



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and  
Intermediary Oversight

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Director

CFTC Letter No. 17-19  
No-Action  
April 4, 2017  
Division of Swap Dealer and Intermediary Oversight

**RE: Request for Relief from Commodity Pool Operator Registration for the University  
“A” Management Company and the Board of Directors of the “Z” Fund**

Dear:

This responds to your letter dated November 14, 2014, and ongoing and recent correspondence (the “Correspondence”), to the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”). In the Correspondence, you request no-action relief from commodity pool operator (“CPO”) registration required by Section 4m(1) of the Commodity Exchange Act (“CEA”)<sup>1</sup> on behalf of University “A” Management Company and the Board of Directors of the “Z” Fund (“Z” Fund Directors”), with respect to several funds operated by them to manage the endowment and other assets belonging to the University “A” at Campus “B” (“Campus “B””), as well as other campuses of University “A” (“University”), their affiliates, and supporting organizations.<sup>2</sup> Specifically, the Correspondence requests relief from CPO registration for (1) University “A” Management Company, with respect to its activities operating and managing the “X” Fund and the “Y” Fund; and (2) the “Z” Fund Directors, with respect to their activities operating the “X” Fund and the “Z” Fund (collectively, the “Funds”).

### **Background**

Based on the Correspondence, we understand the relevant facts to be as follows. University “A” is a political subdivision of the State of “F”, whose mission is to advance higher education in that state. Campus “B” was chartered by the “F” State Legislature in [year]. The University has since expanded from its founding campus at Campus “B” to include [xx] constituent educational institutions (“Campuses”) as part of the consolidated University system.

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<sup>1</sup> 7 U.S.C. 6m(1).

<sup>2</sup> Because this response grants your request for no-action relief from CPO registration for University “A” Management Company and the “Z” Fund Directors, the Division need not separately address your alternative requests for similar exemptive or interpretative relief.

## RE: Relief for University “A” Management Company and the “Z” Fund Directors from CPO Registration

Page 2

### *The “X” Fund*

The “X” Fund is a limited liability company tax-exempt under the U.S. Internal Revenue Code of 1986 as amended (“IRC”)<sup>3</sup> that holds and invests assets collectively on behalf of its participants. The “X” Fund was established in 2003 to benefit Campus “B”, the University, other Campuses of the University, and a limited type and number of their respective affiliates. The Correspondence describes the “X” Fund as a “fund-of-funds,” that “allows the University, the Campuses, and certain of their affiliates to commingle their investment assets in order to more cost-effectively invest and manage their investment assets, obtain better access to more investment managers, achieve greater diversification in their portfolios, and realize higher returns with lower risk than they could experience investing and managing their investment assets separately.”<sup>4</sup>

The governing documents of the “X” Fund limit participants exclusively to “Eligible Persons,” defined as (a) an entity that (i) is either a government or a tax-exempt organization under the IRC, and (ii) is either the University, one of its Campuses, or an “affiliate” thereof,<sup>5</sup> or (b) is an entity, all of whose participants satisfy the foregoing criteria in (a). Additionally, an entity that is a supporting organization of the University or a Campus must satisfy the criteria specified in IRC Section 509(a)(3), in order to meet the “Affiliate” definition and be allowed to participate in the “X” Fund. The Correspondence states that all participants in the “X” Fund represent that they are “accredited investors,” as defined by the Securities and Exchange Commission (“SEC”) in its Regulation D,<sup>6</sup> and most of them are believed to be qualified eligible persons (“QEPs”), pursuant to Commission Regulation 4.7(a).<sup>7</sup>

The Correspondence represents that participation in the “X” Fund is entirely voluntary, and is decided by each participant’s governing body or persons. The controlling member of the “X” Fund is the “Z” Fund, which is further discussed below. Other participants in the “X” Fund include the University, some (but not all) of the Campuses, affiliated non-profit entities,

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<sup>3</sup> 26 U.S.C. 1 *et seq.*

<sup>4</sup> Correspondence, p. 2.

<sup>5</sup> The “X” Fund’s governing documents define “Affiliate” as follows: “‘Affiliate’ means, with respect to any Person, each other Person that directly, or indirectly through one or more intermediaries, owns, controls, or is controlled by or under common control with, such Person. Additionally, an Affiliate of the University shall be deemed to include any Person (i) that primarily supports The University or one of its constituent institutions, *as contemplated by Section 509(a)(3) of the Code*, or (ii) a majority of whose board of trustees, directors or managers is elected or appointed by the Board of Governors of The University, by the board of trustees of a constituent institution of The University, or by individuals elected or appointed by such Board of Governors or such board of trustees.” Correspondence, Annex III (emphasis added) (proper names redacted).

<sup>6</sup> See 17 CFR 230.500-506; 17 CFR 230.501(a) (defining “accredited investor”).

<sup>7</sup> 17 CFR 4.7(a).

**RE: Relief for University “A” Management Company and the “Z” Fund Directors from CPO Registration**

Page 3

foundations and statutory endowments that support the University or one of its Campuses (including University “A” Management Company), and certain entities affiliated with the University and its Campuses, such as the University hospital system.

*The “Z” Fund*

The “Z” Fund is a tax-exempt corporation that invests the assets of entities that support Campus “B”, including the Campus “B” Endowment Fund, the Campus “B” Foundation, Inc., and other entities organized and operated primarily to support Campus “B”. The “Z” Fund invests directly into the “X” Fund, and currently invests all of its investible assets therein. All of the “Z” Fund’s management and operational decisions are made by the “Z” Fund Directors.

The “Z” Fund was created in 1995, in order to “more efficiently and effectively invest and manage (utilizing a long-term, endowment-style investment model) the assets of [Campus “B”]’s statutory and private endowments and certain of the numerous organizations that support [Campus “B”] and its various schools, departments, programs, and initiatives.”<sup>8</sup> The “Z” Fund is governed by the “Z” Fund Directors, the selection of which was then, and is still, controlled directly or indirectly by Campus “B”.

From 1995 until 2002, the staff members responsible for managing the “Z” Fund were employees of Campus “B”. Campus “B” formed University “A” Management Company in December 2002 and transferred its investment management staff and responsibilities effective January 1, 2003. The “Z” Fund and University “A” Management Company formed the “X” Fund in 2003 to open investment management by University “A” Management Company to the University, other Campuses of the University, and their endowments, foundations, and supporting organizations. The “Z” Fund thereafter transferred all of its investible assets to the “X” Fund.

The “Z” Fund, through the “Z” Fund Directors, retained all ultimate decision-making authority with respect to the “X” Fund (including asset allocations), subject to the advice, recommendations, implementation, and management of University “A” Management Company (except to the extent delegated to the discretion of University “A” Management Company). The other participants in the “X” Fund do not have any operational authority, except to withdraw or increase their respective investments therein, subject to certain operating procedures.

Participation in the “Z” Fund is “currently limited exclusively by its governing documents to charitable, non-profit foundations, associations, trusts, endowments, and funds that are organized and operated primarily to support [Campus “B”].”<sup>9</sup> Funds eligible for investment

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<sup>8</sup> Correspondence, p. 4.

<sup>9</sup> *Id.*

## RE: Relief for University “A” Management Company and the “Z” Fund Directors from CPO Registration

Page 4

in the “Z” Fund include endowment funds and other assets that are suitable for a long-term investment horizon. Participation in the “Z” Fund is entirely voluntary, and is decided by each participant’s governing body or persons. Of the 27 existing participants in the “Z” Fund, 20 are accredited investors, many of whom are also believed to be QEPs.

The Correspondence also states that 17 of the 27 current participants in the “Z” Fund are classified by the University as “Associated Entities.”<sup>10</sup> The University Policy Manual defines an “Associated Entity,” as “any foundation, association, corporation, LLC, partnership or other non-profit entity that was established by the officers of the University, that is controlled by the University, that raises funds in the name of the University, that has a primary purpose of providing services or conducting activities in furtherance of the University’s mission pursuant to an agreement with the University, or that has a tax exempt status that is based on being a support[ing] organization of the University.”<sup>11</sup> An Associated Entity must formally agree to abide by the policies and regulations established by the University and must provide in its governing documents that, upon dissolution of the Associated Entity, all of its assets (except to the extent otherwise restricted by donors) will revert to the University, a Campus, or another Associated Entity approved by the University or Campus.<sup>12</sup> The Correspondence states that all such Associated Entities currently participating in the “Z” Fund have entered into written agreements with Campus “B” agreeing to these and other substantive requirements, and have provided for the reversion of their assets upon dissolution to Campus “B” or another Associated Entity supporting Campus “B”.<sup>13</sup> Based on these agreements and the reversion of assets requirement, the Correspondence asserts that, “it is clear that any organization entering into an agreement with [Campus “B”] to be an Associated Entity is an organization that exists and operates primarily to support, and thereby is closely associated with, [Campus “B”].”<sup>14</sup>

The Correspondence requests that all existing participants, including the four who are neither accredited investors nor Associated Entities, in the “Z” Fund be permitted to continue their participation with respect to their existing and future investments in the “Z” Fund (“Grandfathered Participants”). The Correspondence also proposes new criteria applicable to any new participant wishing to invest in the “Z” Fund: any new participant would be required to be either (1) a tax-exempt entity that is a supporting organization of Campus “B”, pursuant to

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<sup>10</sup> Three of the seven entities that are not accredited investors are Associated Entities, leaving four participants in the “Z” Fund that are neither accredited investors nor Associated Entities.

<sup>11</sup> Correspondence, Annex VII.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* The Correspondence further points out that, “[i]t is equally clear that the participants that are not Associated Entities are organizations that exist and operate primarily to support, and thereby are closely associated with, [Campus “B”] and its public educational mission... The relationships between most of the participants in the [“Z”] Fund are so closely and significantly associated with [Campus “B”] that they are referenced in the [Campus “B”] Comprehensive Annual Financial Report.” *Id.*

## **RE: Relief for University “A” Management Company and the “Z” Fund Directors from CPO Registration**

Page 5

IRC Section 509(a)(3);<sup>15</sup> or (2) a foundation, association, corporation, limited liability company, partnership, or other non-profit entity that is both an “Associated Entity” as contemplated by the University Policy Manual (discussed above), and (a) is established by officers of Campus “B”, (b) is controlled by Campus “B”, (c) raises funds in the name of Campus “B”, or (d) has a primary purpose of providing services or conducting activities in furtherance of the mission of Campus “B”, pursuant to an agreement with Campus “B”.<sup>16</sup>

### *The “Y” Fund*

The “Y” Fund is a limited liability company taxed as a partnership under the IRC that holds and invests assets collectively on behalf of its participants. The “Y” Fund was established in May 2013 and began operations in January 2014. It contains assets constituting “mostly general operating funds and reserves of its participants,” and was “established to benefit [Campus “B”], the University, other Campuses, and a limited type and number of their respective affiliates by enabling its participants to make medium-term horizon investments (generally, a 3-5 year time period) in high quality, short duration money market and other fixed income investments.”<sup>17</sup> University “A” Management Company serves as the manager of the “Y” Fund, and subject to the terms of the constituent documents, has the authority to make investment decisions on behalf of that fund. Campus “B” is the controlling member of the “Y” Fund.

Participation in the “Y” Fund is limited to any entity that (i) is either a government entity or a tax-exempt organization, and that (ii) is either the University, one of its Campuses, or an Affiliate thereof. As with the “X” Fund, the definition of “Affiliate”<sup>18</sup> includes entities deemed to be supporting organizations, pursuant to IRC Section 509(a)(3).<sup>19</sup> Participation in the “Y” Fund is voluntary and decided by each participant’s governing body or persons. All participants in the “Y” Fund represent that they are accredited investors, and all are believed to be QEPs.

### *University “A” Management Company*

The Correspondence makes the following representations with respect to University “A” Management Company, and its activities managing and operating the “X” Fund and the “Y” Fund. University “A” Management Company is a tax-exempt corporation that is organized and operated to support Campus “B” and provides investment management services to the University, Campus “B”, the “X” Fund, the “Y” Fund, and the “Z” Fund. University “A”

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<sup>15</sup> 26 U.S.C. 509(a)(3).

<sup>16</sup> *Id.* at 4 and Annex VI.

<sup>17</sup> Correspondence, p. 6.

<sup>18</sup> *See* note 5 above. The “Y” Fund and the “X” Fund use the same definition for “Affiliate” in their corresponding participant eligibility requirements.

<sup>19</sup> 26 U.S.C. 509(a)(3).

## **RE: Relief for University “A” Management Company and the “Z” Fund Directors from CPO Registration**

Page 6

Management Company is subject to the Investment Advisers Act (“IAA”), though it is exempt from registration as an investment adviser pursuant to the charitable adviser exemption in IAA Section 203(b)(4).<sup>20</sup>

University “A” Management Company manages, for compensation, the daily operations and investments of the “X” Fund and the “Y” Fund, pursuant to governing and contractual documents approved and periodically reviewed by the “Z” Fund Directors (with respect to the “X” Fund) and by Campus “B” (with respect to the “X” Fund and the “Y” Fund). University “A” Management Company and the “Z” Fund are supporting organizations of Campus “B”, and all members of their respective Boards of Directors are appointed directly or indirectly by Campus “B” or are senior officers of Campus “B”. University “A” Management Company does not market or solicit participants, but on an unsolicited basis, does meet and correspond with prospective eligible participants at their request to discuss the details of, and answer questions about, University “A” Management Company, the “X” Fund, the “Z” Fund, and the “Y” Fund, as applicable. University “A” Management Company has no other clients other than the “X” Fund, the “Y” Fund, and Campus “B”, and is not otherwise required to register with the Commission.

### *The “Z” Fund Directors*

The Correspondence makes the following representations with respect to the “Z” Fund Directors (“Directors”) and their activities. All of the Directors are appointed, directly or indirectly, by Campus “B” or are senior officers of Campus “B”. Some of the Directors also serve on the Board of University “A” Management Company. With the exception of senior officers of Campus “B” serving as ex officio members, the Directors serve on a voluntary and part-time basis, and are not compensated for their service as Directors.<sup>21</sup> The Correspondence describes the Directors as “supporters of [Campus “B”], drawn from public, private, and community interests and having (or having had) significant and high-level experience and full-time employment and careers in higher education, finance, and various other industries.”<sup>22</sup> In their capacity as Directors, such persons do not advertise, conduct any marketing activity with respect to, or otherwise solicit participants for, the “Z” Fund or the “X” Fund.<sup>23</sup>

The Correspondence explains the role and motive of the Directors as follows:

The Directors, other than senior employees of [Campus “B”], take their positions on the Boards to provide a service to their alma mater, [Campus “B”]. The

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<sup>20</sup> Correspondence, p. 7; 15 U.S.C. 80b-3(b)(4).

<sup>21</sup> The Correspondence notes that the reasonable out-of-pocket expenses incurred by the Directors in attending meetings and performing their duties for the “Z” Fund Board may be paid or reimbursed. Correspondence, p. 7.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 8.

## **RE: Relief for University “A” Management Company and the “Z” Fund Directors from CPO Registration**

Page 7

Directors perform their services as dedicated alumni, friends, and donors, and have no incentive whatsoever other than to do what is best for the University and [Campus “B”] and advance their missions of higher public education. Lastly and significantly, the Directors of the [“Z”] Fund serve in a volunteer capacity due to their affiliation, loyalty, and dedication to [Campus “B”], and they are not investors or participants in the [“X”] Fund or the [“Z”] Fund.<sup>24</sup>

The Correspondence further states that, “[the Directors] have no incentive or conflict whatsoever to pursue any aim other than the best interests of the participants of the [“Z”] Fund and the [“X”] Fund or to allow such funds to operate irresponsibly, at any risk to anyone, or in a manner that could in any way damage [Campus “B”], the University, the Campuses, or their supporting or associated organizations.”<sup>25</sup>

### **Existing Compliance Obligations and Oversight**

The Correspondence further discusses, in detail, the compliance obligations already applicable to University “A” Management Company, the “Z” Fund Directors, and the Funds themselves, and the system of oversight established by the University. In particular, the Division finds the following details instructive:

- Participants in the Funds are provided with disclosure materials discussing the structure, operation, investment terms, distribution and withdrawal policies, fees and costs, and investment strategies and policies, including the Funds’ limited direct and/or indirect exposure to the derivatives markets through commodity interests.
- The “X” Fund and the “Z” Fund provide monthly, quarterly, and annual reports of investment results, as well as quarterly unaudited and annual audited financial statements to each “Z” Fund Director and to each of the participants in the respective Funds. The “Y” Fund provides monthly, quarterly, and annual reports of investment results and annual audited financial statements to each participant. The financial statements provided by each Fund are prepared in accordance with U.S. generally accepted accounting principles and audited by an independent certified public accountant.
- The President of the University and the Chancellor of Campus “B” also receive audited financial statements of the Funds, and the Funds’ balance sheets and income statements are consolidated into the financial statements of Campus “B”, pursuant to Governmental Accounting Standards Board pronouncements.
- In addition to the annual audits performed on the Funds, an independent certified public accountant examines the “X” Fund and the “Z” Fund, their suitability of design, and the operating effectiveness of their controls (“SOC Audits”). The SOC Audit is distributed

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

## **RE: Relief for University “A” Management Company and the “Z” Fund Directors from CPO Registration**

Page 8

to participants in all three Funds, is expected to be performed annually, and is reviewed, along with all of the other audited financial statements of the Funds, by the Audit Committees of University “A” Management Company and the “Z” Fund Directors with the accountant.

- Each of the Funds and the University “A” Management Company is subject to oversight by the Chancellor and Board of Trustees of Campus “B”, who in turn are overseen by the University’s President and Board of Governors, the members of which are appointed by the General Assembly of the State of “F”.

The Correspondence states that the disclosures and reporting described above are driven by: regulations of the Board of Governors of the University; contractual obligations in the legal documents governing the Funds; requests and demands of the “Z” Fund Directors and the Executive Committee of the Board of the “Z” Fund; requests and demands of the Fund participants; and university, endowment, and industry best practices.<sup>26</sup> In addition to the self-imposed obligations above, the University “A” Management Company and each of the Funds are subject to periodic audit by the Office of the Auditor of the State of “F”.

### **Investment Activities and the Need for Relief from CPO Registration**

As stated in the Correspondence, the “Z” Fund invests directly into the “X” Fund, and currently invests all of its investible assets therein. The Correspondence also describes the investment activities of the “X” Fund as follows: “[t]he [“X”] Fund invests in a diverse array of asset classes within investment funds, vehicles, and accounts sponsored and managed by third-party investment managers, including private equity, real estate, venture capital, buyout, equity, debt, securitization, and hedge investment funds, vehicles, and accounts, including ones in specific industries (e.g., natural resources).”<sup>27</sup> Some of these funds, vehicles, and accounts already do, or may in the future, invest in commodity interests, and thus may constitute commodity pools. Additionally, the “X” Fund engages in a “*de minimis* amount of direct investment in commodity interests for purposes of managing investment risk,” but the Correspondence emphasizes that “[s]ignificant direct exposure to the commodities markets is inconsistent with the endowment-style investing offered by the [“X”] Fund,” and “the primary purpose for such direct investing is for specific risk management purposes.”<sup>28</sup> Based on the discussion of investment activities in the Correspondence and the fact that the “Z” Fund invests all of its investible assets in the “X” Fund, both the “X” Fund and the “Z” Fund could be considered commodity pools, and University “A” Management Company and the “Z” Fund Directors, their CPOs.

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<sup>26</sup> Correspondence, p. 16-17.

<sup>27</sup> Correspondence, p. 8.

<sup>28</sup> *Id.* at 9.



## **RE: Relief for University “A” Management Company and the “Z” Fund Directors from CPO Registration**

Page 9

The Correspondence states that the “Y” Fund invests in funds, vehicles and accounts sponsored by third-party investment managers using various investment approaches, some of which may invest in commodity interests. It also invests a portion of its assets in the “X” Fund for diversification purposes. Because it may, through either of these investment practices, invest indirectly in commodity interests, the “Y” Fund could also be considered a commodity pool, and University “A” Management Company, its CPO.

### **Analysis**

Absent the relief provided herein, University “A” Management Company and the “Z” Fund Directors could be required to register as CPOs with respect to their operational and investment management activities for the Funds. The Division believes that granting University “A” Management Company and the “Z” Fund Directors relief from CPO registration is warranted, based on the facts presented by this request and subject to the specific conditions of relief outlined below.

The Correspondence asserts that University “A” Management Company, the “Z” Fund Directors, and the Funds share an aligned interest and common goal with the Fund participants, who are, *inter alia*, the University, Campus “B”, the other Campuses, their Affiliates, and their supporting organizations – that being the provision and furtherance of public higher education in the State of “F”, and the prudent management of University assets to accomplish that goal. Additionally, a unique feature of this structure is that Campus “B”, an organization who is itself and whose affiliates, supporting organizations, and foundations are participants in the Funds, has the power to appoint the Board of Directors of University “A” Management Company, as well as the “Z” Fund Directors (in the event that these individuals are not already senior staff of Campus “B”). This fact, and others, is indicative of the control exerted by Fund participant(s) over the management and operations of the possible CPOs, and is one of several factors that makes the instant situation distinguishable from the typical relationship CPOs and commodity pools have with their pool participants, and which CPO registration and the attendant compliance regime is designed to address.

The Correspondence represents, however, that neither University “A” Management Company nor the “Z” Fund Directors engage in marketing of the Funds to the public, and neither of them have any other clients other than the Funds, and the University (or its affiliates). Further, the realm of possible participants in each of the Funds is sufficiently limited by the Fund participant eligibility requirements and the conditions of relief discussed in detail below, such that any new participants in the Funds would be limited to entities or persons very closely linked to the University, Campus “B”, or their affiliates, that share the aligned interests previously discussed herein.

**RE: Relief for University “A” Management Company and the “Z” Fund Directors from CPO Registration**

Page 10

The conditions of relief, proposed by the Correspondence and accepted by the Division, specifically alter the “Z” Fund’s participant eligibility requirements by limiting new participants to tax-exempt entities that have such status by virtue of being supporting organizations of Campus “B”, as contemplated by IRC Section 509(a)(3),<sup>29</sup> or entities that are “Associated Entities,” as defined by the University Policy Manual, and meet other requirements.<sup>30</sup> The Division believes these conditions appropriately clarify the meaning of “supporting organization” and will sufficiently limit potential participants to entities very closely related to Campus “B”. IRC Section 509(a) defines a “private foundation” as “a domestic or foreign organization described in [IRC] section 501(c)(3) other than” the entities described in that section’s paragraphs (a)(1)-(4).<sup>31</sup> The Manual for the Internal Revenue Service explains that, “IRC 509(a) thus divides organizations described in [and therefore tax-exempt under] IRC 501(c)(3) into two classes: A. private foundations, and B. organizations other than private foundations (sometimes called ‘public charities’ by way of distinction...).”<sup>32</sup> In particular, IRC Section 509(a)(3) deems an entity, organized and operated in the following manner, a “supporting organization” that is also considered a public charity:

- (A) Is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more specified organizations described in paragraph (1) or (2),
- (B) Is ---
  - (i) operated, supervised, or controlled by one or more organizations described in paragraph (1) or (2),
  - (ii) supervised or controlled in connection with one or more such organizations, or
  - (iii) operated in connection with one or more such organizations, and
- (C) Is not controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers and other than one or more organizations in paragraph (1) or (2).]

The Division believes that limiting supporting organizations seeking to participate in the “Z” Fund to those that are able to meet the standards of IRC Section 509(a)(3) is appropriate to ensure that such organizations participating in the Funds have significant ties with Campus “B”, derive their tax-exempt status from their support of and affiliation with Campus “B”, and thus,

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<sup>29</sup> 26 U.S.C. 509(a)(3).

<sup>30</sup> Correspondence, pp. 4-5, and Annex VI. Prior to the granting of this relief, the “Z” Fund limited eligible participants to, “[o]nly charitable, nonprofit foundations, associations, trusts, endowments, and funds that are organized and operated primarily to support [Campus “B”] and that are approved by the Treasurer of the “Z” Fund.”

<sup>31</sup> 26 U.S.C. 509(a).

<sup>32</sup> IRS Manual Section 7.26.1.1, “Introduction to Private Foundations,” *available at* [http://www.irs.gov/irm/part7/irm\\_07-026-001.html](http://www.irs.gov/irm/part7/irm_07-026-001.html) (internal citations omitted).

## **RE: Relief for University “A” Management Company and the “Z” Fund Directors from CPO Registration**

Page 11

share the same aligned interests and goals. Associated Entities are also appropriate participants for the “Z” Fund by virtue of their detailed contractual obligations to Campus “B”, including the automatic reversion of their assets in the event of dissolution to Campus “B” or another Associated Entity thereof. With respect to the “X” Fund and the “Y” Fund, the Division need not pose an additional, similar condition of relief because the participant eligibility requirements have already been amended to include language restricting supporting organizations meeting the “Affiliate” definition, and able to participate in those Funds, to those meeting the standard in IRC Section 509(a)(3).

In addition to restrictions on Fund participant eligibility, the Correspondence discusses multiple compliance obligations the Funds currently meet to respond to and fulfill the requests and demands of the Board of Governors of the University, the “Z” Directors, and the Fund participants; the Funds’ contractual obligations in their governing documents; and “university, endowment, and industry best practices.”<sup>33</sup> As discussed above, these include the provision of detailed disclosure documents to participants prior to investment in the Funds; ongoing periodic and annual reporting to Fund participants and University and state officials overseeing the management of these assets; as well as audits of the Funds’ assets and SOC Audits conducted annually by independent certified accountants, which are distributed to Fund participants and entities or persons overseeing the Funds’ operations.

In CFTC Staff Letter 85-22 (the “85-22 Letter”),<sup>34</sup> the Division of Trading and Markets, one of the Division’s predecessors, granted no-action relief from CPO registration to a non-profit membership corporation that provided investment management services to its members – a variety of universities and colleges seeking assistance in managing their endowments. Though the instant request is factually distinguishable from that situation, the Division believes that granting no-action relief in this context is nonetheless appropriate.<sup>35</sup> In this case, the Fund participants are all part of the public university system of the State of “F” that created and continues to manage the Funds, and the possible CPOs, Funds, and participants share the same goal of effectively managing assets belonging to the University, its Campuses, and their affiliates and supporting organizations to continue providing public higher education to their students.

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<sup>33</sup> Correspondence, p. 17.

<sup>34</sup> CFTC Staff Letter 85-22 [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,821 (Nov. 20, 1985).

<sup>35</sup> For instance, the 85-22 Letter imposed conditions requiring the recipient to, among other things, “commit no more than five percent of any fund it operates to initial margin for futures contracts and premiums on commodity option contracts,” and “use commodity interests for any such fund in a manner incidental to the operation of such fund’s cash portfolio.” *Id.* at 7. The Division believes similar restrictions are unnecessary in this context because the provision of relief herein is primarily based on the fact that the interests of the CPOs, Funds, and Fund participants are closely aligned, if not nearly identical. Where the Funds and their operators are additionally overseen by University officials and the State of “F”, and already subject to a disclosure and reporting regime, the Division finds that specific requirements with respect to the Funds’ commodity interest trading would not provide any additional substantive protections to Fund participants.

**RE: Relief for University “A” Management Company and the “Z” Fund Directors from CPO Registration**

Page 12

Consistent with the 85-22 Letter, the Funds discussed herein provide their participants with disclosure documents, periodic reports, audited annual reports, and other information about how their assets are being managed. The conditions of relief below are also consistent with the 85-22 Letter, in that they establish appropriate limitations for participant eligibility and require that any commodity trading advice provided to the Funds be provided by an entity or person registered as a commodity trading advisor (“CTA”) with the Commission.

Based on the specific facts and analysis above, the Division has determined that it will not recommend to the Commission that it take an enforcement action against either University “A” Management Company or the “Z” Fund Directors for their failure to register as CPOs, provided that they and the Funds meet the conditions outlined below:

1) **“Z” Fund Enrollment:**

- a. Grandfathered Participants. Pursuant to this letter, and subject to the remaining conditions of this relief, the Division agrees that the current participants in the “Z” Fund be permitted to continue their participation in the “Z” Fund, with respect to their existing and any future investments they may make in the “Z” Fund.
  - b. IRC Section 509(a)(3) “Supporting Organizations” or Associated Entities. Any new participant in the “Z” Fund is required to be (i) a tax-exempt entity that is a supporting organization of Campus “B”, pursuant to IRC Section 509(a)(3);<sup>36</sup> or (ii) a foundation, association, corporation, limited liability company, partnership, or other non-profit entity that is both an “Associated Entity” as defined by the University Policy Manual, and is established by the officers of Campus “B”, is controlled by Campus “B”, raises funds in the name of Campus “B”, or has a primary purpose of providing services or conducting activities in furtherance of the mission of Campus “B”, pursuant to an agreement with Campus “B”.
- 2) **Commodity Trading Advice:** To the extent that the University “A” Management Company, the “Z” Fund Directors, or the Funds receive commodity trading advice in the management of Fund assets from third-party investment advisers or managers, such advice must only be provided by persons or entities registered with the Commission as CTAs, exempt from such registration, or excluded from the CTA definition.<sup>37</sup>

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<sup>36</sup> 26 U.S.C. 509(a)(3).

<sup>37</sup> The Correspondence notes that, “to the extent any third-party investment manager engages in commodity interest trading, University “A” Management Company expects that such person is (or would be) registered as a CPO and/or ... [CTA] as applicable or qualifies (or would qualify) for a registration exemption.” Correspondence, p. 10. As noted above, this condition is also consistent with that imposed on similar relief granted by the Division’s predecessor to an organization exclusively managing university and college endowment assets. CFTC Staff Letter 85-22, p. 7.

**RE: Relief for University “A” Management Company and the “Z” Fund Directors from CPO Registration**

Page 13

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.

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

cc: Regina Thoele, Compliance  
National Futures Association