



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Gary Barnett
Director

CFTC Letter No. 14- 57
No-Action
April 11, 2014
Division of Swap Dealer and Intermediary Oversight

Re: Request for interpretation and no-action relief regarding the registration of “A” as a commodity trading advisor in connection with its activities in respect of “B”

Dear :

This is in response to your letter dated January 24, 2014, to the Division of Swap Dealer and Intermediary Oversight (the “Division”) of the Commodity Futures Trading Commission (the “Commission” or “CFTC”). You request on behalf of “A” (the “Manager”), the investment manager in respect of “B”, which is an issuing vehicle in a cash collateralized loan obligation transaction that is expected to close on or around February 27, 2014, relief from registering as a commodity trading advisor (a “CTA”) pursuant to Section 6m of the Commodity Exchange Act (the “Act”) and Commission regulation 3.4.

Request for Interpretation and No-Action Relief

Based upon the representations made in your letter and other telephone and email correspondence (the “Correspondence”), we understand the facts to be as follows. You request, on behalf of the Manager, relief from registering as a CTA in connection with its activities in respect of the “B” pursuant to Section 6m of the Act and Commission regulation 3.4. In particular, you request an interpretation that the Manager’s activities in respect of the “B” do not rise to a level that requires CTA registration for the Manager and that the CTA registration requirements were never intended to apply to parties and transactions such as those described in the Correspondence. Furthermore, you also request no-action relief for the Manager for conducting its activities in respect of the “B” without registering as a CTA.

You state that the Manager will be engaged by the “B” to provide investment advice in respect of traditional cash loan assets and that the Manager will receive compensation from the “B”, which is, in part, based upon the total assets under management. You state that the “B” does not have a synthetic bucket and that it comports with the requirements outlined in CFTC

Letters No. 12-14 and No. 12-45¹ such that it is not considered a “commodity pool” or “pool” pursuant to Section 1a(10) of the Act and Commission regulation 4.10(d), respectively. You state that, as a result, the Manager will not need to register as a commodity pool operator (a “CPO”).

In connection with its engagement by the “B”, you state that, in certain circumstances, the Manager may recommend that the “B” purchase cash loan assets, the cashflows of which do not match those of the “B’s” liabilities (*e.g.*, fixed instead of floating or in a currency different than that in which the “B’s” debt obligations are denominated). You state that, in such cases, the Manager will also assist the “B” in putting on perfect asset hedges through the use of derivatives subject to the Commission’s jurisdiction to convert those assets’ cashflows to match the cashflows desired to be received by the “B” in light of the denomination, tenor, and other terms of its liabilities so that the “B” will avoid mismatches between its assets and its liabilities. Furthermore, you state that the Manager will not receive any extra compensation for providing advice regarding such hedging transactions and that there are no incentives in the “B” for the Manager to select cash assets requiring such hedging transactions versus those that do not. You state that, in summary, any advice in respect of such hedging transactions is, at most, incidental to the Manager’s core function, is not separately compensated, and is a peripheral, rather than an essential, part of the “B’s” investors’ investment experience.

Regulatory Background

The term CTA is defined in Section 1a(12) of the Act and Commission regulation 1.3(bb)(1), which are substantively identical. According to these definitions, a CTA is any person who, for compensation or profit, whether directly or indirectly, engages in the business of advising others, or as part of a regular business issues reports or analysis, as to the value of or the advisability of trading in, among other things, any futures contract or swap.² Certain persons, however, are excluded from the definition of a CTA. Generally, these exclusions apply to otherwise-regulated persons and persons engaged in certain professions whose advisory services are solely incidental to such persons’ otherwise-regulated business or profession.³

A CTA is generally required to register with the Commission.⁴ However, there are a number of exemptions to registration available.⁵ For example, a person is not required to register as a CTA if the person does not direct client accounts and does not provide commodity trading

¹ See CFTC Staff Letters No. 12-14 and No. 12-45 (providing that certain securitization vehicles are not within the definition of commodity pool under the Commodity Exchange Act and the Commission’s regulations due in part to their limited use of commodity interests), available at <http://www.cftc.gov/LawRegulation/CFTCStaffLetters/LettersArchive/2012/index.htm>.

² See Section 1a(12) of the Act and Commission regulation 1.3(bb)(1).

³ The excluded persons include, for example, a news reporter, lawyer, accountant, or teacher, as well as a bank or trust company. See Commission regulation 1.3(bb)(1). Commission regulation 4.6 also excludes certain otherwise-regulated persons from the CTA definition, including, for example, a swap dealer (whether registered or exempt from registration) and a regulated insurance company.

⁴ See Section 6m of the Act and Commission regulation 3.4 regarding the registration of CTAs.

⁵ See Section 6m of the Act and Commission regulations 4.14 and 3.10(c)(3)(i).

advice based on, or tailored to, the positions or other circumstances of particular clients.⁶ In addition, a person is not required to register as a CTA if, during the course of the preceding 12 months, that person has not furnished commodity trading advice to more than 15 persons and it does not hold itself out generally to the public as a CTA.⁷ However, based on the Correspondence, it does not appear that the Manager desires to avail itself of any of the exemptions from registration as CTAs, due in part to the additional obligations to take advantage of certain exemptions.

No-Action Relief Granted

Based upon the foregoing and the representations made in the Correspondence, the Division, at this time, declines to provide an interpretation that the Manager’s activities in respect of the “B” does not rise to a level that requires the Manager to register as a CTA. Also, the Division, at this time, declines to provide an interpretation that the CTA registration requirements were never intended to apply to parties and transactions such as those described in the Correspondence.

However, the Division believes that granting no-action relief is warranted. In particular, the Division notes that the advisory activities are limited in nature and are provided to an entity, which, based on the representations made in the Correspondence, the Division has previously interpreted to be not included within the definition of “commodity pool” or “pool” under Section 1a(10) of the Act and under Commission regulation 4.10(d), respectively, pursuant to CFTC Letters No. 12-14 and 12-45. The Division also notes that providing no-action relief is consistent to the relief that the Division has provided to an operator of such entities from the Act and Commission regulations applicable to CPOs, including, based on the representations made in the Correspondence, the Manager in respect of the “B”. Accordingly, the Division will not recommend that the Commission take an enforcement action against the Manager for failure to register as a CTA pursuant to Section 6m of the Act and Commission regulation 3.4 in connection with its advisory activities in respect of the “B” as they have been presented in the Correspondence.⁸

This letter, and the positions taken herein, represent the view of this Division only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. 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 interpretation void.

⁶ See Commission regulation 4.14(a)(9).

⁷ See Commission regulation 4.14(a)(10).

⁸ Nothing in this letter should be construed as providing any relief or opinion with respect to any other activities in which the Manager may engage.

“A”

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Should you have any questions, please do not hesitate to contact Amanda Olear, Associate Director, at 202-418-5283, or Chang Jung, Attorney-Advisor, at 202-418-5202.

Very truly yours,

Gary Barnett
Director
Division of Swap Dealer and
Intermediary Oversight