



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and
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CFTC letter No. 05-13
August 15, 2005
Interpretation
Division of Clearing and Intermediary Oversight

James L. Carley
Director

Re: Rule 4.14(a)(8): “X” – Request for an Interpretation that an SEC-registered investment adviser relying upon the CTA registration exemption provided by Section 4m(3) may also advise clients pursuant to a claim of relief under Rule 4.14(a)(8).

Dear :

This is in response to your letter dated June 15, 2004, to the Division of Clearing and Intermediary Oversight (the “Division”) of the Commodity Futures Trading Commission (the “Commission”). By your correspondence, you request, on behalf of “X”, confirmation that “X”, while relying upon the commodity trading advisor (“CTA”) registration exemption provided by Section 4m(3) of the Commodity Exchange Act (the “Act”)¹ with respect to certain of its advisory activities, may simultaneously claim exemption from CTA registration pursuant to Commission Rule 4.14(a)(8)² with respect to certain of its other advisory activities.

Based upon the representations made in your letter, we understand the relevant facts to be as follows. “X” is registered with the Securities and Exchange Commission (“SEC”) as an investment adviser. In 2003, “X” withdrew from registration as a CTA with the Commission based upon its reliance on Section 4m(3) of the Act, a provision that was added to the Act by the Commodity Futures Modernization Act of 2000. Section 4m(3) provides that CTA registration is not required for an SEC-registered investment adviser “whose business does not consist primarily of acting as a commodity trading advisor”, as defined in the Act, “to any investment trust, syndicate, or similar form of enterprise that is engaged primarily in trading any commodity for future delivery on or subject to the rules of any contract market or registered derivatives transaction execution facility.”

¹ 7 U.S.C. §6m(3) (2000).

² Commission rules referred to herein are found at 17 C.F.R. Ch. I (2005).

“X” now intends to advise a commodity pool (the “Fund”) for which it will not be able to rely upon exemption from CTA registration under Section 4m(3), but will be eligible to claim exemption from CTA registration under Rule 4.14(a)(8).³ In this regard, then, “X” has asked the Division to confirm that it may simultaneously rely upon the statutory exemption from CTA registration under Section 4m(3) with respect to certain of its activities and file a claim for exemption under Rule 4.14(a)(8) with respect to certain of its other activities.

The Commission previously considered a similar issue in connection with its adoption of Rule 4.14(a)(8), *i.e.*, whether a CTA relying on Section 4m(1) of the Act could also claim exemption under the newly adopted rule.⁴ In response to the comments received on that rulemaking, the Commission stated:

[T]he Commission wishes to make clear that the relief provided by [Rule] 4.14(a)(8) is mutually exclusive from that provided by section 4m(1) – that is, depending upon the nature of its activities a CTA may be exempt from registration as such under either or both provisions. Thus, the fact that a CTA who is claiming exemption under [Rule] 4.14(a)(8) has more than 15 clients for the purpose of that rule will not affect the CTA’s ability to claim exemption under section 4m(1) for a different set of clients – *i.e.*, clients who are other than [Rule] 4.5 trading vehicles.⁵

Like Section 4m(1), Section 4m(3) provides a statutory exemption from CTA registration, if specified conditions are met. As you point out in your correspondence, in the case of Section 4m(3), the CTA relying upon that statutory registration exemption is also subject to regulation by the SEC as an investment adviser. The Division sees no reason why the Commission’s reasoning with respect to simultaneous reliance upon Section 4m(1) and Rule

³ Specifically, “X” will meet the criteria for exemption under either Rule 4.14(a)(8)(i)(A) and (B) or Rule 4.14(a)(8)(i)(D), which concern providing commodity interest trading advice, respectively, to “qualifying entities” and “non-pools” under Rule 4.5 or to pools for which the CPOs thereof have claimed an exemption from registration under Rule 4.13(a)(3) or Rule 4.13(a)(4). The latter two rules provide exemption, respectively, where the CPO observes specified limits for the pool’s commodity interest trading and admits as participants generally only accredited investors or where the CPO admits only certain classes of generally more sophisticated persons.

⁴ Section 4m(1) provides an exemption from CTA registration where a CTA advises no more than fifteen persons in a twelve-month period and does not hold itself out generally to the public as a CTA.

⁵ 52 Fed. Reg. 41975, 41978 (November 2, 1987).

4.14(a)(8) should not also apply where a CTA seeks to rely simultaneously upon Section 4m(3) and Rule 4.14(a)(8).

Accordingly, the Division believes that if the activities of an SEC-registered investment adviser (such as “X”) meet the requirements of Section 4m(3), and the investment adviser desires to advise a commodity pool in a manner consistent with the requirements of Rule 4.14(a)(8), the investment adviser should be able simultaneously to rely on the CTA registration exemption provided by Section 4m(3) and to claim exemption from CTA registration under Rule 4.14(a)(8).⁶

This letter does not excuse a CTA relying on exemption from registration provided by Section 4m(3) while also claiming exemption under upon Rule 4.14(a)(8) from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder. For example, the CTA remains subject to all antifraud provisions of the Act⁷ and the Commission’s regulations, to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission’s regulations, and to all applicable provisions of Part 4.

This letter is based upon the representations made to us. Any different, changed or omitted material facts or circumstances might render this interpretation void. Further, this letter represents the position of this Division only. It does not necessarily represent the position of the Commission or of any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact me or Christopher W. Cummings, Special Counsel, at (202) 418-5445.

Very truly yours,

James L. Carley
Director

⁶ For the purpose of this letter, it has not been necessary for the Division to define or otherwise interpret the criteria of Section 4m(3), or to make any determination whether “X” meets these criteria in connection with its other activities, and this letter should not be read as providing any such definition, interpretation or determination.

⁷ See, e.g., Sections 4b and 4o, 7 U.S.C. §§6b and 6o (2000).