



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-6700
Facsimile: (202) 418-5407
tsmith@cftc.gov

Division of Swap Dealer and
Intermediary Oversight

Thomas J. Smith
Acting Director

CFTC Letter No. 15-46
No-Action
May 8, 2015
Division of Swap Dealer and Intermediary Oversight

RE: “A”, operator of “B”

Dear :

This letter is in response to your letter dated December 10, 2012, (“Correspondence”) to the Division of Swap Dealer and Intermediary Oversight (the “Division”) of the Commodity Futures Trading Commission (the “Commission”) on behalf of “A”, the operator of “B”.¹ In the Correspondence, you request confirmation that the Division will not recommend enforcement action against “A” for failure to register as a CPO with respect to its activities related to “B”, pursuant to Section 4m(1) of the Commodity Exchange Act (“CEA”), due to the investment of U.S. management employees in funds operated by “A”.²

The Division understands the facts to be as follows. “A” is a wholly owned subsidiary of “X”, and the current operator of “B”, which is an umbrella company with variable share capital incorporated in the Grand Duchy of Luxembourg. You further state that “B” is an undertaking for collective investment in transferable securities (UCITS) authorized in accordance with the UCITS Directive. You state that “B” is subject to regulation by the Commission de Surveillance du Secteur Financier (“CSSF”), the financial regulatory authority of Luxembourg. You state that “B” is comprised of a number of subfunds, each with a separate pool of assets that are invested in accordance with the investment objective and policy for each subfund. You further state that each subfund has its own investment adviser, some of which are incorporated in the United States and some of which are not. You state that the rights of investors and creditors relating to each subfund are limited in their recourse to the assets of that subfund. Additionally, you state that the assets of each subfund are separate pools of assets, although part of a single legal entity.

¹ The Correspondence initially requested relief on behalf of “C”, the former operator of “B”, as well as “A” (an affiliate of “C”), pending “A’s” authorization from the United Kingdom’s Financial Conduct Authority (“UK FCA”) to both act as an alternative investment fund manager (“AIFM”) pursuant to the E.U. Alternative Investment Fund Managers Directive (“AIFMD”) and as a manager to UCITS funds pursuant to Directive 2011/61/EU. “A” received such authorization from the UK FCA on July 21, 2014, and as a result, succeeded “C” as the operator of “B”. Therefore, “C” no longer requires relief from commodity pool operator (“CPO”) registration, and the no-action relief provided herein is limited to “A”.

² 7 U.S.C. 6m(1).

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With respect to "B", you state that as a UCITS fund, "B" is designed for, and targeted to, retail investors in the European Union. You state that UCITS are subject to specific investment restrictions including limitations on the use of derivatives to those derivatives based on broad-based indices or on transferable securities, or derivatives used to mitigate interest rate or currency risk.

In a supplemental email, you state that "A" became authorized by the UK FCA as an AIFM on July 21, 2014, and as a UCITS management company on July 4, 2014. You also represent that "A", by virtue of its authorization by the UK FCA, is permitted by the CSSF in Luxembourg to provide investment management services in that jurisdiction.

You state that certain U.S.-based management employees of "B's" U.S. investment advisers, and sometimes their immediate family, have contributed seed money to the subfunds managed by the various U.S. investment advisers, and the total amount of such U.S. seed investment only represents % of the total assets under management of the "B" subfunds. You state that "B" currently has twenty sub-funds, 8 of which have seed investment from U.S. management employees of the U.S. investment advisers. You also state that at times this contribution would be accomplished through direct investment, but that more frequently it would be executed through a U.S. investment vehicle that was established by the investor or investors contributing capital. You state that no solicitation has been or will be made in the U.S., and there has been and will be no public marketing of any kind in any medium. You state that any seed investments from U.S.-based management employees and their immediate family were made on a private placement basis in accordance with Section 4(2) of the Securities Act of 1933. You further state that all such U.S.-based management employees and their immediate family members that have made seed investments in subfunds are "qualified eligible persons" as defined in Commission regulation 4.7(a).

You state that once the sub-fund begins to attract third party investors, the seed money is withdrawn with the intention of fully eliminating the seed investment. You further state that if the subfund is not successful, it is generally liquidated within two years from the time of the initial seed investment. You state that due to the rescission of Regulation 4.13(a)(4), "A" reevaluated its exemption claims and CPO registration status with the Commission. Through this request for relief, "A" is seeking confirmation that consistent with relief historically granted by the Division's predecessors,³ the Division would not recommend an enforcement action against "A", due to the presence of U.S. management employee investors in the subfunds it operates, for failure to register with the Commission as a CPO.

You state that you will agree that, as a condition of the receipt of the no-action position from the Division, "A" will require U.S. persons to redeem within two years of the inception of the subfund, with subfunds in existence at the time of the issuance of this letter having two years from the date of this letter to redeem its U.S. participants. You further state that "A" will file a notice with the Division whenever a new subfund is launched with seed investments from U.S.-based management employees or their immediate family members.

³ You cite CFTC Staff Letters 03-18, 00-95, and 85-18 as examples.

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You also represent that "A" would continue, as it currently does, to monitor and screen its investors to ensure that no investments are made by any other person who would be a U.S. person within the meaning of Commission regulation 4.7. In that regard, you represent that "A", in preparation for requesting relief from the Division, has screened the "B" platform to determine the existence of any other U.S. participants other than the U.S.-based employees of the U.S. investment advisers and their immediate family members, and has confirmed that no other U.S. person is invested in "B" or its sub-funds.

Conditions of No-Action Relief

Based upon the foregoing, and subject to the conditions outlined below, the Division will not recommend that the Commission take an enforcement action pursuant to Section 4m(1) of the CEA against "A" for failure to register with the Commission as a CPO with regard to its operating "B", including any of the subfunds in which U.S.-based management employees or their immediate family have provided or will provide seed capital. This no-action relief is subject to the following conditions:

1. No seeded subfund will, to the knowledge of "A", have any U.S. person as a pool participant, other than the U.S. management employees and their immediate family;
2. No seeded subfund will offer or sell its shares or other equity to any U.S. person, other than the U.S. management employees and their immediate family, in compliance with its offering prospectus, and no seeded subfund will undertake any marketing activities in the United States or to U.S. persons;
3. The U.S. management employees and their immediate family participating in a seeded subfund must be the beneficial owners of the subfund participations, and are prohibited from holding ownership, directly or indirectly, for any other person or entity;
4. Neither "A" nor its principals and associated persons, are subject to statutory disqualification under Sections 8a(2) or 8a(3) of the CEA;
5. "A" will redeem the investment of the U.S. management employees and their immediate family within two years of the seed capital investment in the relevant subfund or two years from the date of this letter, whichever is later; and
6. "A" will notify the Division, via email at dsionoaction@cftc.gov, of any seed capital investments in any new subfund within "B" within 30 days of the investment. Such notice shall state (a) the name of the new subfund, (b) the amount of seed capital contribution, and (c) the date upon which the seed capital was invested in the new subfund.

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The Division's position with respect to granting no-action relief to "A" from registration as a CPO for "B" and its subfunds is based on the representations in the Correspondence and conditions of relief, including, among other things, that: (1) "A" is subject to regulation by the UK FCA and AIFMD, and "B" is subject to regulation by the CSSF in Luxembourg; (2) "A" was not organized for the purpose of avoiding CPO registration; (3) the only funds or capital that will be contributed to the subfunds of "B" will be received from U.S. management employees of the subfunds' investment advisers, and/or their immediate family; (4) shares in "B" and its subfunds will not be offered or sold to any U.S. person beyond the U.S. management employees and their immediate family members; and (5) any investment in the subfunds by the U.S. management employees and their immediate family members pursuant to the relief granted herein is time-limited, and subject to the specific conditions outlined above.

This letter, and the positions taken herein, represent the view of this Division only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse the affected persons from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. This letter does not create or confer any rights for or obligations on any person or persons subject to compliance with the Commodity Exchange Act that bind the Commission or any of its other offices or divisions. Further, this letter, and the relief contained herein, is based upon the representations made to the Division. Any different, changed or omitted material facts or circumstances might render this letter void.

Should you have any questions, please do not hesitate to contact Amanda Olear, Associate Director, at 202-418-5283.

Very truly yours,

Thomas J. Smith
Acting Director
Division of Swap Dealer and
Intermediary Oversight