement projects. Two employees provide accounting support for the Families’ investment activities and for the individual members of the Families. Two other employees assist with investment administration, which includes managing due diligence, completing forms required by investment firms (such as account applications, subscription agreements, and redemption forms), generating spreadsheets describing the investments and their performance for review by the Families, coordinating the completion and filing of tax returns, organizing meetings requested by the members of the Families who manage the investments, and other similar tasks. The eighth employee oversees “A’s” operations described above.

At this time, the Families’ investment activities continue to be predominantly managed by “D” and “E” through the Funds, which are established as limited liability companies and partnerships. There are thirteen Funds organized as limited partnerships or limited liability companies, and one general partnership. Neither the Funds nor any member of the Families compensate Mr. “D” or Mr. “E”, or any other member of the Families, with management fees or other compensation for managing the Funds or directing the investment of the assets in the Funds. The Families have not retained, and do not currently plan to retain, an outside investment adviser to oversee all investments of the assets in the Funds, although the Families occasionally do retain registered investment advisers who are specialists in certain asset classes to oversee specific types of assets in separately managed accounts (*e.g.*, municipal bonds or master limited partnerships). The Families could manage their investments through a single fund, but have created multiple funds primarily for administrative purposes, to simplify the administrative and accounting functions, and as cash flow management for individual members of the Families. The creation of the Funds as separate investment vehicles secondarily provides flexibility in family estate planning.

Funding for the investment activities of the Families’ Funds has derived almost entirely from the private wealth of the Families, and from returns on investments made by the Funds. No third party has provided, or will provide, investment capital for the Funds, and no third party has, or will have, any equity or other interest in the Funds. Other than the Mr. “D” and “E” (together with their spouses), only two of Mr. “D’s” sons have contributed personal capital to the Funds, although it is possible that other members of the Families will contribute personal funds in the future.

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Four Funds are managed by the "B" family, although both Families have economic interests in one of those entities. One entity is managed by the "C" family, and both Families have economic interests in that entity. The remaining Funds are controlled jointly by the two Families. As a practical matter, currently, regardless of the formal structure of any particular Fund, investment decisions for the Funds are predominantly made jointly by "D" and "E", although over time other members of the Families are likely to play a greater role in making investment decisions.

The limited partners and members of the Funds are primarily a number of trusts that were formed for estate planning purposes. The beneficiaries of the trusts are members of the Families and their descendants, with the exception that each family has a private charitable foundation that is a remote beneficiary under some of the trusts (such that its interest in the trusts is remotely contingent on no other individual beneficiary surviving to benefit under the trust). The two foundations (the "B Family Foundation" and the "C Family Foundation") are controlled and funded by members of the "B" or "C" families, respectively. Neither foundation accepts funding from sources outside of the family that established it.

All of the thirteen Funds invest directly in a variety of financial instruments, including other funds maintained by third parties unaffiliated with the Families, but none in the ordinary course invests directly in investments that could result in their being classified as "commodity pools," although it is possible that one or more funds may do so from time to time. Also, as noted above, certain of the Funds retain registered investment advisers who are specialists in certain asset classes to oversee specific types of assets in separately managed accounts. It is possible that such investment advisers may make investments that would result in the Funds being classified as "commodity pools."

Specifically, you request an assurance that the Division will not recommend enforcement action to the Commission if neither Mr. "D" nor Mr. "E", nor other members of the Families who serve as managing members or general partners of the Funds that the Families have established or establish in the future, nor "A" and its employees, register as CPOs. Based upon the foregoing representations and consistent with the Division's prior practice in this area,² the Division believes that your request has merit. Accordingly, the Division will not recommend enforcement action to the Commission against Mr. "D", Mr. "E", other members of the Families who serve as managing members or general partners of the Funds that the Families have established or establish in the future, or "A" or its employees, for their failure to register as CPOs

² See, e.g., CFTC Staff Letter 96-11 (Jan. 18, 1996) (Commission staff granted no-action relief from CPO registration otherwise required by CEA Section 4m(1) to the managing member of a limited liability company formed to trade commodity interests, and whose members consisted of family members as well as individuals with whom the managing member had long-standing business relationships).

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in connection with the Families’ financial investment activities outlined in this letter, including the operation of the Funds.

The relief issued by this letter does not excuse Mr. “D”, Mr. “E”, the Families, or “A” from compliance with any otherwise applicable requirements contained in the Act or the Commission’s regulations issued thereunder. For example, they remain subject to all antifraud provisions of the CEA³ and the Commission’s regulations, as well as the reporting requirements for traders in the Commission’s regulations.

This letter is based upon the representations made in the Correspondence. Any different, changed, or omitted material facts or circumstances might render the interpretations taken in this letter void. You must notify us immediately in the event that the operations or activities of “A”, the Funds, or any funds established in the future by the Families change in any way from the representations you have made to us. Moreover, this letter represents an interpretation of Commission regulations and the CEA by the Division only and does not necessarily represent the views of the Commission or any other division or office of the Commission.

If you have any questions regarding this letter, please contact Amanda Olear, Associate Director, at 202-418-5283 or aolear@cftc.gov, or Elizabeth Groover, Special Counsel, at 202-418-5985 or egroover@cftc.gov.

Very truly yours,

Gary Barnett
Director
Division of Swap Dealer and
Intermediary Oversight

³ See, e.g., 7 U.S.C. §§ 4b and 4o.