



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer  
and  
Intermediary Oversight

Gary Barnett  
Director

CFTC Letter No. 12-54  
No-Action  
December 12, 2012  
Division of Swap Dealer and Intermediary Oversight

Re: Section 4m(1)

Dear [Counsel]:

This is in response to your letter to the Division of Swap Dealer and Intermediary Oversight (the “Division”) of the Commodity Futures Trading Commission (the “Commission” or “CFTC”) dated September 10, 2012, as supplemented by your e-mail messages sent October 25 and 26, and November 29, 2012 and telephone conversations with Division staff (collectively, the “Correspondence”). By the Correspondence, you request on behalf of “A”, relief from the requirement to register with the Commission as a commodity trading advisor (“CTA”) pursuant to Section 4m(1) of the Commodity Exchange Act (the “Act”).<sup>1</sup>

Based upon the representations set forth in the Correspondence, we understand the relevant facts to be as follows. “B” is an investment adviser registered as such with the Securities and Exchange Commission (“SEC”) under the Investment Advisers Act of 1940. “B” is the adviser to more than 200 investment companies registered under the Investment Company Act of 1940. With respect to any commodity interest trading by those investment companies, “B” has claimed, and currently relies upon, the exclusion in Commission Regulation 4.5<sup>2</sup> from the definition of the term commodity pool operator (“CPO”). Following the Commission’s recent amendments to Regulation 4.5 that restrict the extent to which a qualifying entity may trade commodity interests, “B” has applied for CPO registration.

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<sup>1</sup> 7 U.S.C. §1, *et seq.* (2006). The Act may be accessed through the Commission’s Web site at [www.cftc.gov](http://www.cftc.gov).

<sup>2</sup> Commission regulations are found at 17 C.F.R. Ch. 1 *et seq.* (2012) and may also be accessed through the Commission’s Web site.

“B” does not conduct its advisory functions directly, but instead engages other investment advisers that act as sub-advisers and that have direct portfolio management responsibilities. “A” is one of the sub-advisers engaged by “B”. “A” is a subsidiary of “B”, which owns all of “A’s” voting interests.<sup>3</sup> Like “B”, “A” is an SEC-registered investment adviser. As a sub-adviser of “B”, “A” directs securities and futures trading for more than 150 registered investment companies for which “B” is the CPO and advisor.<sup>4</sup> Currently, “A” relies upon the exemption under Regulation 4.14(a)(8) from the requirement to register as a CTA, but once any of the investment companies for which “A” is a sub-advisor cease to be qualifying entities under Regulation 4.5, “A” will cease to be eligible for the exemption from CTA registration in Regulation 4.14(a)(8).

In support of your request for relief from the CTA registration requirement, you state that “A” is owned and controlled by “B”. For payroll and benefits purposes, all employees of “A” and “B” are employees of the same subsidiary of “B’s” direct parent (“C”) and they are subject to certain enterprise-wide policies, including a common code of ethics. Besides “B”, all of the principals of “A” are either principals of “B” or they report (directly or indirectly) to a principal of “B”. In addition, you represent that neither “A” nor any of its principals is subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Act.

You further represent that “B” will assume responsibility for oversight of “A’s” activities. “A” will make and keep all of the books and records that it would be required to make and keep if it were registered as a CTA, and “B” personnel will have unrestricted access to those books and records. Moreover, “B” and “A” will provide a signed written acknowledgment by “A” and “B” of joint and several liability for any violation by either of them of the Act or the Commission’s regulations thereunder committed in connection with providing commodity interest trading advice to any of the investment companies for which “B” is (or becomes) the CPO and for which “A” acts as sub-adviser (the “Acknowledgment”).

The Division believes that although “B” has delegated to “A” the function of providing commodity interest trading advice to pools that “B” operates, “B” remains effectively responsible for that function. “B” owns “A”, shares principals and employees with “A”, and has agreed to the Acknowledgment. Moreover, if “A” were required to comply with the disclosure

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<sup>3</sup> Except for the fact that certain non-voting interests in “A” have been granted to employees in connection with an equity incentive plan, “A” is wholly-owned by “B”.

<sup>4</sup> You note that “A” also advises certain separate accounts that engage in commodity interest trading, as to which “A” relies upon the exemption from CTA registration in Section 4m(1) or 4m(3) of the Act and/or Regulation 4.14(a)(8). You further note that some shared employees of “A” and an affiliated registered broker-dealer conduct sales activities regarding the funds that “B” operates, relying upon the associated person registration exemption in Regulation 3.12(h)(1)(ii). By this letter, the Division is not providing confirmation of the availability of any of the foregoing exemptions to “A” and its employees, and the issuance of this letter should not be read as providing any such advice.

requirements applicable to a registered CTA in connection with advising pools that “B” operates, it would be making those disclosures to its own parent.

Accordingly, consistent with prior practice,<sup>5</sup> the Division will not recommend that the Commission commence any enforcement action against “A”, based solely upon “A’s” failure to register as a CTA in connection with acting as a sub-adviser to investment companies for which “B” is (or becomes) the adviser and with respect to which “B” is (or becomes) required to be registered as a CPO. This position is, however, subject to the conditions that: (1) within thirty days of the date of this letter, “A” delivers the Acknowledgment to the National Futures Association (Attn: Senior Vice-President, Compliance); (2) “B” retains a copy of the Acknowledgment in its files pursuant to the requirements of Regulation 1.31; and (3) “B” becomes registered as a CPO.

This letter is applicable to “A” solely in connection with providing commodity interest trading advice to investment companies for which “B” is the CPO and is subject to compliance with the conditions set forth above. It does not excuse “A” from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder. For example, “A” remains subject to all antifraud provisions, to all reporting requirements for traders, and to all other applicable provisions of Part 4.<sup>6</sup>

This letter is based upon the representations made to the Division and is subject to compliance with the conditions set forth above. Any different, changed or omitted material facts or circumstances might render this letter and the no-action position taken herein void. You must notify the Division immediately in the event that the operations of “A” or “B” change in any material way from those represented to us. Further, 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.

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<sup>5</sup> See, e.g., CFTC Staff Letter 93-45 [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,736 (Apr. 6, 1993) (exemption from Disclosure Document delivery requirement for a registered CTA advising pools operated by its sister company); and Staff Letter 09-39 [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,473 (Jul. 30, 2009) (exemption from Disclosure Document delivery and updating requirement for a registered CTA advising a pool operated by its affiliate).

<sup>6</sup> See Regulations 4.30 and 4.41.

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If you have any questions concerning this correspondence, please contact me or Christopher W. Cummings, Special Counsel, at (202) 418-6700.

Very truly yours,

Gary Barnett  
Director  
Division of Swap Dealer and  
Intermediary Oversight