



## U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre  
1155 21st Street, NW, Washington, DC 20581  
Telephone: (202) 418-6700  
Facsimile: (202) 418-5528  
*eflaherty@cftc.gov*

Division of Swap Dealer and  
Intermediary Oversight

Eileen T. Flaherty  
Director

CFTC Letter No. 17-49  
No-Action  
September 22, 2017  
Division of Swap Dealer and Intermediary Oversight

**RE: Request for No-Action Relief from CPO and CTA registration for Group of Universities with respect to their Endowment Funds and Planned Giving Accounts**

Dear :

This is in response to your request dated September 15, 2017, to the Division of Swap Dealer and Intermediary Oversight (“DSIO” or “Division”) of the Commodity Futures Trading Commission (“CFTC” or “Commission”), as well as ongoing conversations, meetings, and supplemental responses with and to DSIO Staff (“Correspondence”). In the Correspondence, you request relief from commodity pool operator (“CPO”) and commodity trading advisor (“CTA”) regulation on behalf of several universities with respect to (1) their collective management of endowment funds that include the assets of organizations affiliated with the universities, and (2) the offering, solicitation, and operation of multiple planned giving arrangements for donors to those universities (“Planned Giving Accounts”). The universities in question are “A”, “B”, “C”, “D”, and “E” (each, a “University” and, collectively, the “Universities”).<sup>1</sup>

### **Background**

#### *Combined Endowment Accounts*

Based on the Correspondence, we understand the relevant facts to be as follows. Each University is a non-stock corporation that is an accredited university, is recognized as a tax-exempt charitable organization under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (“IRC”), is considered an “institution of higher education” as defined by the Higher Education Act of 1965, and is an entity eligible for tax deductible charitable contributions under IRC Section 170(c).<sup>2</sup> Each University is supported by multiple endowment funds, which may

---

<sup>1</sup> You alternatively request interpretative relief that would determine each of the Universities not to be a commodity pool, as that term is defined in Section 1a(10) of the Commodity Exchange Act (“CEA” or “Act”). However, the Division need not address that request in light of the issuance of the instant no-action relief.

<sup>2</sup> IRC Section 170(c) provides the definition of “charitable contribution” in a variety of contexts. Section 170(c)(2), which is pertinent here, defines the term as “a contribution or gift for the use of – a corporation, trust, or community chest, fund, or foundation – created or organized in the United States or in any possession thereof, or under the law of the United States, any State, or the District of Columbia, or any possession of the United States; organized and

## RE: Request for No-Action Relief for several Universities

Page 2

generally be defined as a fund or assets, the income from which may be expended, but the principal of which cannot.<sup>3</sup> Because the Universities are typically supported by hundreds of these “endowments,” the Universities invest such assets collectively, usually by managing them in a single account in the University’s name (the “Combined Endowment Account”).

The Combined Endowment Account belonging to each University does not have an independent legal existence from each respective University, as a whole.<sup>4</sup> Consequently, the assets of each Combined Endowment Account are held in the name of the University, are held and invested on behalf of the University, and are not legally segregated from other assets of the University. Each of the Universities has also historically invested assets attributable to certain charitable organizations closely affiliated with the respective Universities (“Affiliated Organizations”) concurrently and collectively with each University’s endowment assets.

Additionally, each University uses the same accounting method of unitization to manage and track the assets belonging to each University, its respective schools or departments, and/or to each participating Affiliated Organization. You define “unitization” as “an accounting method used by universities and other charitable institutions to manage investments more efficiently by commingling the assets of multiple endowment funds into a single ‘fund.’” As a result, Affiliated Organizations investing in each Combined Endowment Account generally commit portions or all of their investment assets to each University for investment by and in the name of the University itself.

### *Management of Endowment Assets*

Each University manages its Combined Endowment Account either through an Investments Office (“Investments Office”), which is part of each University and led by

---

operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals; no part of the net earnings of which inures to the benefit of any private shareholder or individual; and which is not disqualified for tax exemption under section 501(c)(3) by any reason of attempting to influence legislation, and which does not participate in, or intervene in . . . , any political campaign on behalf of (or in opposition to) any candidate for public office.” 26 U.S.C. §170(c)(2) (internal paragraphs omitted).

<sup>3</sup> You note that endowments also may be restricted for a particular purpose (*i.e.*, to support a specific school or academic department, establish a scholarship or fellowship, or fund research) or may be unrestricted. Additionally, you emphasize that “a substantial majority of these funds consist of outright donations to the Universities, in which no donor or beneficiary other than the University or a department of the University has any interest.” The endowments also include “quasi-endowment” donations, which are non-endowment funds that the Universities treat and invest like endowment assets, and which are also subject to the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”).

<sup>4</sup> You also state that a University may make charitable contributions of all or substantially all of a Combined Endowment Account’s assets to one or more entities that are owned or controlled by the University. Certain of these investment entities satisfy the IRC Section 509(a)(3) “supporting organization” definition. Each investment entity is controlled by the relevant University and may, in turn, invest a portion of its assets in trading vehicles. The assets contributed to the investment entities and the trading vehicles are held in their respective names, despite originating from each University or participant in a University’s Combined Endowment Account. The instant discussion of the Universities and the management of their Combined Endowment Accounts, as well as the attendant no-action relief provided herein, should be construed to include investments made through investment entities and trading vehicles by the Universities. *See, e.g.*, CFTC Staff Letter 17-19 (Apr. 4, 2017) (providing no-action relief to a state-wide university system employing multiple trading vehicles considered to be “supporting organizations” of the university system).

## RE: Request for No-Action Relief for several Universities

Page 3

University staff, or by forming and using a separately organized non-profit entity (“Management Company”) (together with Investments Offices, “Investment Units”) to serve as the Combined Endowment Account’s investment manager.<sup>5</sup> An Investments Office typically operates under the supervision of a University’s Investment Committee, which may be comprised of University trustees, other University personnel, or other experts, including alumni. Comparatively, a Management Company is supervised by a board of directors, which similarly may be staffed by trustees, personnel, and/or alumni. The Investment Units have overall responsibility for all investment decisions or supervision of investments with respect to the Universities’ Combined Endowment Accounts, and may manage a portion of assets directly, while having the authority to engage or terminate third-party managers and investments in third-party managed funds. You state that, regardless of what particular structure any of the Universities uses, “the mandates and objectives of its Investment Unit are fully aligned with those of the University and the Investment Units do not operate in a manner that is comparable to for-profit fund sponsors or asset managers.”

### The Affiliated Organizations

As noted above, each University maintains relationships with a variety of Affiliated Organizations, each of which is a separately organized legal entity, regardless of their close ties with any particular University. The Affiliated Organizations generally include entities like campus newspapers, social or recreational organizations, community service organizations, hospitals, and a variety of others. You note that each such relationship presents one or more of the following characteristics:

- The Affiliated Organization’s existence and mission are dependent on the University and it could not feasibly continue its operations if the link to the University were severed or the University ceased operation;
- The programming of the Affiliated Organization is closely related to or supportive of activities or programming within the University;
- The Affiliated Organization resides in or conducts its programs in a University facility (*i.e.*, is located on the University’s campus) and the University has a particular interest in the Affiliated Organizations programs or benefits from those programs;
- The Affiliated Organization uses the University name or would be permitted to do so to explain its identity;
- The Affiliated Organization has a long historical relationship with the University and could be operated as part of the University, but has been established as a separate entity for historical reasons;
- The University has personnel dedicated to board, executive, and/or administrative functions of the Affiliated Organization;
- The University provides services to the Affiliated Organization (in addition to investment services), or the Affiliated Organization provides services to the University, and, in either

---

<sup>5</sup> In many instances, such Management Companies would also be considered “supporting organizations” of a University, and one such Management Company received no-action relief from the Division from CPO registration regarding its collective investment of a state university system’s endowment and Affiliated Organization assets. CFTC Staff Letter 17-19.

## **RE: Request for No-Action Relief for several Universities**

Page 4

case, the services provided are essential or integral to the mission of the University or Affiliated Organization; or

- The Affiliated Organization receives significant support through donations from University alumni or other persons who have an association with the University.

For purposes of this request for relief, you have proposed, and the Division agrees to the following definition of “Affiliated Organization”: an entity that (i) is a separate legal entity that is itself a charitable organization that operates under Section 501(c)(3), (ii) has an integral relationship with the relevant University to the extent that it is generally regarded by the University as part of the University community or as closely aligned with the University; (iii) provides services to and/or receives services from, the University or other organizations, groups, or individuals within the University community; and (iv) could not feasibly operate in the absence of its affiliation with the University without a fundamental change to its operations or purpose.

Due to the close relationships and the alignment of interests between the Universities and the Affiliated Organizations, the Affiliated Organizations have committed portions or all of their investment assets to the Universities or for investment by the Universities, and each University has invested those committed assets in its Combined Endowment Account. You state that the assets attributable to the Affiliated Organizations represent a relatively small portion of each Combined Endowment Account, amounting to less than % in some cases and in all cases less than % of the Combined Endowment Account. Additionally, you emphasize that the Universities do not market investments in the Combined Endowment Accounts as vehicles for commodity interest exposure, and the Affiliated Organizations do not enter into these arrangements for that purpose.

Additionally, each University typically passes through various charges on each unit of its Combined Endowment Account, reflecting each unit’s pro rata share of administrative and investment expenses incurred, directly or indirectly, by the University or its Management Company as a result of its investment activities, subject to restrictions in the terms of certain Planned Giving Vehicles that may preclude allocation of such Vehicles’ pro rata share of such expenses. In some cases, a University may also impose an additional charge on each unit, representing an allocation of the University’s overhead costs of operation. However, you state that none of the Universities or their Management Companies charges any fees or other compensation that generate profits for the Universities or their Management Companies and that all charges imposed on Affiliated Organizations through their units are designed to be limited to reimbursement for specific investment or general overhead costs. The Universities provide each of the Affiliated Organizations with reports of the performance of the Combined Endowment Accounts on a monthly, quarterly, or annual basis. Such reports generally provide aggregate performance results, but do not disclose particular investments or portfolio assets and do not address direct or indirect commodity interest exposure.

### *The Planned Giving Accounts*

In addition to the Combined Endowment Account, each University also operates charitable remainder trusts (“CRTs”), pooled income funds (“PIFs”) and other types of trusts or vehicles that are designed to allow donors to make contributions to the Universities while

## RE: Request for No-Action Relief for several Universities

Page 5

providing for income streams for the donor and beneficiaries. You state that a CRT is an irrevocable trust that is funded by a donor and administered and invested by a designated trustee, and that its defining characteristic is that the donor generally has no right or expectation of repayment of any portion of the principal amount of the donation.<sup>6</sup> The CRT pays income to beneficiaries of the donor's choosing for life or for a term of years (not to exceed 20), and upon the death of the last CRT beneficiary, the CRT terminates and the principal is paid to the charitable organization designated by the donor.

A PIF is formed by a University in order to permit individual donors to make gifts of cash or marketable securities into a pooled trust or commingled arrangement. Like with the CRTs, a donation made through the PIF is irrevocable and the donor has no right or expectation of repayment of principal. On a quarterly basis, a PIF pays a proportional share of the PIF's estimated net income to the beneficiaries designated by the donor in the gift instrument ("PIF Beneficiary") for the life of each such PIF Beneficiary.<sup>7</sup> Upon the death of the last designated PIF Beneficiary, the University severs the donor's original contribution from the PIF master trust and then uses the assets for the University's activities in accordance with instructions specified by the donor in the original gift instrument.<sup>8</sup>

Each University generally serves as trustee for the Planned Giving Accounts and in all cases holds at least a portion of the remainder interest. The assets of the Planned Giving Accounts are either invested in the Combined Endowment Account or managed in separate accounts by each University. Like the Affiliated Organizations, beneficiaries of income payments from the Planned Giving Accounts hold unitized interests in the Combined Endowment Account or Planned Giving Account, and receive periodic statements of the status of their interests and/or the Combined Endowment Account's performance. The assets attributable to the Planned Giving Accounts represent a relatively small portion of the Universities' combined endowments. Specifically, the percentage of the combined endowments represented by assets of the Planned Giving Accounts varies, but is typically under %.

In each instance, each donation is irrevocable and the donor cannot have any expectation of or right to repayment of the donation. Moreover, although donations, including donations through the Planned Giving Accounts, are solicited by the Universities, and donors may request to, or be requested to, have the contributed assets invested in the Combined Endowment Account or Planned Giving Accounts, no donors are solicited for purposes of obtaining commodity interest exposure or primarily with the expectation of obtaining such exposure. The Planned Giving Accounts could potentially have indirect exposure to commodity interests to the extent that commodity interests may be held by underlying mutual funds and ETFs in which the Planned Giving Accounts invest.

---

<sup>6</sup> An incentive for this type of donation is federal charitable income tax deduction based on the fair market value of the assets contributed to the CRT minus the present value of the life-income interest the donor retained.

<sup>7</sup> An incentive for this type of donation is the federal charitable income tax deduction available to the donor, which is based on the fair market value of the donated assets minus the present value of the life-income interest retained by the donor/PIF Beneficiary.

<sup>8</sup> Such instructions could, for instance, include limitations on which schools, academic programs, or supporting organizations the donated assets are used to support.

### **Need for Relief and Legal Analysis**

Any of the Universities (or a separate Investment Unit or other related entity) could be required to register as a CPO or a CTA, with respect to its operational, solicitation, and collective investment management activities related to the Combined Endowment Account and the Planned Giving Accounts, in which each University has commingled assets of multiple sources, with direct and/or indirect exposures to commodity interests. You describe the Universities' direct exposure to commodity interests as "limited and incidental" to the principal focus of the Combined Endowment Accounts, and state that indirect exposure to commodity interests arises through investments in third-party managed funds or separate accounts that transact in commodity interests. Absent the relief provided herein, the Endowment Account and Planned Giving Accounts could also be subject to certain of the Commission's regulations, *i.e.*, Part 4 of the Commission's regulations, which govern CPOs, CTAs, and the operational compliance required of such registrants. Based on the description of the Combined Endowment Accounts and Planned Giving Accounts in the Correspondence, the Division believes that, in addition to relief from CPO and CTA registration, relief from the requirements of Commission Regulation 4.20 would also be required to permit the acceptance and holding of third-party assets in each University's own name, as well as the commingling of those assets, currently characteristic of each University's structures.<sup>9</sup>

The Division believes that granting each University no-action relief from CPO and CTA registration and the requirements of Regulation 4.20 is appropriate based on the facts presented by this request and subject to the specific conditions of relief outlined below. The Division finds that, with respect to the Combined Endowment Accounts, multiple factors are in favor of granting such no-action relief. Much like CFTC Staff Letter 17-19, the interests of the Universities and the Affiliated Organizations are very closely aligned, and, in particular, further the mission of each of the Universities as a whole.<sup>10</sup>

You also state that the Affiliated Organizations are largely defined by their relationship to each University, and the Division agrees that it is that relationship that both permits and causes the Affiliated Organizations to commit assets to each University's Combined Endowment Account. Additionally, you represent that each University does not engage in the solicitation of Affiliated Organizations for investments, and the sole clients of the Investment Units at each University continue to be the University itself through the Combined Endowment Account (as well as the Planned Giving Accounts). These facts, among others as represented, distinguish the management of the Combined Endowment Account from the typical arms-length, business relationship that CPOs and commodity pools typically have with their participants, and which CPO registration and the corresponding compliance regime are generally designed to address.

The Division believes that limiting Affiliated Organizations pursuant to the conditions of this no-action relief is appropriate because such conditions ensure that organizations participating in the Combined Endowment Account have significant ties to each University, and

---

<sup>9</sup>Commission Regulation 4.20 provides, in pertinent part, that a CPO: (1) Must operate a pool as an entity cognizable as a legal entity separate from that of the CPO; (2) Receive funds from existing and prospective pool participants in the name of the pool; and (3) Must hold property of a pool separate from property of any other person.

<sup>10</sup> CFTC Staff Letter 17-19 (Apr. 4, 2017).

## RE: Request for No-Action Relief for several Universities

Page 7

thus, possess interests and goals aligned with the University and its community as a whole. With appropriate conditions in place, the Division believes granting the no-action relief herein to the Universities for their operation of the Combined Endowment Accounts benefits the Universities, the Affiliated Organizations, and their communities as a whole, by permitting the ongoing management of the Combined Endowment Account assets with limited regulatory or public interest risk.

With respect to the Planned Giving Accounts, the Division believes that, the resulting tax benefits and income streams notwithstanding, the principal purpose of committing assets to each University through a PIF or CRT continues to be making a charitable donation in support of the University. This conclusion is supported by the outright donation by an individual of the principal amount of the contribution to the University and other designated IRC Section 501(c)(3) charitable organizations with no expectation whatsoever of receiving those assets back. Further, any ancillary benefits, whether through tax deductions or income streams resulting from such a donation, have been legislated by Congress or otherwise adopted by the IRS to encourage individuals to support charitable causes, *e.g.*, higher education, and thus, should not be deemed to “convert” such a donation into an investment.

Additionally, similar to the Combined Endowment Account, each University has an ongoing interest, aligned with the donor, in prudently managing the Planned Giving Account assets to maximize the principal asset donations reverting to each University at the termination of each PIF Beneficiary’s interest and CRT. As stated above, such aligned interests distinguish this transactional structure from that of typical CPO or CTA arrangements. Therefore, although each University solicits from the public and provides investment choices, the Division concludes that with this conduct, the Universities are soliciting donations to financially support their educational and academic goals and mission, rather than to provide any investment management or advisory services to its planned giving donors. Consequently, the Division believes that granting no-action relief for the Universities from CPO and CTA registration with respect to the Planned Giving Accounts is also appropriate.

Based on the foregoing, the Division has determined that it will not recommend to the Commission that it take an enforcement action against any of the Universities, any of their Investment Units or related investment entities, or any individuals employed by or officers or members of the Board of Directors or Board of Trustees of the foregoing, for failure to register as a CPO or CTA, or to comply with Commission Regulation 4.20, with respect to the collective management of endowment and affiliated organization assets in a Combined Endowment Account, and the offering, solicitation, and operation of Planned Giving Accounts, *provided* that Universities meet the following conditions of relief:

- Standard for any Affiliated Organization Participant in the Combined Endowment Account: Any Affiliated Organization participant in the Endowment Account is required to be
  - (i) a tax-exempt entity that is a supporting organization of a University, pursuant to IRC Section 509(a)(3); or
  - (ii) a separate legal entity that
    - is itself tax-exempt under IRC Section 501(c)(3).

**RE: Request for No-Action Relief for several Universities**

Page 8

- has an integral relationship with a University to the extent that it is generally regarded by the University as part of the university community or as closely aligned with the University;
  - provides services to and/or receives services from the University or other organizations, groups, or individuals within the University community;  
and
  - could not feasibly operate in the absence of its affiliation with the University without a fundamental change to its operations or purpose.
- Third-Party Investment Managers and Advisors: To the extent that the University invests Combined Endowment Account assets in pooled investment vehicles that are commodity pools or receives commodity trading advice in the management of the Combined Endowment Account or Planned Giving Accounts, such collective investment services and advice must only be provided by persons or entities registered with the Commission as CPOs or CTAs, exempt from such registrations, or excluded from the CPO or CTA definitions.<sup>11</sup>

The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the Commodity Exchange Act or in the Commission regulations issued thereunder. 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. The Division retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the relief provided herein in its discretion. Finally, this letter and the position taken herein represent the views of this Division only, and do not necessarily represent the views of the Commission or any other office or division 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,

Eileen T. Flaherty  
Director  
Division of Swap Dealer and  
Intermediary Oversight

---

<sup>11</sup> This condition is consistent with that imposed on similar relief granted by the Division's predecessor to an organization exclusively managing university and college endowment assets, and on no-action relief recently granted by this Division to a university system with respect to its endowment and other university assets. See CFTC Staff Letter 85-22, p. 7, and CFTC Staff Letter 17-19, p. 12.