



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5000
Facsimile: (202) 418-5521
www.cftc.gov

Division of Market Oversight

CFTC Letter No. 18-12
Interpretation
May 2, 2018
Division of Market Oversight

Kathryn M. Trkla
Partner
Foley & Lardner LLP
321 North Clark Street
Suite 2800
Chicago, IL 60654

Re: **Request for Interpretation Regarding Commission Regulation 150.4(b)(1)**

Dear Ms. Trkla:

This letter responds to your request for an interpretation by the Division of Market Oversight (“Division” or “DMO”) regarding Commodity Futures Trading Commission (“Commission” or “CFTC”) Regulation 150.4(b)(1). By letter dated February 20, 2018, you have asked for confirmation that “when an investor in a commodity pool qualifies for the disaggregation relief under Regulation 150.4(b)(1)(iii) as to any commodity interest trading by the pool, it does not have to aggregate commodity interest positions of a portfolio company in which the pool is invested when the investor’s investment in the pool results in acquisition of an indirect interest of 10% or more in the portfolio company” (the “Request for Interpretation”).¹

I. Background

On December 16, 2016, the Commission published in the Federal Register the Aggregation of Positions Final Rule, which amended Commission Regulation 150.4 (“Final Rule”).² The amendments to Regulation 150.4 determine which accounts and positions a person must

¹ DMO notes that, although the Request for Interpretation describes Regulation 150.4(b)(1)(iii) as an “exemption” from aggregation, this interpretation reflects the fact that Regulation 150.4(b)(1) is an exemption from aggregation, whereas Regulations 150.4(b)(1)(i)-(iii) are exceptions to the exemption (i.e., situations when aggregation is required) as explained further below in Section I. Background.

² Aggregation of Positions, 81 FR 91454 (Dec. 16, 2016).

aggregate for purposes of determining compliance with the applicable position limit levels set forth in Regulation 150.2 (“position limits”). The Final Rule became effective on February 14, 2017.

Generally under Regulation 150.4(a)(1), for purposes of applying position limits, a person must aggregate all positions in accounts for which such person directly or indirectly controls trading or holds a 10 percent or greater ownership or equity interest, unless an exemption set forth in Regulation 150.4(b) applies.³ This letter addresses Regulation 150.4(b)(1), which is an exemption from aggregation for certain commodity pool investors. The Regulation 150.4(b)(1) aggregation exemption applies to a person who is a passive investor (i.e., “a person that is a limited partner, limited member, shareholder, or other similar pool participant”) that holds a 10 percent or greater ownership or equity interest in a commodity pool (the “exemption”). However, the exemption does not apply if such investor is excluded by the exceptions in Regulations 150.4(b)(1)(i)-(iii) (the “exceptions”).⁴

Specifically, under Regulation 150.4(b)(1)(i), the exemption for passive investors is not available if the person is the commodity pool operator of the pooled account. Under Regulation 150.4(b)(1)(ii), the exemption is not available if the person is a principal or affiliate of the operator of the pooled account (unless the person and the pool operator meet the conditions set forth in paragraphs (A)-(C) of Regulation 150.4(b)(1)(ii)). Finally, under Regulation 150.4(b)(1)(iii) (which is the focus of the Request for Interpretation), the exemption is not available if: (a) the commodity pool’s operator is exempt from CPO registration (pursuant to Regulation 4.13); and (b) the person holds a 25 percent or greater direct or indirect ownership or equity interest in the commodity pool.⁵

II. Summary of the Request for Interpretation⁶

According to the Request for Interpretation, your client is a large institutional investor (“Institutional Investor”) that actively invests in a range of financial instruments, including

³ DMO notes that, notwithstanding the aggregation exemptions set forth in Regulation 150.4(b), under Regulation 150.2(a)(2) a person must also aggregate if they hold or control positions in more than one account or pool with substantially identical trading strategies (the “substantially identical trading requirement”). However, DMO also notes that pursuant to CFTC Letter 17-37, DMO staff granted no-action relief under which the substantially identical trading requirement applies only if there is willful intent to circumvent position limits. *See* CFTC Letter 17-37 (Aug. 10, 2017) (stating that a person does not have to aggregate pursuant to Regulation 150.4(a)(2) “unless that person holds or controls the trading of positions in more than one account or pool with substantially identical trading strategies in order to willfully circumvent applicable position limits”).

⁴ In other words, the exemption would cover a passive investor, so long as such investor is not otherwise excluded from relying on the exemption pursuant to the exceptions in Regulations 150.4(b)(1)(i)-(iii).

⁵ DMO notes that, although the Request for Interpretation focuses on the exception in Regulation 150.4(b)(1)(iii), staff’s interpretation provided herein would apply equally to the exceptions in Regulations 150.4(b)(1)(i) and (ii) to the extent that a person qualifies for the exemption and is not otherwise excluded by the exceptions or the substantially identical trading requirement.

⁶ This summary section is based on DMO’s understanding of the Request for Interpretation. DMO notes that any different, changed, or omitted material facts or circumstances may require a different conclusion or render this letter void.

futures, options on futures, and swaps (“commodity interests”), some of which are subject to CFTC and/or CFTC-regulated market position limits.⁷ Separately, Institutional Investor also invests in venture capital and private equity funds (“Funds”) that acquire interests in operating companies (“Portfolio Companies”), which may be engaged in commercial operations in the agriculture and energy spaces.

The Funds are structured as a form of pooled investment enterprise that, in most cases, reserve the right to trade commodity interests. As such, the Funds qualify as commodity pools, and their managers are commodity pool operators (“CPOs”).⁸ In connection with any commodity interest trading by the pools, a Fund manager generally confirms its intent to either rely on the exemption from registration as a CPO, pursuant to CFTC Regulation 4.13, or register as a CPO before the Fund commences commodity interest trading.

Generally, Institutional Investor is a passive investor in such Funds and often represents a substantial portion of the capital commitment to a Fund – close to or sometimes exceeding 25 percent.⁹ As a result, Institutional Investor often faces circumstances in which it could or will acquire a 10 percent or greater indirect ownership interest in an underlying Portfolio Company through its investment in a Fund. Institutional Investor does not, however, control the Fund’s operations or its investment decisions. Institutional Investor also does not know, or want to know, if a prospective Portfolio Company (in which a Fund may invest) plans to trade commodity interests.

The Request for Interpretation asks for confirmation that, when Institutional Investor qualifies for the Regulation 150.4(b)(1) aggregation exemption with respect to a Fund, Institutional Investor does not have to look through its investment in the Fund to aggregate commodity interest positions held by an underlying Portfolio Company solely by virtue of the Institutional Investor acquiring a 10 percent or greater indirect interest in the Portfolio Company by way of the Fund.”¹⁰

⁷ You note in the Request for Interpretation that your reference to “CFTC-regulated market” covers Commission designated contract markets and (although not currently applicable to Institutional Investor) swap execution facilities.

⁸ See Commodity Exchange Act (“CEA”) Section 1a(11), 7 U.S.C. 1a(11).

⁹ DMO clarifies that, pursuant to Regulation 150.4(b)(1)(iii), the exemption and staff’s interpretation herein would not apply to the extent that Institutional Investor has a 25 percent or greater ownership or equity interest in a commodity pool, the operator of which is exempt from registration as a CPO. In addition, the Request for Interpretation notes that “[t]he overall structure for a particular investment can be more complicated. For tax or other reasons, Institutional Investor may, in addition to its investment in a primary Fund, also invest in related alternative funds or parallel funds. [The Request for Interpretation uses] the term Fund to refer also to such alternative funds and parallel funds.” DMO also clarifies that the exemption and staff’s interpretation herein would not apply with respect to such alternative or parallel funds to the extent that Institutional Investor takes an ownership or equity interest in such funds to circumvent position limits.

¹⁰ The Request for Interpretation acknowledges that “other factors could be present that may separately require a pool investor to aggregate positions held by the portfolio company, for example, if the investor has another relationship with the portfolio company under which it controls the portfolio company’s trading or if it and the portfolio company are trading in concert pursuant to an express or implied agreement. We further understand that if

III. Staff Interpretation

The Division agrees that, under the circumstances described in the Request for Interpretation, when Institutional Investor qualifies for the Regulation 150.4(b)(1) aggregation exemption with respect to a Fund, and is not excluded from relying on the exemption pursuant to the Regulation 150.4(b)(1)(iii) exception (or pursuant to any of the other exceptions), Regulation 150.4(b)(1) does not require Institutional Investor to look through its investment in a Fund to aggregate commodity interest positions of an underlying Portfolio Company in which Institutional Investor has a 10 percent or greater indirect interest (via the Fund).¹¹ In this scenario, Institutional Investor's Regulation 150.4(b)(1) aggregation exemption, with respect to its investment in a Fund, would extend to Institutional Investor's 10 percent or greater indirect interest (via the Fund) in Operating Companies for which Institutional Investor does not control trading.

The Division notes that, as stated in the Final Rule, "[t]he overall purpose of the position limits regime would be better served by focusing the aggregation requirement on situations where the owner is, in view of the circumstances, actually able to control the trading of the owned entity."¹² In that light, the Division believes that the Regulation 150.4(b)(1) aggregation exemption is intended to apply to a passive investor, who has no ability to control the trading decisions of a commodity pool in which it invests.

Finally, the Division clarifies that, as noted in the Request for Interpretation and this letter, this interpretation would not apply to other circumstances where a passive investor has another relationship with a portfolio company in which, for example, the investor controls or directs trading directly or indirectly, or trades in concert with the portfolio company pursuant to an express or implied agreement. This interpretation also would not apply to circumstances in which a passive investor invests in alternative or parallel funds with the intention to circumvent position limits.

IV. Conclusion

This interpretation represents the position of the Division and does not necessarily represent the views of the Commission or those of any other division or office of the Commission. Any different, changed, or omitted material facts or circumstances may require a different conclusion or render this letter void. Finally, as with all interpretative letters, the Division retains the

an investor controls a portfolio company's trading through its investment in the Fund, the investor is likely not a passive Fund investor and thus could not rely upon the exemption under Regulation 150.4(b)(1)(iii). The interpretation we request would be inapplicable under that scenario."

¹¹ DMO notes that, although the Request for Interpretation focuses on the exception in Regulation 150.4(b)(1)(iii), staff's interpretation provided herein would apply equally to the exceptions in Regulations 150.4(b)(1)(i) and (ii) to the extent that an investor qualifies for the exemption and is not otherwise excluded by the exceptions or the substantially identical trading requirement.

¹² 81 FR 91454, 91457 (Dec. 16, 2016).

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authority to condition further, modify, suspend, terminate, or otherwise restrict the interpretation provided herein, in its discretion.

Should you have questions regarding this matter, please contact Jeanette Curtis, Special Counsel, Division of Market Oversight at (202) 418-5669 or jcurtis@cftc.gov, or Aaron Brodsky, Special Counsel, Division of Market Oversight at (202) 418-5349 or abrodsky@cftc.gov.

Sincerely,
Amir Zaidi
Director
Division of Market Oversight