



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer
and
Intermediary Oversight

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CFTC Letter No 14-126
No-Action
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Division of Swap Dealer and Intermediary Oversight

Re: CEA Section 4m(1) – Self-Executing Registration No-Action Relief for Delegating CPOs when Certain Requirements are Satisfied

I. Introduction.

By this letter, the Division of Swap Dealer and Intermediary Oversight (“DSIO” or “Division”) of the Commodity Futures Trading Commission (“CFTC” or “Commission”) is issuing no-action relief from the requirement to register as a commodity pool operator (“CPO”) under Section 4m(1) of the Commodity Exchange Act (“Act” or “CEA”)¹ to persons who have delegated certain of their responsibilities as a CPO of a commodity pool (“Delegating CPO”) to another person who is registered as a CPO (“Designated CPO”), such that the Designated CPO will serve as the CPO of the pool in lieu of the Delegating CPO.

This relief is self-executing, such that no notice or claim needs to be filed to take advantage of it. However, as explained in Section III below, the availability of this relief is limited to certain circumstances and is subject to compliance with certain conditions.

This letter constitutes a further progression of the relief addressed in CFTC Staff Letter No. 14-69 (“Letter 14-69”).² Accordingly, the Division will no longer consider requests for CPO registration no-action relief pursuant to the streamlined approach described in Letter 14-69,

¹ 7 U.S.C. §6m(1). The CEA is found at 7 U.S.C. §§1 *et seq.* (2012). It may be accessed through the Commission’s Web site, www.cftc.gov.

² May 12, 2014. CFTC Staff Letters are available on the Commission’s Web site.

The instant letter does not, however, affect the efficacy of any prior Staff Letter issued by the Division with respect to CPO registration relief for a Delegating CPO, including any Staff Letter issued pursuant to the streamlined approach in Letter 14-69.

including any requests previously submitted to the Division that are pending.³ Any person who has a request pending under Letter 14-69 should instead assess whether they are entitled to the self-executing relief provided by this letter. In this regard, the Division notes that, with the exception of certain clarifications added to the criteria in Letter 14-69 discussed below,⁴ the circumstances and conditions set forth in Section III below are, in purpose and effect, the same as those set forth in Letter 14-69.

Notwithstanding the issuance of this letter, the Division recognizes 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 this letter. Accordingly, DSIO intends to continue to evaluate requests submitted pursuant to Regulation 140.99⁵ for CPO registration no-action relief from persons who fall outside of the scope of this letter.

II. Letter 14-69.

A. Regulatory Background.

CEA Section 1a(11)(A)(i) defines the term “commodity pool operator” to mean any person –

- (i) engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including any –
 - (I) commodity for future delivery, security futures product, or swap;
 - (II) agreement, contract, or transaction described in section 2(c)(2)(C)(i) of this title or section 2(c)(2)(D)(i) of this title;
 - (III) commodity option authorized under section 6c of this title; or

³ Any person who received a no-action letter pursuant to Letter 14-69 may continue to rely thereon.

⁴ In clarifying the criteria for relief set forth in Letter 14-69, this letter addresses certain activities of the Delegating CPO or Designated CPO that would not prevent the Delegating CPO from obtaining the relief provided. It is noted that, because the additional language clarifies the criteria in Letter 14-69, the clarifications do not narrow the relief previously provided by the Division in its responses to requests for relief filed pursuant to Letter 14-69.

⁵ Regulation 140.99 governs requests for staff exemptive, no-action and interpretative letters. The Commission’s regulations are found at 17 C.F.R. Part 1 *et seq.* (2014). They may be accessed through the Commission’s Web site.

(IV) leverage transaction authorized under section 23 of this title. .

⁶

CEA Section 4m(1) makes it unlawful for any person who comes within the CPO definition, “unless registered under [the Act], to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such . . . [CPO].” CEA Sections 8a(2) and 8a(3) provide for registration disqualifications if certain circumstances are present (“Statutory Disqualification”). Each person who must register as a CPO is subject to the membership requirements of the National Futures Association (“NFA”), which is registered as a futures association with the Commission.⁷

B. The Streamlined Approach.

Letter 14-69 established a streamlined approach to address requests for registration no-action relief from Delegating CPOs. As discussed in Letter 14-69, the purpose of the streamlined approach was to allow the Division to more efficiently address many of the numerous requests for relief it was receiving in this area.⁸ As the Division emphasized in Letter 14-69, that letter did not, by itself, provide CPO registration no-action relief. Rather, Letter 14-69 established the circumstances under which the Division intended to provide registration no-action relief through the streamlined approach described therein.

Letter 14-69 set out certain criteria required to be met to request relief under the streamlined approach established in that letter (“Letter 14-69 Criteria”). Certain of the Letter 14-69 Criteria depended on whether the Delegating CPO was a natural person and whether the Delegating CPO and Designated CPO were affiliated. Notably, in Letter 14-69 the Division

⁶ CEA Section 1a(10)(A) correspondingly defines the term “commodity pool” to mean –

- any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including any –
- (i) commodity for future delivery, security futures product, or swap;
- (ii) agreement, contract, or transaction described in section 2(c)(2)(C)(i) of this title or section 2(c)(2)(D)(i) of this title;
- (iii) commodity option authorized under section 6c of this title; or
- (iv) leverage transaction authorized under section 23 of this title.

⁷ See NFA Bylaw 1101. To date, NFA is the sole registered futures association.

⁸ In Letter 14-69, the Division discussed at length the relevant regulatory background and the prior no-action letters Commission staff had issued in this area. Among other things, the Division noted that the increase in the number of requests for no-action relief likely arose, at least in part, due to the rescission of Regulation 4.13(a)(4), which previously provided an exemption from registration to certain types of CPOs. See *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252 (Feb. 24, 2012).

stated its intent to provide relief (under the streamlined approach) to a Delegating CPO who was an “Unaffiliated Board Member” (as defined in Letter 14-69), notwithstanding that such Delegating CPO and the relevant Designated CPO had not agreed to “CPO Joint and Several Liability” (as also defined in that letter).

Under Letter 14-69, a Delegating CPO seeking CPO registration relief through the streamlined approach was required to submit a request for relief pursuant to Regulation 140.99 in the form of the Attachment to Letter 14-69. The form of Attachment called for the requestor to provide certain information regarding the Delegating CPO and Designated CPO, as well as a certification that the Letter 14-69 Criteria had been met.

C. Subsequent Events.

Following the issuance of Letter 14-69, the Division received a large number of requests for CPO registration no-action relief filed in accordance with the streamlined approach. While the Division has considered and granted relief in response to a number of these requests, many requests are still pending, and the Division expects many more persons will request relief under Letter 14-69 in the future. In addition, the Division has received a number of inquiries concerning the application of the Letter 14-69 Criteria, primarily regarding Criterion 1, in the context of certain scenarios not specifically addressed in Letter 14-69, which the Division believes are sufficiently prevalent to warrant further clarification by the Division.

Thus, in light of the administrative burdens Letter 14-69 is imposing on DSIO’s limited resources, the Division believes it is appropriate to issue CPO registration no-action relief to Delegating CPOs, in the circumstances and subject to the conditions set forth below, thereby making it unnecessary for persons to continue to seek and receive relief from the Division on a case-by-case basis, as had been required by Letter 14-69.

The criteria for relying on the relief provided by this letter, as set forth below (“Criteria”), are the same as the Letter 14-69 Criteria. However, in response to questions raised with respect to the application of Criterion 1 in Letter 14-69, the Division is clarifying in Criterion 1 of this letter that satisfaction of that Criterion is not precluded in certain situations.

III. The Relief.

The Division will not recommend that the Commission commence an enforcement action under CEA Section 4m(1) against a Delegating CPO for failure to register as a CPO if the following Criteria are satisfied.

1. a. Pursuant to a legally binding document,⁹ the Delegating CPO has delegated to the Designated CPO all of its investment management authority with respect to the commodity pool at issue; provided, however, that satisfaction of this criterion is not

⁹ The legally binding document could include, but is not limited to, a separate delegation agreement, a document that establishes the pool, or an investment management agreement between the Delegating CPO and the Designated CPO.

precluded where: (i) a Delegating CPO or the Designated CPO appoints one or more third parties to serve as investment manager(s) of the pool; and (ii) each such third party investment manager is registered as a commodity trading advisor (“CTA”) or is exempt from such registration pursuant to the CEA or the Commission’s regulations;¹⁰

b. The Delegating CPO does not participate in the solicitation of participants for the pool; provided, however, that satisfaction of this criterion is not precluded where the Delegating CPO: (i) is registered as an associated person (“AP”) of the Designated CPO or is exempt from registration as such pursuant to the CEA or the Commission’s regulations;¹¹ and (ii) participates in the solicitation of pool participants solely in its capacity as an AP of the Designated CPO; and

c. The Delegating CPO does not manage any property of the pool; provided, however, that satisfaction of this criterion is not precluded where the Delegating CPO: (i) is a principal or employee of the Designated CPO or of a CTA of the pool at issue; and (ii) has management responsibilities over pool property; provided further, however, that such Delegating CPO: (1) exercises these management responsibilities solely in the capacity of a principal or employee of the Designated CPO or as a CTA of the pool and not as the Delegating CPO of the pool; and (2) in connection with exercising these management responsibilities, is subject to supervision as a principal or an employee by either the Designated CPO or a CTA of the pool in accordance with Regulation 166.3. For purposes of this Criterion, management of pool property does not include responsibilities with respect to pool property of an administrative, clerical or ministerial nature.

2. The Designated CPO is registered as a CPO.
3. The Delegating CPO is not subject to a Statutory Disqualification.
4. There is a business purpose for the Designated CPO being a separate entity from the Delegating CPO that is not solely to avoid registration by the Delegating CPO under the CEA and the Commission’s regulations.
5. The books and records of the Delegating CPO with respect to the commodity pool are maintained by the Designated CPO.

¹⁰ See CEA Section 4m(1), which concerns the registration requirement for CTAs, and CEA Section 4m(3) and Regulation 4.14, which concern exemptions from the requirement to register as a CTA.

¹¹ See CEA Section 4k(2) and Regulation 3.12, which concern the registration requirement and exemptions therefrom for APs of CPOs.

6. If the Delegating CPO and the Designated CPO are each a non-natural person, then one such CPO controls, is controlled by, or is under common control with the other CPO.
7. If a Delegating CPO is a non-natural person, then such Delegating CPO and the Designated CPO have executed a legally binding document whereby each undertakes to be jointly and severally liable for any violation of the CEA or the Commission's regulations by the other in connection with the operation of the commodity pool.
8. If a Delegating CPO is a natural person and is not an Unaffiliated Board Member, as defined below, then such Delegating CPO and the Designated CPO have executed a legally binding document whereby each undertakes to be jointly and severally liable for any violation of the CEA or the Commission's regulations by the other in connection with the operation of the commodity pool.
9. If a Delegating CPO is an Unaffiliated Board Member, then such Delegating CPO must remain fully responsible as a Board member in accordance with the laws under which the commodity pool is established.

For purposes of this letter, the term "Unaffiliated Board Member" means a natural person who is a voting member of the board of directors, board of trustees, board of managers or an equivalent governing body of the commodity pool who: (i) is not a member of the management or an employee of the Designated CPO or any affiliate thereof; (ii) is not a substantial beneficial owner of the Designated CPO or any affiliate thereof or of any company holding more than five percent of such Designated CPO's beneficial ownership interests or any affiliate thereof; and (iii) has no other interest or relationship that could interfere with his/her ability to act independently of management of the Designated CPO or any affiliate thereof or of any company holding more than five percent such Designated CPO's beneficial ownership interests or any affiliate thereof.¹²

IV. Conclusion.

This letter and the position taken hereby 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.

¹² Whether a director has an interest or relationship under clause (iii) will be based on the relevant facts and circumstances. For example, interests or relationships that are indicative of an affiliation with the Designated CPO that could trigger clause (iii) may include: the director being a material service provider or investment counterparty to the Designated CPO or any of its affiliates, or is, or within the past three years was, employed in an executive capacity by, or was a principal or employee of, a material service provider or investment counterparty to, the Designated CPO or any of its affiliates.

If you have any questions concerning this letter, please contact the undersigned at (202) 418-5977, Erik Remmler, Deputy Director, at (202) 418-7630, Barbara S. Gold, Associate Director, at (202) 418-5441, or Israel Goodman, Special Counsel, at (202) 418-6715.

Very truly yours,

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