



## U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre  
1155 21st Street, NW, Washington, DC 20581  
Telephone: (202) 418-6700  
Facsimile: (202) 418-5528  
*mkulkin@cftc.gov*

Division of Swap Dealer and  
Intermediary Oversight

Matthew B. Kulkin  
Director

CFTC Letter No. 18-08  
No-Action  
February 28, 2018  
Division of Swap Dealer and Intermediary Oversight

**RE: No-Action Relief from Commodity Pool Operator and Commodity Trading Advisor Registration for the “A” in connection with its operation of the “B”**

Dear :

This is in response to your request submitted to the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”) on November 9, 2017, (the “Correspondence”), on behalf of “A”, the sponsor and investment manager of the “B”.<sup>1</sup> In the Correspondence, you request that the Division not recommend that the Commission take an enforcement action, pursuant to Section 4m(1) of the Commodity Exchange Act (“CEA”),<sup>2</sup> against “A” for failure to register with the Commission as a commodity pool operator (“CPO”) or commodity trading advisor (“CTA”), with respect to its activities operating “B”. In particular, you request relief comparable to that provided by Commission Regulations 4.5 and 4.6, notwithstanding that a pension plan group trust is not a “qualifying entity” under Regulation 4.5.<sup>3</sup>

### **Background**

#### *“B” Structure and Operations*

In the Correspondence, you make the following representations: “A” is registered with the Securities and Exchange Commission (“SEC”) as an investment adviser under the Investment Advisers Act of 1940, as amended. “A” will act as the sponsor of “B”, pursuant to an Agreement of Trust (“Trust Agreement”) between “A” and “C”, a New York state-chartered bank currently anticipated as serving as “B’s” directed trustee (“Trustee”). “A” will operate “B” exclusively for the investment of assets of trusts that form part of qualified defined benefit pension plans and governmental pension plans (the “Plans”). Further, “A” intends to apply for

---

<sup>1</sup> You state that “A” is not currently registered with the Commission in any capacity.

<sup>2</sup> 7 U.S.C. 6m(1). The CEA is found at 7 U.S.C. 1, *et seq.* The CEA and other regulatory provisions and staff letters cited herein may be accessed through the Commission’s website, <http://www.cftc.gov>.

<sup>3</sup> 17 CFR 4.5 and 4.6.

**RE: No-Action Relief from CPO and CTA Registration for “A” in connection with its operation of the “B”**

February 28, 2018

Page 2

tax-exempt status for “B” under Section 501(a) of the Internal Revenue Code of 1986, as amended (“IRC”), as a “group trust” under Internal Revenue Service Ruling 81-100 (“IRS Ruling 81-100”).

You also describe operational, marketing, and participation limitations “A” will employ in operating “B” to support your request for relief. You state that “A” will approve only defined benefit pension plans or trusts comprised of defined benefit pension plan assets.<sup>4</sup> You emphasize that any Plans participating in “B” (“Participating Trusts”) are each excluded from the “pool” definition pursuant to the provisions in Commission Regulations 4.5(a)(4)(i), (ii), or (iii). Additionally, each Participating Trust will be required to adopt and incorporate by reference the Trust Agreement and to adopt “B” as part of such Participating Trust, prior to their participation. You state that, by adopting “B”, each such Participating Trust will thereby designate “A” as named fiduciary, as such term is defined in the Employee Retirement Income Security Act of 1974 (“ERISA”),<sup>5</sup> with respect to those assets invested by each Participating Trust in “B”.

---

<sup>4</sup> Specifically, you state that “A” will limit approval for Group Trust participation to three categories:

- (i) a trust established as part of a defined benefit pension plan that (A) is exempt from Federal income taxation under [IRC Section 401(a) as “governmental plans”], (B) is maintained pursuant to a plan or trust instrument that specifically authorizes it to either (1) participate in the Group Trust ..., or (2) participate in collective or commingled trust funds generally and (C) is maintained pursuant to a plan or trust instrument that specifically or in substance and effect adopts as part of the plan of which such trust is a part either (1) the Trust Agreement or (2) the declarations of trust or other governing instruments under which collective or commingled trust funds in which such plan participates generally are maintained; or
- (ii) any common, collective, or commingled trust fund, including but not limited to, any such fund maintained by the Group Trust’s Trustee or an affiliate or any third-party that (A) consists solely of the assets of trusts and plans described in clause (i) above, (B) is exempt from Federal income taxation under [IRC Section 501(a)] ... by reason of qualifying as a “group trust” under [IRS Ruling 81-100], as modified by Revenue Ruling 2011-1, (C) is maintained pursuant to an instrument that specifically authorizes it to either (1) participate in the Group Trust or any fund or (2) participate in collective or commingled trust funds generally, and (D) is maintained pursuant to an instrument that specifically or in substance and effect adopts as a part thereof either (1) the Trust Agreement or (2) the declarations of trust or other governing instruments under which collective or commingled trust funds in which such fund participates generally are maintained; or
- (iii) any other defined benefit pension plan or trust permitted by [IRS Ruling 81-100], as modified by Revenue Ruling 2011-1, to be commingled in trust for investment purposes with the assets of other Participating [Plans], the resulting commingled trust being exempt from Federal income taxation under [IRC Section 501(a)] by reason of qualifying as a “group trust”; provided, however, that the organizational documents, maintenance, actions and activities of such plan or trust satisfy any applicable conditions of [IRS Ruling 81-100], as so modified, and any other legal requirements applicable to the trust.

<sup>5</sup> 29 U.S.C. 1001, *et seq.*

**RE: No-Action Relief from CPO and CTA Registration for “A” in connection with its operation of the “B”**

February 28, 2018

Page 3

*“B” Operations: Investment Management and Compliance*

You state that “B” will consist of numerous separate investment funds (“Funds”) established from time to time pursuant to respective “Fund Declarations” adopted by “A” and the Trustee pursuant to the Trust Agreement. Each Fund will be separately held, managed, administered, valued and otherwise dealt with as a separate sub-trust comprised of distinct assets and liabilities invested in accordance with its own specific investment objective, policies, and strategies. You represent that “A” will appoint one or more investment managers (“Managers”) for each Fund, and if a Fund has more than one Manager, “A” will designate a specified sub-fund sleeve (“Sub-Fund”) to be managed by each such Manager.<sup>6</sup> Subject to the investment objectives, guidelines and restrictions established for any particular Fund, the Managers of each Fund or Sub-Fund will have broad authority to manage, acquire, control, and otherwise dispose of the assets of any Fund or Sub-Fund. You state that, consequently, each Manager must acknowledge that it is a “fiduciary,” as defined by ERISA Section 3(21),<sup>7</sup> and an “investment manager,” under ERISA Section 3(38),<sup>8</sup> with respect to each Fund or Sub-Fund for which it has been appointed Manager and with respect to each Plan participating in such Fund or Sub-Fund.

Generally, “A” will be responsible for the establishment of “B”, and will have the authority to hire or terminate the Fund and Sub-Fund Managers and to make investment decisions on behalf of “B”. You state that such services provided by “A” will include the authority to select and oversee Managers for “B” that may trade in commodity interests, including futures, options, swaps, and foreign currency contracts. You emphasize that none of the Funds will hold itself out as a vehicle for participating in commodity interest investments, and that none of the Funds will be engaged primarily in trading commodity interests.<sup>9</sup> With respect to Managers specifically authorized to trade commodity interests, you affirm that “A” will obtain representations from any such Manager indicating either valid registration with the Commission as a CTA, or the Manager’s claim of appropriate exemptive or exclusionary relief from CTA registration regarding those trading activities.

You state that prospective Participating Trusts will receive a “Confidential Offering Memorandum” explaining important risk factors and containing terms common to the Funds

---

<sup>6</sup> Additionally, you state that, in certain cases, such as where the principal asset of a Fund is expected to be interests in another investment vehicle (a fund-of-fund(s)), “A” may serve as investment manager to that Fund.

<sup>7</sup> 29 U.S.C. 1002(21).

<sup>8</sup> 29 U.S.C. 1002(38).

<sup>9</sup> You also note, however, that commodity interest exposure is nonetheless possible through “B”: “certain Funds will have the authority to invest directly or indirectly in commodity interests at the direction of the relevant Manager and may do so for hedging or investment purposes.”

**RE: No-Action Relief from CPO and CTA Registration for “A” in connection with its operation of the “B”**

February 28, 2018

Page 4

offered under “B”, relevant Fund supplemental memoranda describing the investment objectives, policies, terms, and risks factors specific to each Fund in which the prospective Participating Trust is considering an investment, as well as copies of the Trust Agreement and relevant Fund Declarations.

The Trustee, comparatively, will serve as the custodian of “B’s” assets. You state that the Trustee will assist with the valuation, delivery, and receipt of securities and other “B” assets; will be responsible for maintaining accounting and financial records and assisting with the preparation of periodic reports for “B”; will have no investment discretion with respect to “B” assets; and will have no involvement in the formulation of “B” investment policies. Consequently, you conclude that, “the ultimate investment management of the Group Trust’s assets will be the responsibility of “A”.”

Pursuant to the terms of the relevant Fund Declaration and the Investment Management Agreement between “A” and the relevant Manager (each, a “Manager IMA”), you state that, generally, each Manager (other than “A”) will be entitled to a management fee based on the aggregate value of the assets managed by such Manager. You describe the management fee as calculated and accrued on a daily basis and paid periodically from the Fund assets managed by such Manager. Finally, you represent that each Fund will be responsible for its own operational and administrative costs (including any extraordinary expenses), and will each bear a *pro rata* share, based on the relative net asset values of the Funds, of “B’s” operational and administrative costs.

**Legal Analysis**

Commission Regulation 4.5(a)(4) provides an exclusion from the CPO definition to a trustee of, named fiduciary of, or an employer maintaining a pension plan subject to Title I of ERISA, with respect to its operation of a “qualifying entity” as described in Regulation 4.5(b)(4), *i.e.*, a pension plan subject to Title I of ERISA.<sup>10</sup> Additionally, Regulations 4.5(a)(4)(i)-(iii) list certain employee benefit plans not construed to be commodity pools, and for which no exclusion from the CPO definition need be claimed.<sup>11</sup> Although you can affirm that all Participating Trusts in the Group Trust are “not construed to be pools” under Regulations 4.5(a)(4)(i)-(iii), Regulation 4.5 does not provide exclusionary relief for an operator or manager of a group trust comprised of multiple pension plans, even if each underlying plan is either a “qualifying entity” or otherwise “not construed to be [a] pool[.]” Regulation 4.6(a)(2) provides an exclusion from the CTA definition for “a person who is excluded from the definition of ‘commodity pool

---

<sup>10</sup> 17 CFR 4.5(a)(4) and (b)(4).

<sup>11</sup> 17 CFR 4.5(a)(4)(i)-(iii).

**RE: No-Action Relief from CPO and CTA Registration for “A” in connection with its operation of the “B”**

February 28, 2018

Page 5

operator’ by § 4.5,” provided that, among other things, “the person’s commodity interest advisory activities are solely incidental to the operation of those trading vehicles for which Regulation 4.5 provides relief.”<sup>12</sup>

As noted above, “B” is not a “qualifying entity,” under Regulation 4.5, and therefore, “A” cannot rely on Regulation 4.5 for an exclusion from the CPO definition with respect to its operation of “B”. As a result, absent the relief provided herein, “A” could also not avail itself of the CTA exclusion in Regulation 4.6(a)(2). The Division has previously granted CPO and CTA registration relief through the issuance of no-action letters in substantively similar situations involving pension plan group trusts.<sup>13</sup> You request comparable relief,<sup>14</sup> and in support of your request, you represent affirmatively that the commodity interest advisory activities by “A” with respect to the “B” will be solely incidental to the operation of “B” and its Funds, in accordance with Regulation 4.6(a)(2)(i). Additionally, you represent that, like all other entities excluded by Regulation 4.5, “A” intends to and will operate “B” in accordance with the terms of Regulation 4.5(c)(2).

Notwithstanding that the regulations do not provide exclusionary relief for pension plan group trusts, the Division believes that equivalent relief is warranted for “A” and “B”. Specifically, where all of the Participating Trusts in the Group Trust are not construed to be pools under Regulations 4.5(a)(4)(i), (ii), or (iii), the Commission’s regulatory interests are especially limited. Consequently, based on the facts and representations above, the Division believes granting “A” the requested relief from CPO and CTA registration with respect to the operation of “B” is appropriate.

**No-Action Relief for “A” and its operation of “B”**

---

<sup>12</sup> 17 CFR 4.6(a)(2); 17 CFR 4.6(a)(2)(i).

<sup>13</sup> See CFTC Staff Letters 12-72 (Dec. 21, 2012), 01-08 (Aug. 11, 2000), 97-94 (Nov. 21, 1997), 94-52 (Jun. 2, 1994), 93-91 (Sept. 7, 1993), and 86-8 (Apr. 4, 1986). Each of these letters involved a group trust comprised of participating plans that were either: (i) excluded from the “pool” definition under Regulations 4.5(a)(4); or (ii) a “qualifying entity” under Regulation 4.5(b)(4), for which the operator could claim an exclusion from the CPO definition.

<sup>14</sup> Alternatively, you request confirmation from the Division that it would not recommend that the Commission take an enforcement action against “A” for failing to register as a CTA in reliance on the exemption in Regulation 4.14(a)(8). Regulation 4.14(a)(8) provides a registration exemption to a registered investment adviser, provided that: (1) the adviser provides commodity interest trading advice solely to, and for the sole use of, qualifying entities as defined in Regulation 4.5(b) or entities not construed to be pools under Regulation 4.5(a)(4); (2) such commodity interest trading advice is solely incidental to its business of providing securities advice to such entities; and (3) the adviser is not otherwise holding itself out as a CTA. Because the Division is granting no-action relief consistent with the terms of Regulation 4.6, Division staff declines to address this question.

**RE: No-Action Relief from CPO and CTA Registration for “A” in connection with its operation of the “B”**

February 28, 2018

Page 6

Based upon the foregoing, and consistent with prior practice,<sup>15</sup> the Division will not recommend enforcement action for failure to register with the Commission as a CPO or CTA under CEA Section 4m(1) against “A” with respect to its operation of “B”, provided that “A” operates and advises “B” in a manner that meets the conditions in Regulations 4.5(c)(2) and 4.6.

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 “A” from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder. For example, “A” remain subject to all antifraud provisions of the Act. Further, this letter, and the relief contained herein, is based upon 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.

If you have any questions regarding this letter, please contact Amanda Olear, Associate Director, at 202-418-5283 or aolear@cftc.gov, or Elizabeth Groover, Special Counsel, at 202-418-5985 or egroover@cftc.gov.

Very truly yours,

Matthew B. Kulkin  
Director  
Division of Swap Dealer and  
Intermediary Oversight

---

<sup>15</sup> See supra note 13.