

Commodity Futures Archive - Selected materials, CFTC Interpretative Letter No. 89-2. (Request for CTA Exemption.), ¶24,405, Commodity Futures Trading Commission, (Mar. 1, 1989)

¶24,405. Commodity Futures Trading Commission. Division of Trading and Markets. March 1, 1989. Correspondence in full text.

Registration: Interpretations: CTA Exemption.— A “no action” position such that a company would not be required to register with the CFTC as a CTA in connection with certain activities would not be inappropriate or inconsistent with the purposes of Reg. §4.14(a)(8), since the company is otherwise regulated as an investment adviser under the Investment Advisers Act of 1940. The “no action” determination was also based upon the fact that the company's provision of commodity interest trading advice would be solely incidental to its business of providing securities advice to each insurance company client and that any general accounts of the company's insurance company clients would be subject to substantial state regulation. Further, the “no action” position is subject to the company's strict compliance with the condition that it will provide commodity interest trading advice to insurance company clients whose general accounts are at all times subject to state regulation concerning, without limitation, the filing of annual reports, periodic examinations, and authorized asset categories.

See ¶7625, "Registration" division, Volume 1.

This is in response to your letter dated September 29, 1988 to the Division of Trading and Markets (the “Division”), Commodity Futures Trading Commission (the “Commission”), on behalf of the Company. In your letter, you ask the Division not to recommend that the Commission take enforcement action against the Company for its failure to register as a commodity trading advisor (“CTA”), or against any associated person (“AP”) of the Company for failure to register as such, in connection with the provision of commodity interest trading advice to certain insurance company clients as more particularly set forth in your letter.

In your letter, you have represented the following:

The Company previously sought and received a no-action letter from the Commission regarding its commodities advice to pension plans.... Subsequently, the Commission ... amended Rule 4.14 to add subpart (a)(8) thereto.... The [enclosed copy of a notice of exemption filed pursuant to Commission Rule 4.14] states that the Company's advice will be directed not only to entities excluded from the term “pool” or qualifying entities as required by Rule 4.14(a)(8)(i)(A), but entities with respect to which the Company has received a no-action letter.

The Company's earlier request for a no-action letter dealt with its advice to entities that were either “non-pool” entities under [Commission] Rule 4.5(a)(4)(i) or were qualifying entities under [Commission] Rule 4.5(b) which comply with the requirements of [Commission] Rule 4.5(c). One such exempt entity is an insurance company “separate account.” Although the Company does not intend to offer advice to any insurance company separate account, it wishes to be in a position to advise *insurance companies* and accordingly seeks a no-action position from the Commission permitting it to do so.

You have also represented that: (1) the Company is registered as an investment adviser under the Investment Advisers Act of 1940; (2) the Company will not engage in commodity interest trading for an entity unless such entity is not a pool by virtue of the proviso to Commission Rule 4.5(a)(4), has filed a notice of eligibility under Commission Rule 4.5(c) or is an insurance company which represents to the Company that its investment activities are regulated by state law; (3) with respect to such entities, the Company will employ only trading strategies that are consistent with those permitted under Commission Rule 4.5(c) (including, without limitation, not committing more than five percent of the fair market value of an entity's assets to initial margin and option premiums); (4) the Company's provision of commodity interest trading advice to its insurance company clients will be solely incidental to its business of providing securities advice to such clients; (5) the Company has not, and will not, market its services to clients in any way that emphasizes commodity interest trading as particularly significant and critical to the growth of assets, but will describe the trading of such interests as a means of refining the implementation of strategies originating from analyses of the cash fixed income market and, therefore, incidental to the Company's investment strategy; and (6) the Company will submit to such special calls as the Commission may make to demonstrate compliance with the representations made in your letter.

As you know, Commission Rule 4.14(a)(8), 17 C.F.R. §4.14(a)(8) (1988), provides, in part, as follows:

- (a) A person is not required to register under the [Commodity Exchange Act (the “Act”), 7 U.S.C. §2 (1982)] as a commodity trading advisor if:

- (8) It is registered as an investment adviser under the Investment Advisers Act of 1940... *Provided, however, That:*
- (i) The person's commodity interest trading advice:
 - (A) Is directed solely to, and for the sole use of, entities which are excluded from the definition of the term "pool" under §4.5 or are qualifying entities under §4.5 for which a notice of eligibility has been filed;
 - (B) Is solely incidental to its business of providing securities advice to each such entity; and
 - (C) Employs only such strategies as are consistent with eligibility status under §4.5.
 - (ii) The person is not otherwise holding itself out as a commodity trading advisor....

Although the Company will not meet all of the criteria for exemption from registration as a CTA under Commission Rule 4.14(a)(8) in connection with its activities on behalf of its insurance company clients, we have determined not to recommend that the Commission take enforcement action against the Company if it does not register as such in connection with the activities set forth in your letter to us. In making this determination, we note, particularly, that the Company would be eligible for relief under Commission Rule 4.14(a)(8) but for the fact that it proposes to provide commodity interest trading advice to the general account of an insurance company client rather than any separate account that may be offered or established and maintained by such client from time to time as contemplated by the exemption criterion set forth in Commission Rule 4.14(a)(8)(i)(A) and the requirements of Commission Rule 4.5(b)(2).

¹ We further note that any such general account is already subject to substantial state regulation; that the Company will advise only such accounts of its existing insurance company clients; that the Company will employ only trading strategies in a manner consistent with the requirements of Commission Rule 4.5(c) (including, without limitation, not committing more than five percent of the fair market value of an entity's assets to initial margin and option premiums); and that the Company will not otherwise hold itself out as a CTA.

In light of the foregoing, we believe that a "no action" position such that the Company will not be required to register with the Commission as a CTA in connection with the activities set forth in your letter would not be inappropriate or inconsistent with the purposes of Commission Rule 4.14(a)(8). This determination is based, in part, on the facts that the Company is otherwise regulated as an investment adviser under the Investment Advisers Act of 1940; that any general accounts of the Company's insurance company clients will be subject to substantial state regulation; and that the Company's provision of commodity interest trading advice will be solely incidental to its business of providing securities advice to each such insurance company client. In this connection, the "no action" position taken in this letter is subject to the Company's strict compliance with the condition that it will provide commodity interest trading advice to insurance company clients whose general accounts are at all times subject to state regulation concerning, without limitation, the filing of annual reports, periodic examinations and authorized asset categories.

This letter does not excuse the Company from strict compliance with any other applicable requirements contained in the Act or the Commission's rules thereunder. For example, the Company would remain subject to the antifraud provisions of Section 4 of the Act, 7 U.S.C. §6 (1982), and the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's rules, 17 C.F.R. Parts 15, 18 and 19 (1988).

This letter is based on the representations that you have made to us and is limited strictly to those representations. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this connection, we request that you notify us immediately if the activities or operations of the Company change in any way from that as represented to us. Finally, this letter expresses the views of the Division only and not necessarily those of the Commission or any other division or office of the Commission.

Footnotes

- ¹ The Commission previously has noted that "the holding of commodity interests in an insurance company's general assets should not make the insurance company a commodity pool." 50 Fed. Reg. 15868, 15872 (April 23, 1985).