



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Matthew B. Kulkin
Director

CFTC Letter No. 18-10
Exemption
March 30, 2018
Division of Swap Dealer and Intermediary Oversight

Re: Relief from the annual report requirement of 4.7(b)(3)

Dear :

This is in response to your letters dated November 17, 2017 and February 13, 2018 to the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission” or “CFTC”), as well as other emails, telephone calls, and correspondence (“Correspondence”).

On March 21, 2017, the Division issued CFTC Staff Letter No. 17-23 (“Letter 17-23”)¹ to “A” that granted relief from the requirement in Commission regulation 4.7(b)(3) to file with the National Futures Association (“NFA”) and distribute to participants an audited annual report² for certain commodity pools that it operated. Letter 17-23 required “A” to comply with certain conditions imposed in that letter to be eligible for relief. Furthermore, the Division issued Letter 17-23 after considering all of the representations made by “A” to the Division, with the understanding that any different, changed, or omitted material facts or circumstances could render that letter void.

In the Correspondence, you state that there have been two material changes to the structure of the commodity pools referenced in Letter 17-23. First, “A” formed “B”, which is approximately % indirectly owned by “C” and % indirectly owned by “A”.³ “A” is the commodity pool operator (“CPO”) for “B” and operates it pursuant to Commission regulation 4.7. “B” was created as a proprietary feeder fund to enable “F” Persons⁴ to participate side-by-

¹ Letter 17-23 is available on the Commission’s website, www.cftc.gov.

² Specifically, pursuant to Commission regulation 4.22(d)(1), the financial statements in the annual report required by Commission regulation 4.7(b)(3) must be audited by an independent public accountant.

³ “B” is approximately % owned by “D”, which, in turn, is % owned by “C”. The remaining % is owned by “E”, which, in turn, is % owned by “A”.

⁴ “F” Persons has the same definition as in Letter 17-23. Namely, “F” Persons are current and former high-level employees of “A” or its affiliates. They are also managing directors (or former managing directors) of “C”. “F” Persons are chosen by “A’s” management committee based on a variety of factors, which may include seniority of the position, length of service, performance of the individual, profitability, capital managed, teamwork, *etc.* You state that “F” Persons who are no longer employees of “A” or its affiliates may remain a “F” Person for up to four

side in a trading strategy implemented by “A” for unaffiliated investors in separate funds. Second, “G” is now approximately % indirectly owned by “C” and % indirectly owned by “A”.⁵ Previously, “G” was approximately % indirectly owned by “C” and % indirectly owned by “A”.⁶ You state that all other representations that you made with respect to the overall commodity pool structure in Letter 17-23 remain valid and that there are no other material changes to the facts.⁷

In light of these changes, you request the following. First, you request that the relief granted in Letter 17-23 to “A” with respect to “H”, “I”, and “J” also apply to “B”, because “B” is materially identical to such commodity pools in this particular context. Second, you request that the Division no longer require the third condition in Letter 17-23, which requires “A” to file with NFA annual reports with unaudited financial statements for “G”, because of the change in ownership percentages to “G”, which results in “G” being materially identical to “H”, “I”, and “J” in this particular context.

As a preliminary matter, the relief in Letter 17-23 applied solely with respect to the enumerated commodity pools in that letter. As a result, absent additional relief from the Division, “A” cannot unilaterally extend the relief granted by the Division in Letter 17-23 with respect to “H”, “I”, and “J” to “B”. However, based on the Correspondence, the Division agrees that the relief provided in Letter 17-23 with respect to “H”, “I”, and “J” should be extended to “B”. “B” is approximately % owned by “D” and % indirectly owned by “A”. When Letter 17-23 was issued, “H”, “I”, and “J”’s ownership ranged between approximately % indirectly owned by “C” and % indirectly owned by “A” to approximately % indirectly owned by “C” and % indirectly owned by “A”. The Division believes that it is neither contrary to the purpose of Commission regulation 4.7(b)(3) nor to public interest to extend the relief provided in Letter 17-23 with respect to “H”, “I”, and “J” to “B”, because, based on the Correspondence, there is no material difference between “B” and those commodity pools in this particular context.

The Division also agrees that the third condition in Letter 17-23 should no longer be required with respect to “G”. “G” is now approximately % indirectly owned by “C” and % indirectly owned by “A”. Previously, it was approximately % indirectly owned by “C” and % indirectly owned by “A”. In Letter 17-23, the Division required “A” to file with NFA unaudited annual reports for “G”, but did not require the same for “H”, “I”, and “J”. This requirement was intended to minimize the gap in information that the Division and NFA would receive by

years after the date of their departure. You state that, during this period, such “F” Persons may maintain their existing investment in “C” and “A”, but are not permitted to make any additional investments therein.

⁵ “G” is approximately % owned by “D”, which, in turn, is % owned by “C”. The remaining % is owned by “E”, which, in turn, is % owned by “A”.

⁶ The chain of ownership remained the same.

⁷ You also note two additional changes, which do not constitute material changes in the facts previously presented to the Division. First, “H” is now approximately % indirectly owned by “C” and % indirectly owned by “A”. Specifically, “H” is approximately % owned by “D”, which, in turn, is % owned by “C”. The remaining % is owned by “E”, which, in turn, is % owned by “A”. Previously, “H” was approximately % owned by “D” and % indirectly owned by “A” with the same chain of ownership.

Second, “K”, which is an administrative general partner that did not hold any economic interests with respect to “I” and “G”, is now % indirectly owned by “A”. Previously, “K” was % indirectly owned by “C” and % owned by “A”.

granting the relief in Letter 17-23. Specifically, absent this additional requirement, the Division and NFA would only have access to financial statements that reflected % of “G”. This was because you stated that “C” (through “D”) was not permitted to consolidate the financial information of “G” into the audited annual reports required under Commission regulation 4.7(b)(3) pursuant to U.S. generally accepted accounting principles (“U.S. GAAP”).⁸ As a result, the audited consolidated annual report of “C”, which “A” was filing with NFA, would only reflect the % interest it had in “G”. The remaining % interest in “G” was held indirectly by “A”, which was not required to file its audited financial statements with NFA because it was a CPO. In contrast, you stated that “C” (through “D”) was able to consolidate the financial information for “H”, “I”, and “J” pursuant to U.S. GAAP because of the ownership structure of those commodity pools. As a result, “C’s” audited annual report reflected % of the financial information for “H”, “I”, and “J”.⁹ Although unaudited financial statements for “G” were not an exact substitute for all of the information required absent relief, the Division believed that it was nonetheless a satisfactory substitute, given all of the factors it considered in granting relief. However, now, due to the change in ownership of “G”, you state that “C” (through “D”) will consolidate all of “G’s” financial information into its audited annual report. As a result, the Division believes that it is neither contrary to the purpose of Commission regulation 4.7(b)(3) nor to public interest to no longer require the third condition in Letter 17-23 with respect to “G”. By doing so, the Division is treating “G” the same as “H”, “I”, and “J”,¹⁰ because, based on the Correspondence, there is no material difference between “G” and those other commodity pools in this particular context.

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. The Division notes that this includes all representations that you made with respect to the commodity pool structure in connection with the issuance of Letter 17-23, except for those that were disclosed in connection with the issuance of this letter. Any different, changed, or omitted material facts or circumstances might render this letter void. For the avoidance of doubt, the Division also notes that “A” is required to satisfy all conditions in Letter 17-23 with respect to “B” and “G”, except for the third condition listed therein. Letter 17-23 remains in effect for all other commodity pools with respect to which “A” received relief. 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.

⁸ Pursuant to Commission regulation 4.22(d), an audited annual report pursuant to Commission regulation 4.7(b)(3) must be prepared in connection with U.S. GAAP or one of the enumerated accepted foreign accounting standards in Commission regulation 4.22(d).

⁹ The interests that were not ultimately held by “C” were designated as non-controlling interests.

¹⁰ This also includes “B”, after the Division issues this letter.

“A”

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Should you have any questions, please do not hesitate to contact Amanda Olear, Associate Director, at 202-418-5283, or Chang Jung, Special Counsel, at 202-418-5202.

Very truly yours,

Matthew B. Kulkin
Director
Division of Swap Dealer and
Intermediary Oversight