



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and  
Intermediary Oversight

Gary Barnett  
Director

CFTC Letter No. 14-146  
No-Action  
November 6, 2014  
Division of Swap Dealer and Intermediary Oversight

**Re: Request for relief from registration as a commodity pool operator when acting as a directed trustee**

Dear :

This is in response to your letter (the “Letter”), dated June 6, 2014, to the Division of Swap Dealer and Intermediary Oversight (the “Division”) of the U.S. Commodity Futures Trading Commission (the “Commission” or “CFTC”). In the Letter, on behalf of “B” and its affiliated state-regulated companies (collectively, “A”), you request an interpretation that “A” is not acting as a commodity pool operator (a “CPO”) within the meaning of section 1a(11) of the Commodity Exchange Act (the “Act”)<sup>1</sup> and Commission regulation 1.3(cc) when it acts as a “directed trustee” of certain trusts described below, and therefore is not required to register as a CPO pursuant to section 4m(1) of the Act.

### **Background**

Based on the representations made in the Letter and other supplemental correspondence (the “Correspondence”), the Division understands the facts to be as follows. You state that “A” is regularly engaged to act as a “directed trustee” of trusts established under the laws of various states (each, a “Trust”) pursuant to a Trust agreement for each Trust. You state that although “A”, as a directed trustee, holds legal title to the assets of each Trust, it has limited discretionary powers. You state that each Trust’s Investment Manager, which is customarily the Trust’s sponsor, or an affiliate thereof, holds primary responsibility for the Trust’s operations from the inception of the Trust, including solicitation of, and interaction with, the Trust’s investors and trading on behalf of the Trust.

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<sup>1</sup> 7 U.S.C. § 1 *et seq.*

You state that, with respect to activities that could cause it to come within the definition of a CPO, “A” may act under the Trust agreements only on a “directed” basis, as instructed by each Trust’s Investment Manager. You state that each Trust agreement provides that:

1. The Investment Manager is solely responsible for trading the assets of the Trust, without input from “A”.<sup>2</sup>
2. The Investment Manager has exclusive authority to select the brokers through which the Trust will trade.<sup>3</sup>
3. The Investment Manager directs “A” with respect to investor eligibility requirements and the admission of investors into the Trust.
4. “A”, as directed trustee, does not have the power to remove the Investment Manager or to appoint additional or replacement asset managers for the Trust. “A”, however, can be removed as directed trustee by the Investment Manager.<sup>4</sup>

You state that the only discretionary powers that “A”, as a directed trustee, has with respect to a Trust are limited to those relating to the custody of the Trust’s assets, the payment of certain fees, expenses, and reimbursements out of the Trust assets, and the engagement of certain agents and service providers on behalf of the Trust.<sup>5</sup>

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<sup>2</sup> The sample Trust agreement that you have provided to the Division states that “A” “irrevocably delegates all of its rights, duties and liabilities with respect to the management of the Trust to the Investment Manager, except to the extent such rights, duties and liabilities are expressly retained by [“A”] under this [Trust agreement].” Furthermore, the sample Trust agreement states that “A” “shall have no duty or liability with respect to the acts or omissions of the Investment Manager, nor shall [“A”] be responsible for monitoring or supervising the performance of the Investment Manager’s obligations under this [Trust agreement].”

<sup>3</sup> You state that, although it is not reflected in the sample Trust agreement, some Trust agreements also give “A” the authority to establish and maintain brokerage, commodity, and other similar accounts with brokers that have been selected by the Investment Manager.

<sup>4</sup> You state that, in the sample Trust agreement, the Trust terminates upon the resignation or removal of the directed trustee, as well as upon the resignation of the Investment Manager. You state that, in some cases, the Investment Manager may be further authorized to appoint a successor directed trustee and continue the Trust.

<sup>5</sup> The sample Trust agreement states that “A”, as a directed trustee, has the following discretionary powers that may be exercised absent any instructions or directions to the contrary by the Investment Manager: (1) Make, execute, and deliver instruments in writing necessary to exercise the directed and discretionary powers allocated to “A” in the Trust agreement to the extent required by the state trust act or other applicable law; (2) Execute, deliver, acknowledge, and file documents required by the state trust act or other applicable law requiring registration or qualification of the Trust in other states; (3) Pay from the Trust property fees, expenses, taxes, charges, liabilities, and obligations lawfully imposed on the Trust, “A” (as directed trustee), and/or the Trust property; (4) Reimburse “A” for advancing any cash or securities in connection with its performance as directed trustee under the Trust agreement; (5) Register securities; and (6) Establish and maintain bank accounts and deposit Trust property in such accounts.

Furthermore, in the sample Trust agreement that you have provided to the Division, “A” is denied any discretionary powers that are not explicitly provided in the Trust agreement. Specifically, it states:

Except as otherwise specifically provided in this [Trust agreement], the Trustee shall not have any discretionary powers or authority with respect to the administration or management of the Trust or the portfolios of any of the [series of the Trust], and shall in all respects act at the direction of the Investment Manager...Further, notwithstanding anything to the contrary herein, except as otherwise specifically required by the [state trust act] or as specified [in this Trust agreement as discretionary powers granted to the Trustee], the Trustee...shall act only pursuant to the directions and instructions (which may be standing instructions) of the Investment Manager and shall have no right or authority to disregard, revoke, amend, or supplement such directions or instructions in the discharge of its duties and shall not be responsible for such directions’ or instructions’ compliance with Applicable Law.<sup>6</sup>

In arguing for relief, you reference the Commission’s statement in a proposed rule release, which states that, in determining who would be the CPO of a particular pool, Commission staff “typically looks at such factors as who will be acting in the manner contemplated by the statutory definition of the term ‘commodity pool operator’ -- *e.g.*, who will be promoting the pool by soliciting, accepting or receiving from others, property for the purpose of commodity interest trading -- and who will have the authority to hire (and to fire) the pool’s CTA and to select (and to change) the pool’s FCM.”<sup>7</sup> You also reference CFTC Staff Letter 97-94, which granted registration relief to a group trust’s trustee and custodian that did not: “(1) solicit or initiate any contact with participants in the [trust] other than with respect to administrative matters arising out of its custodial responsibilities; (2) have any investment discretion with respect to the assets of the [trust’s investment fund]; (3) make any investment recommendations or review the investment decisions of [the trust’s fund manager/sponsor]; or (4) hire or fire or have any authority to hire or fire the [trust’s] fund managers or its FCMs.” You argue that given the nature of “A” as directed trustee and the factors that have been considered by Commission staff in determining whether a person should register as a CPO, “A” should be granted registration relief.

### **Relief Granted**

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<sup>6</sup> The sample Trust agreement states that the Investment Manager may delegate the administration or management of the Trust or the portfolios of any of the series of the Trust to “A”, provided that “A” consents. However, as mentioned above, you represent that “A” will only engage in activities that could cause it to come within the definition of a CPO on a directed basis, as instructed by the Trust’s Investment Manager. The relief provided in this letter is dependent on, among other things, this representation.

<sup>7</sup> 49 FR 4778, 4780 (Feb. 8, 1984).

The Division declines to provide an interpretation that “A” is not acting as a CPO within the meaning of section 1a(11) of the Act and Commission regulation 1.3(cc) when it acts as a directed trustee of a Trust. However, based upon the representations made in the Correspondence, the Division will not recommend that the Commission take an enforcement action against “A” for failure to register as a CPO with respect to a Trust, as required by section 4m(1) of the Act, solely as a result of its role as a directed trustee with respect to such a Trust; provided, that the Investment Manager of such Trust is registered as a CPO with respect to the operation of such Trust.

This letter, and the positions taken herein, represents the view of this Division only, and does 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 “A” from compliance with any other applicable requirements contained in the Act or in any 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 letter void. Finally, the Division retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the relief provided herein, in its discretion.

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

Very truly yours,

Gary Barnett  
Director  
Division of Swap Dealer and  
Intermediary Oversight