



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer  
and  
Intermediary Oversight

Gary Barnett  
Director

CFTC Letter No. 14-28  
No-Action  
February 28, 2014  
Division of Swap Dealer and Intermediary Oversight

### Re: Section 4m(1)

Dear:

This is in response to your letter to the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission” or “CFTC”) dated May 6, 2013, as supplemented by your letter dated November 4, 2013, your e-mail messages dated August 5, November 6 and November 25, 2013, and telephone conversations with Division staff (collectively, “Correspondence”).

By the Correspondence, you request on behalf of “A” and “B”, both of which are non-profit corporations entirely controlled by “C”, that the Division not recommend that the Commission commence an enforcement action against “A” or “B” for failure to register as a commodity pool operator (“CPO”) under Section 4m(1) of the Commodity Exchange Act (“Act”)<sup>1</sup> with respect to the operation of accounts (“Commingled Accounts”) in which will be commingled assets of: (1) employee benefit plans for employees of churches and organizations controlled by or associated with “C” (“Church Plans”); and (2) endowments and related assets (“Endowments”) of certain non-profit corporations entirely controlled by “C” (“C” Organizations). Assets of Commingled Accounts will be allocated to collective investment vehicles and/or separate accounts, some of which will engage in commodity interest trading.

Based upon the representations made in the Correspondence, we understand the relevant facts to be as follows. “C” is a non-profit corporation that acts as a general coordinating organization for “Ds” and “D” churches in the United States to promote missionary activity, religious education, benevolent activities and social services. “C” is the sole member of “A” and “C” elects the approximately fifty trustees that manage “A” and that elect the officers to run

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<sup>1</sup> 7 U.S.C. 6m(1) (2006). The Act may be accessed through the Commission’s Web site, [www.cftc.gov](http://www.cftc.gov).

“A’s” day-to-day activities. “A” sponsors, maintains, and/or administers the Church Plans, and is the named fiduciary of each of them.

“A” formed and solely controls “B”. “A” and “B” may provide investment services to the “C” Organizations with respect to the Endowments and to the Church Plans. This structure was designed to foster management efficiency by housing “A’s” investment advisory functions and personnel in a separate legal entity.

“A” and “B” intend to commingle Church Plan assets and Endowments in several strategy-specific accounts (the Commingled Accounts). The assets of the Commingled Accounts will be invested in hedge funds and/or separate accounts that are operated or advised, respectively, by third-parties not affiliated with “C”, “A” or “B”.<sup>2</sup> The Commingled Accounts will be separate legal entities, for which “A” and/or “B” may serve as the CPO. As of the date hereof, no decision has been made as to the legal form of the Commingled Accounts or who will be operating a particular Commingled Account. Accordingly, you have requested relief from CPO registration for both “A” and “B”.

Commission Regulation 4.10(d)(1)<sup>3</sup> defines a “pool” as “any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests.” Regulation 4.5(a)(4)(v) excludes from the “pool” definition in Regulation 4.10(d)(1) a plan defined as a “church plan.” You represent that each of the Church Plans qualifies under Regulation 4.5(a)(4)(v).

We further believe that the “C” Organizations are not pools within the meaning of Regulation 4.10(d)(1). Each is a non-profit corporation without shareholders whose sole member is “C”. Additionally, “C” entirely controls each “C” Organization and appoints all of each “C” Organization’s directors or trustees. The assets of the “C” Organizations are contributed by churches and church members as donations, and the contributors do not expect or receive a return on their donations other than the personal satisfaction of, *e.g.*, having furthered missionary activity or having helped sponsor a seminarian’s training.

Direct investment of a “C” Organization’s assets in an investment vehicle or separate account that trades commodity interests would not make the “C” Organization a commodity

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<sup>2</sup> To the extent that any such third-party operator or advisor engaged in commodity interest trading, such person would be registered as a CPO or commodity trading advisor, or would rely upon an applicable exemption from such registration.

Although your May 6, 2013 letter indicates that in the future, assets may also be contributed to Commingled Accounts from other tax exempt entities affiliated with “C”, you subsequently informed staff that your client has decided that only Church Plan assets and Endowment assets of the “C” Organizations will be combined in the Commingled Accounts.

<sup>3</sup> 17 C.F.R. §4.10(d)(1) (2013). The Commission’s Regulations may also be accessed through the Commission’s Web site.

pool. In *Lopez v. Dean Witter Reynolds, Inc.*<sup>4</sup> the Court noted that those courts which have raised the issue of what criteria were necessary to find that a trading vehicle was a commodity pool require, among others, the following factors to be present: (1) an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity futures contracts; and (2) participants share *pro rata* in accrued profits or losses from commodity futures trading. Neither of these criteria is present in the “C” Organizations. Indeed, there are no pool “participants,” as that term is defined in Regulation 4.10(c), inasmuch as no person has any direct financial interest in a “C” Organization as, *e.g.*, a limited partner.<sup>5</sup>

While the Church Plans and the “C” Organizations are not pools themselves, if assets from the Church Plans and “C” Organizations are commingled and used to engage in commodity interest trading, the entity in which those assets are commingled would be a pool (with one or more Church Plans and “C” Organizations being the participants therein). Its operator would be subject to registration as a CPO. In support of your request, you note that Commission staff has, on several occasions, granted CPO registration no-action relief where assets of pension plans that (like the Church Plans) individually qualify under Regulation 4.5 for exclusion from the “pool” definition were combined into pension plan group trusts.<sup>6</sup> But unlike the facts of the letters you cited, the Commingled Accounts would accept assets from other sources (the “C” Corporations) in addition to assets from trading vehicles excluded from the pool definition by Regulation 4.5 (*i.e.*, the Church Plans). Thus, the Commingled Accounts would fit within the definitional criteria for commodity pools outlined in the *Lopez* case referenced, above.

Notwithstanding that the Commingled Accounts would be pools, the Division believes that under the facts that you have presented, no substantial regulatory purpose would be served by requiring “A” or “B” to register as a CPO in connection with the formation and operation of the Commingled Accounts. As noted above, “C” formed and controls “A”, which formed and controls “B”. If CPO registration were required of “A” or “B”, each of the persons who would be subject to background checks or proficiency examinations in the registration process will already have been selected and hired by “C”, “A” or “B”. Moreover, if “A” or “B” were required to deliver a Disclosure Document (in the case of “A”, to “C”, or in the case of “B” to “A”), it would, in essence, be delivering the Disclosure Document to itself. The same would hold true for Account Statements and Annual Reports.<sup>7</sup>

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<sup>4</sup> 805 F.2d 880 (9<sup>th</sup> Cir. 1986).

<sup>5</sup> See CFTC Staff Letter 09-36 [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,477 (Aug. 3, 2009), wherein staff concluded that a charitable foundation was not a pool because neither of these two factors cited from the *Lopez* case was present.

<sup>6</sup> Specifically, you referenced Staff Letters 01-08, 12-72, 97-94, 94-52, and 93-91. These letters may be accessed on the Commission’s Web site.

<sup>7</sup> In this regard, the Division notes that where a person is required to register as a CPO, the person is exempt from the Disclosure Document, Account Statement and Annual Report delivery requirements where the prospective or actual pool participant is a pool operated by a pool

Accordingly, if “A” serves as the CPO of the Commingled Accounts, the Division will not recommend that the Commission commence an enforcement action against “A” based solely on its failure to register as a CPO in connection with operating the Commingled Accounts. Similarly, if “B” serves as the CPO of the Commingled Accounts, the Division will not recommend that the Commission commence an enforcement action against “B” based solely on its failure to register as a CPO in connection with operating the Commingled Accounts.

This letter is applicable to “A” and “B” solely in connection with operating the Commingled Accounts. It does not excuse “A” or “B” from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder. For example, each remains subject to all antifraud provisions, to all reporting requirements for traders, and to all applicable provisions of Part 4.

This letter is based upon the representations made to the Division. Any different, changed, or omitted material facts or circumstances might render this letter and the no-action positions taken herein void. You must notify the Division immediately in the event that the operations of “C”, “A”, “B” or the Commingled Accounts change in any material way from those represented to us. Further, this letter and the positions 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 concerning this correspondence, please contact Barbara S. Gold, Associate Director, or Christopher W. Cummings, Special Counsel, at (202) 418-6700.

Very truly yours,

Gary Barnett  
Director  
Division of Swap Dealer  
And Intermediary Oversight

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operator that is the same as, or that controls, is controlled by, or is under common control with, the pool operator of the offered or invested-in pool. *See* Regulations 4.21(a), 4.22(a)(4) and 4.22(c)(8), respectively.