



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer  
and  
Intermediary Oversight

Gary Barnett  
Director

CFTC Staff Letter No. 14-69  
Other Written Communication  
May 12, 2014  
Division of Swap Dealer and Intermediary Oversight

### **Re: Requesting Registration No-Action Relief on an Expedited Basis for Commodity Pool Operators who Delegate Certain Activities to a Registered Commodity Pool Operator under Certain Circumstances**

#### **I. Introduction.**

The Division of Swap Dealer and Intermediary Oversight (“DSIO” or “Division”) of the Commodity Futures Trading Commission (“CFTC” or “Commission”) has received numerous requests over the past several years asking that the Division provide no-action relief in accordance with Commission Regulation 140.99<sup>1</sup> for failure to register as a commodity pool operator (“CPO”) under Commodity Exchange Act (“Act” or “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. Generally, the requests seek registration no-action relief for a CPO that has delegated investment management authority as a CPO of a commodity pool (“Delegating CPO”) to another person who is registered as a CPO (“Designated CPO”), and the Delegating CPO does not engage in the solicitation of participants for, or the management of property of, the applicable commodity pool. The Division has previously received and considered such requests for individual CPOs and where certain facts were present, and subject to certain conditions, staff issued the requested relief.<sup>2</sup>

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<sup>1</sup> 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.* (2013). They may be accessed through the Commission’s website, [www.cftc.gov](http://www.cftc.gov).

<sup>2</sup> See, e.g., CFTC Staff Letters No. 13-20, 12-24, 11-01, 10-06, 09-44, 07-19, 06-12, 05-11, 04-20, 03-02, 02-21, 01-07, 00-82, 99-30, 98-04, 97-11, 96-66, 95-80, 94-69, and 93-50. Each Staff Letter referred to in this letter is available on the Commission’s website. This letter does not affect the efficacy of any prior Staff Letters issued by the Division with respect to CPO registration relief for a Delegating CPO.

Given the significant number of requests received, the Division has developed the standardized, streamlined approach described in this letter for requests that meet the criteria specifically set forth below. The streamlined approach allows the Division to more efficiently address many of the numerous requests for relief in this area. The Division recognizes that there may be CPO delegation situations involving other circumstances in which CPO registration no-action relief may be warranted, but where the requirements to utilize the approach set forth in this letter cannot be met. Accordingly, DSIO intends to continue to evaluate requests for CPO registration no-action relief from persons who are not able to utilize the approach for requesting such relief set forth in this letter.

The Division emphasizes that this letter does not, by itself, provide CPO registration relief. Rather, this letter establishes the circumstances under which the Division intends to provide relief through the streamlined approach described herein.

## **II. Regulatory Background.**

Section 1a(11)(A)(i) of the Commodity Exchange Act (“Act” or “CEA”)<sup>3</sup> 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
  - (IV) leverage transaction authorized under section 23 of this title. . . .<sup>4</sup>

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)

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<sup>3</sup> 7 U.S.C. §1 *et seq.* (2012).

<sup>4</sup> 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.

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.<sup>5</sup>

### **III. Prior Staff Registration No-Action Letters Involving Delegation of CPO Activity and Authority.**

For many years, Commission staff received and considered requests to the staff not to recommend that the Commission commence an enforcement action against a particular person for failure to register as a CPO under CEA Section 4m(1) where another person would serve in lieu thereof as the registered CPO of the commodity pool at issue.<sup>6</sup> As noted above, where certain facts were present and certain conditions were met, staff issued the requested relief.

Early on, Commission staff typically received requests for, and issued CPO registration no-action relief with respect to, commodity pools that were organized as limited partnerships (“LPs”) with two or more general partners, such that only one of the general partners was required to register as a CPO.<sup>7</sup> More recently, the Division received an increased number of CPO registration no-action requests involving delegation, and some of those requests concern pools with other forms of organization.<sup>8</sup> For example, staff received requests and issued CPO registration no-action relief with respect to pools organized as LPs or limited liability companies (“LLCs”) having, respectively, a general partner or managing member affiliated with the pool’s investment manager, such that the investment manager was permitted to serve as the registered CPO in lieu of the general partner or managing member.<sup>9</sup> Additionally, from time to time,

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<sup>5</sup> See NFA Bylaw 1101. To date, NFA is the sole registered futures association.

<sup>6</sup> Registrants informed staff that separate CPOs may be involved for a number of reasons including for separate asset management purposes, tax-related reasons, to account for different ownership and compensation arrangements, or to comply with licensing requirements in other jurisdictions. See, e.g., CFTC Staff Letters No. 13-17 and 12-23.

<sup>7</sup> See, e.g., CFTC Staff Letters No. 93-09 and 86-30.

<sup>8</sup> 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).

<sup>9</sup> See, e.g., CFTC Staff Letters No. 13-18 and 13-19. DSIO has observed a number of commonalities in the forms of organization typically present in previously issued CPO registration no-action requests involving delegation. For example, with respect to commodity pools domiciled and located in the United States, its territories or possessions, DSIO’s experience is that the Delegating CPO and the Designated CPO are non-natural persons; the pools are organized as LPs or LLCs; and each pool’s Delegating CPO is the general partner of the LP or managing member or manager of the LLC. For commodity pools domiciled and

Commission staff received requests, and issued no-action relief, for one or more persons serving as members of a board of directors or other governing body (“Board”) of a commodity pool domiciled and located outside the United States, its territories and possessions.<sup>10</sup>

In such instances in which relief was provided, staff generally required the Delegating CPO and the Designated CPO to agree to be jointly and severally liable for any violation of the CEA or the Commission’s regulations committed by the other in connection with the operation of the pool (“CPO Joint and Several Liability”). More recently, however, various counsel for Board members seeking CPO registration no-action relief have asserted that such persons should not be required to agree to CPO Joint and Several Liability, particularly if the Board member has little or no relationship with the Designated CPO.<sup>11</sup>

Because many of the fact patterns presented in the relief requests are similar, the Division is instituting this streamlined approach to facilitate consideration of individual requests that meet the criteria set forth herein more quickly and efficiently. Accordingly, by this letter, the Division is clarifying the circumstances in which it intends to grant CPO registration relief by way of this streamlined approach, the conditions to the relief, and how the relief is to be requested in accordance with Regulation 140.99. This streamlined approach includes the use of a simplified form of request, a template of which is attached to this letter.

The requirements that must be met in order to obtain CPO registration relief through the approach set forth in this letter are based on prior staff no-action letters. In addition, the Division is clarifying that it intends to provide relief, upon a duly submitted request, for a Board member of a commodity pool without requiring the Board member to agree to CPO Joint and Several Liability if the Board member is not affiliated with the Designated CPO.<sup>12</sup> Accordingly, this letter also addresses the circumstances under which a person who is an “Unaffiliated Board Member”, as defined below, may utilize the streamlined approach for requesting CPO registration relief without being subject to CPO Joint and Several Liability.

As noted above, the Division recognizes that there may be CPO delegation situations involving facts or circumstances that do not meet the requirements for requesting relief through

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located outside of the United States, its territories or possessions, sometimes a pool is organized as a company with a board of directors, each of whose members is a natural person.

<sup>10</sup> See, e.g., CFTC Staff Letters No. 97-73 and 96-44.

<sup>11</sup> Counsel explained that these Board members are often included on the Board to satisfy the requirements of the laws of the jurisdiction in which the pool has been organized or at the request of pool participants to provide independent oversight of the operations of the pool.

<sup>12</sup> This approach to directors who are not affiliated with the Designated CPO is consistent with the Commission’s view that the investment adviser of a registered investment company is the entity that should register as the CPO for the company, not the members of the company’s board. 77 Fed. Reg. 11259 (Feb. 24, 2012). (Although not a prerequisite for relief under this letter, staff understands that the entity to which CPO duties are delegated is in many instances an investment manager for the commodity pool.)

the streamlined approach set forth in this letter, but which might nonetheless also warrant relief. Accordingly, DSIO intends to continue to evaluate other requests for CPO registration no-action relief in the delegation context where the circumstances do not permit the requestor to utilize this streamlined approach. In addition, the Division may expand the streamlined approach to additional scenarios in the future as appropriate.

#### **IV. The Streamlined Approach.**

The Division intends to provide no-action relief from the registration requirement in Section 4m(1) of the Act to a Delegating CPO who requests such relief from the Division through the approach set forth in Section IV.B, if the Delegating CPO has delegated its investment management authority over a commodity pool to a Designated CPO and the requirements of Section IV.A are satisfied.

##### **A. The Criteria.**

The following facts (“Criteria”) must be satisfied to request CPO registration no-action relief through the streamlined approach set forth in Section IV.B:

1. a. Pursuant to a legally binding document,<sup>13</sup> the Delegating CPO has delegated to the Designated CPO all of its investment management authority with respect to the commodity pool;
- b. The Delegating CPO does not participate in the solicitation of participants for the commodity pool; and
- c. The Delegating CPO does not manage any property of the commodity pool.
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 in accordance with Regulation 1.31.
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.

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<sup>13</sup> 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.

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 be subject to liability 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 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 5% 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 5% of such Designated CPO's beneficial ownership interests or any affiliate thereof.<sup>14</sup>

## **B. Requesting Relief.**

To request relief using the streamlined approach, the Delegating CPO(s) must submit a request for relief pursuant to Regulation 140.99 in the form of the Attachment to this letter. The request must include the following:

1. The name, main business address, main business telephone number and name of a contact person of each of the Delegating CPO(s) and the Designated CPO;<sup>15</sup>

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<sup>14</sup> 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.

<sup>15</sup> If the request is made by a person other than the person on whose behalf the Letter is sought, the request must also contain the name, main business address and main business telephone number of the requestor. *See* Regulation 140.99.

2. The NFA ID Number of the Designated CPO;
3. The name(s) of the commodity pool(s) with respect to which relief is being sought;<sup>16</sup>
4. A representation that the applicable Criteria are met;<sup>17</sup> and
5. A statement from the Designated CPO acknowledging that it has been designated as the registered CPO of the commodity pool(s) and that it satisfies the applicable Criteria.<sup>18</sup>

The Division intends to issue responses to each request for relief made pursuant to this letter.

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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,

Gary Barnett  
Director  
Division of Swap Dealer  
and Intermediary Oversight

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<sup>16</sup> A single request for relief may be requested by a Delegating CPO with respect to multiple commodity pools.

<sup>17</sup> The representation may be made by an authorized representative of the Delegating CPO(s).

<sup>18</sup> The acknowledgement may be made by an authorized representative of the Designated CPO.

ATTACHMENT

Form of Request

Gary Barnett  
Director  
Division of Swap Dealer and Intermediary Oversight  
Commodity Futures Trading Commission  
1155 21<sup>st</sup> Street N.W.  
Washington, D.C. 20581

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

Dear Mr. Barnett:

In accordance with the requirements of Commodity Futures Trading Commission (“CFTC” or “Commission”) Regulation 140.99, request is hereby made that the Division of Swap Dealer and Intermediary Oversight (“Division”) not recommend that the Commission commence an enforcement action for failure to register as a commodity pool operator (“CPO”) under Section 4m(1) of the Commodity Exchange Act against each Delegating CPO named herein. This letter is submitted pursuant to CFTC Staff Letter 14-69 and the Delegating CPO(s) named below represent(s) that all of the applicable Criteria” are met. Capitalized terms used in this letter have the meaning given to such terms in CFTC Staff Letter 14-69.

1. The name, main business address, main business telephone number, and contact person of the Delegating CPO(s) are as follows:
  - a. Name:\_\_\_\_\_.
  - b. Main business address:\_\_\_\_\_.
  - c. Main business telephone number:\_\_\_\_\_.
  - d. Contact person:\_\_\_\_\_.
  
2. The name, main business address, main business telephone number, and contact person of the Designated CPO are as follows:
  - a. Name:\_\_\_\_\_.
  - b. Main business address:\_\_\_\_\_.
  - c. Main business telephone number:\_\_\_\_\_.
  - d. Contact person:\_\_\_\_\_.
  
3. The NFA identification number of the Designated CPO is \_\_\_\_\_.
  
4. The name of the commodity pool(s) with respect to which the Delegating CPO(s) is/are requesting relief is/are: \_\_\_\_\_.

Attached as “Exhibit A” to this request is the certification and undertaking required by Commission Regulation 140.99(c)(3). Attached as “Exhibit B” to this request is the acknowledgement of the Designated CPO required by CFTC Staff Letter No. 14-69.

Very truly yours,

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[Delegating CPO(s) or  
Authorized Representative]

EXHIBIT A

Certification and Undertaking pursuant to Regulation 140.99

I hereby certify that the material facts set forth in the attached letter dated \_\_\_\_\_ are true and complete to the best of my knowledge. If at any time any material representation made in the attached letter ceases to be true and complete, I will ensure that Division staff is informed promptly in writing of all materially changed facts and circumstances.

Very truly yours,

\_\_\_\_\_  
[Delegating CPO(s) or  
Authorized Representative]

EXHIBIT B

The Designated CPO hereby acknowledges that it has been designated as the registered CPO of the commodity pool(s), as set forth in the attached letter dated \_\_\_\_\_. The Designated CPO hereby represents that it meets all of the applicable Criteria.

Very truly yours,

\_\_\_\_\_  
[Designated CPO/s or  
Authorized Representative]