



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Matthew B. Kulkin
Director

CFTC Letter No. 18-22
No-Action
August 21, 2018
Division of Swap Dealer and Intermediary Oversight

Re: Request for No-Action Relief from the Requirement to Register as a Commodity Pool Operator under Section 4m(1) of the Commodity Exchange Act

Dear :

This is in response to your letter dated January 5, 2018 to the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission” or “CFTC”). In the letter, you request, on behalf of “A” and “B” (“Trustee”), that the Trustee receive relief from the requirement to register with the Commission as a commodity pool operator (“CPO”) under section 4m(1) of the Commodity Exchange Act (“CEA” or “Act”)¹ in connection with its role as the trustee of a certain commodity pool (“Pool”). Instead, you state that the Trustee will delegate certain of its responsibilities as the CPO of the Pool to “A” pursuant to the applicable requirements of CFTC Staff Letter No. 14-126 (“Letter 14-126”),² except for criterion 6 therein.

Background

On May 12, 2014, the Division issued CFTC Staff Letter No. 14-69 (“Letter 14-69”),³ which was in response to numerous requests asking that the Division provide no-action relief for failure to register as a CPO under section 4m(1) of the Act, if another person would serve as the registered CPO of the commodity pool at issue in lieu of the requesting CPO. Letter 14-69 developed a standardized, streamlined approach pursuant to which the Division addressed these types of relief requests, and set forth certain requirements that were based on prior staff no-action letters.

¹ 7 U.S.C. 6m(1). The Act is found at 7 U.S.C. 1 et seq. (2016). It, and the Commission’s regulations, may be accessed through the Commission’s website, <http://www.cftc.gov>.

² CFTC Staff Letter No. 14-126 (Oct. 15, 2014), *available at* <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/14-126.pdf> (last retrieved July 13, 2018). This and the other Commission staff letters referenced herein are also available on the Commission’s website, <http://www.cftc.gov>.

³ CFTC Staff Letter No. 14-69 (May 12, 2014), *available at* <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/14-69.pdf> (last retrieved July 13, 2018).

On October 15, 2014, the Division issued Letter 14-126, which was a further refinement of the relief addressed in Letter 14-69. Like Letter 14-69, Letter 14-126 provided no-action relief for failure to register as a CPO under CEA Section 4m(1) if another person would serve as the registered CPO of the commodity pool at issue in lieu of the requesting CPO. The circumstances and conditions for relief under Letter 14-126 were, in purpose and effect, the same as those set forth in Letter 14-69, with the exception of certain added clarifications. One of those conditions was that, if the Delegating CPO⁴ and the Designated CPO⁵ are each a non-natural person, then one such CPO controls, is controlled by, or is under common control with the other CPO. The relief provided by Letter 14-126 was self-executing, and no notice or claim needed to be filed, in order to, in part, ease the administrative burdens of Letter 14-69 on the Division. In issuing Letter 14-126, the Division noted that there may be other CPO delegation situations involving circumstances in which CPO registration no-action relief may be warranted that are not addressed by Letter 14-126 and indicated that it intends to continue to evaluate requests submitted pursuant to Commission regulation 140.99⁶ for CPO registration no-action relief from persons who fall outside of the scope of Letter 14-126.⁷

Requested Relief and Legal Analysis

Based on the representations made in your letter and other correspondence (“Correspondence”), we understand the facts to be as follows. “A” is an indirect subsidiary of “C”, a publicly traded company (together, with its affiliates, “C”). “A” is a registered CPO and has been registered in such capacity with the Commission since 2004. “A” has also been registered as a commodity trading advisor since 2006. “A” serves as the commodity trading advisor of the Pool and serves as its sponsor as well. In addition, “A” is registered with the Securities and Exchange Commission (“SEC”) pursuant to the Investment Advisers Act of 1940.⁸ “A’s” operations are based in the United States, and all of its books and records are kept in the United States. As of December 31, 2017, “A” and its subsidiaries had approximately \$ in assets under management.

The Trustee serves as trustee to the Pool and is not affiliated with either “C” or “A”. The Trustee holds a category “A” banking license and an unrestricted trust license issued pursuant to the Banks and Trust Companies Law of the Cayman Islands. The Trustee is also a licensed mutual fund administrator pursuant to the Mutual Funds Law of the Cayman Islands. The Pool with respect to which the Trustee is requesting registration relief as a CPO is listed in Appendix A.

In addition, you state that the Trustee and “A” satisfy all of the applicable criteria in Letter 14-126, except for criterion 6 therein, which states that, “[i]f the Delegating CPO and the Designated CPO are each a non-natural person, then one such CPO controls, is controlled by, or

⁴ This term is defined in Letter 14-126.

⁵ *Id.*

⁶ 17 CFR 140.99 (2017).

⁷ Letter 14-126, p. 2. The Division indicated the same following the issuance of Letter 14-69 as well.

⁸ 15 U.S.C. §§80b-1 to 80b-21.

is under common control with the other CPO.” In particular, you represent, among other things, the following:

- Pursuant to a legally binding document, the Trustee has delegated to “A” all of its investment management authority with respect to the Pool.
- The Trustee, including any of its employees or other persons acting on its behalf, does not participate, and has never participated, in the solicitation of participants for the Pool.
- The Trustee, including any of its employees or other persons acting on its behalf, does not manage, and has never managed, any property of the Pool.
- The Trustee is not subject to statutory disqualification under section 8a(2) or 8a(3) of the Act.
- There is a business purpose for “A” being a separate entity from the Trustee that is not solely to avoid registration by the Trustee under the Act and the Commission’s regulations.
- The books and records of the Trustee with respect to the Pool are maintained by “A” in the United States in accordance with Commission regulation 1.31.⁹
- The Trustee and “A” have executed a legally binding document whereby each undertakes to be jointly and severally liable for any violation of the Act or the Commission’s regulations by the other in connection with the operation of the Pool.

As noted above, although “A” and the Trustee are not under common control and neither “A” nor the Trustee controls the other, they will be jointly and severally liable for any violation of the Act or the Commission’s regulations related to operating the Pool. Further, the entity to which the Trustee has delegated has been registered as a CPO for more than 13 years, is dually registered with the SEC, has approximately \$ under management and will maintain all books and records in the United States in compliance with Commission regulation 1.31. The Division believes that under these circumstances, granting no-action relief permitting the delegation of CPO duties and responsibilities for the Pool to “A” is appropriate, notwithstanding that the Trustee and “A” do not qualify for relief under Letter 14-126.

Relief Granted

Based upon the representations made in the Correspondence, the Division will not recommend that the Commission commence any enforcement action against the Trustee for failure to register as a CPO under section 4m(1) of the Act in connection with its current role

⁹ 17 CFR 1.31 (2017).

“B”

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with respect to the Pool. This position is subject to and taken in reliance on all of the representations that you have made in connection with your relief request.

The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the 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 of any other office or division of the Commission.

Should you have any questions, please 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
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Intermediary Oversight

“B”
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Appendix A

“D”