



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and  
Intermediary Oversight

Eileen T. Flaherty  
Director

CFTC Letter No.16-07  
No-Action  
January 13, 2016  
Division of Swap Dealer and Intermediary Oversight

**RE: No-Action Relief from Commodity Pool Operator and Commodity Trading Advisor Registration for the Board of Trustees of “A”**

Dear :

This is in response to your request submitted to the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”) on August 25, 2015, (the “Correspondence”), on behalf of the Board of Trustees (“Trustees”)<sup>1</sup> of “A”. In the Correspondence, you request that the Division not recommend that the Commission take an enforcement action, pursuant to Section 4m(1) of the Commodity Exchange Act (“CEA”),<sup>2</sup> against the Trustees for failure to register with the Commission as a commodity pool operator (“CPO”) or commodity trading advisor (“CTA”), with respect to their activities operating “A”. In particular, you request relief comparable to that provided by Regulations 4.5 and 4.6, notwithstanding that a pension plan group trust is not a “qualifying entity” under Regulation 4.5.<sup>3</sup>

### Background

In the Correspondence, you make the following representations. “A” was organized pursuant to a Trust Agreement entered into by “B” and “C”. “A” is a commingled trust established under IRS Revenue Ruling 81-100.<sup>4</sup> As noted above, the same individuals that serve as Trustees of “A” also make up the Boards of Trustees of “B” and “C”.

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<sup>1</sup> The same individuals that serve as Trustees of “A” also make up the Boards of Trustees of those two underlying participating plans. Therefore, in this letter, the term “Trustees” will refer to those individuals regarding both their actions with respect to “A’s” participating plans, as well as their request for relief from registration and regulatory obligations stemming from the Trustees’ operation of “A”.

<sup>2</sup> 7 U.S.C. 6m(1).

<sup>3</sup> 17 CFR 4.5 and 4.6.

<sup>4</sup> IRS Revenue Ruling 81-100 establishes the requirements that must be met by qualified retirement plans and individual account retirement plans to pool their assets in a group trust for investment purposes.

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You state that “B” and “C” formed “A” to combine their assets for investment purposes and to control the costs of investment. For purposes of determining the proportionate value held by each of the participating trusts, “A” is divided into equal units of value. Since its inception, “A’s” only participants have been “B” and “C”. You represent that the Trustees do not intend to allow any other pension plans to participate in “A”, and do not engage in any marketing. The Trustees of “A” are governed by the fiduciary responsibility requirements of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and have full responsibility for the investment and management of “A’s” assets.

You stated that “B”, which converted to a 401(k) plan effective January 1, 2014, is a pension plan subject to Title I of ERISA, and is a “qualifying entity” under Regulation 4.5(b)(4). On November 25, 2014, the Trustees claimed the exclusion available under Regulation 4.5 to “a trustee of, ... a pension plan,” for the operation of a “qualifying entity,” and are therefore excluded from the CPO definition with respect to their operational and management activities of “B”.<sup>5</sup> You indicated that “C”, which is a noncontributory defined benefit plan covered under Title I of ERISA, is “not construed to be”<sup>6</sup> a commodity pool pursuant to Regulation 4.5(a)(4)(i), and therefore, the Trustees have no registration or compliance obligations under Commission regulations with respect to this plan.

You state that investment in commodity interests is not a primary objective of “A”, and is “incidental” to other types of investments held by “A”. Additionally, you represent that all of “A’s” commodity interest investments are currently indirect, in that the exposure is gained through “A’s” investment in two other commingled funds, the operators of which are registered with the Commission as CPOs and are members of the National Futures Association (“NFA”).

### **Legal Analysis**

Regulation 4.5(a)(4) provides an exclusion from the CPO definition to a trustee of, named fiduciary of, or an employer maintaining a pension plan subject to Title I of ERISA, with respect to its operation of a “qualifying entity” as described in Regulation 4.5(b)(4), *i.e.*, a pension plan subject to Title I of ERISA.<sup>7</sup> Although “B” is a qualifying entity under Regulation 4.5(b)(4) and “C” is excluded from the definition of commodity pool under Regulation 4.5(a)(i), there is no express provision in Regulation 4.5 that would provide exclusionary relief for an operator of a pension plan group trust.

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<sup>5</sup> As a condition of the exclusion, the Trustees must operate “B” in accordance with the terms of Regulation 4.5(c)(2).

<sup>6</sup> 17 CFR 4.5(a)(4) (stating that the plans listed in paragraphs (a)(4)(i)-(iii) “shall not be construed to be pools”).

<sup>7</sup> 17 CFR 4.5(a)(4) and (b)(4).

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Regulation 4.6(a)(2) provides an exclusion from the CTA definition for “a person who is excluded from the definition of ‘commodity pool operator’ by § 4.5,” provided that, among other things, “the person’s commodity interest advisory activities are solely incidental to the operation of those trading vehicles for which Regulation 4.5 provides relief.”<sup>8</sup> As noted above, “A” is not a “qualifying entity,” under Regulation 4.5, and therefore, the Trustees cannot rely on Regulation 4.5 for an exclusion from the CPO definition with respect to their operation of “A”. As a result, absent the relief provided herein, the Trustees could not avail themselves of the CTA exclusion in Regulation 4.6(a)(2).

The Division has previously granted CPO and CTA registration relief in similar situations involving pension plan group trusts.<sup>9</sup> Likewise here, the Division believes granting the Trustees the requested relief from CPO and CTA registration with respect to the operation of “A” is appropriate.

**No-Action Relief for the Board of Trustees of “A”**

Based upon the foregoing, and consistent with prior practice, the Division will not recommend enforcement action, pursuant to CEA Section 4m(1) for failure to register with the Commission as a CPO or CTA, against any individual member of the Trustees<sup>10</sup> with respect to their operation of “A”, provided that the Trustees operate and advise “A” in a manner that meets the conditions in Regulations 4.5(c)(2) and 4.6.

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 Trustees from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder. For example, the Trustees remain subject to all antifraud provisions of the Act. Further, this letter, and the relief contained herein, is based upon representations made to the Division. Any different, changed or omitted material facts or circumstances might render this letter void. Finally, the Division retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the relief provided herein, in its discretion.

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<sup>8</sup> 17 CFR 4.6(a)(2).

<sup>9</sup> See CFTC Staff Letters 12-72 (Dec. 21, 2012), 01-08 (Aug. 11, 2008), 97-94 (Nov. 21, 1997), 94-52 (Jun. 2, 1994), 93-91 (Sept. 7, 1993), and 86-8 (Apr. 4, 1986). Each of these letters involved a group trust comprised of participating plans that were either: (i) excluded from the “pool” definition under Regulations 4.5(a)(4); or (ii) a “qualifying entity” under Regulation 4.5(b)(4), for which the operator could claim an exclusion from the CPO definition.

<sup>10</sup> In the event that the membership of “A’s” Board of Trustees changes after the issuance of this letter, the Division intends the no-action relief provided by this letter to be available to all current and future Trustees of “A”, provided that the facts and circumstances regarding the operation of “A” and the underlying pension plans remain the same, and the conditions of relief continue to be met.

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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,

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