



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Gary Barnett
Director

CFTC Letter No. 14-112
No-Action
September 8, 2014
Division of Swap Dealer and Intermediary Oversight

Re: Request to Consolidate Annual Report Financial Statements and Form CPO-PQR data between Certain Commodity Pools and their Wholly-Owned Subsidiaries

Ladies and Gentlemen:

This is in response to numerous inquiries and several formal requests received by the Division of Swap Dealer and Intermediary Oversight (the “Division”) of the U.S. Commodity Futures Trading Commission (the “Commission” or “CFTC”) regarding relief from certain reporting obligations pursuant to Commission regulations 4.7(b), 4.22(c), and/or 4.27(c).¹ Specifically, the Division has received inquiries and formal requests to permit a commodity pool operator (a “CPO”) of a parent commodity pool (a “Parent Pool”) that is not registered as an investment company under the Investment Company Act of 1940 (the “ICA”) that uses a wholly-owned subsidiary² to trade in commodity interests (a “Trading Subsidiary”) to file with the National Futures Association (“NFA”): (1) an annual report for the Parent Pool that contains consolidated financial statements for the Parent Pool and its Trading Subsidiary in lieu of a separate annual report for the Trading Subsidiary pursuant to Commission regulation 4.7(b)(3) or 4.22(c), as applicable; and (2) a Form CPO-PQR for the Parent Pool that contains consolidated Form CPO-PQR data for the Parent Pool and its Trading Subsidiary in lieu of a separate Form CPO-PQR for the Trading Subsidiary pursuant to Commission regulation 4.27(c).

Regulatory Background

The Commodity Exchange Act (the “Act”)³ defines “commodity pool” as follows:

The term “commodity pool” means any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including any—

- (i) commodity for future delivery, security futures product, or swap;

¹ To date, the Division has received formal relief requests from Mariner Investment Group, LLC, Higher Moment Capital LLC, Whiteside Energy LP, Dearborn Capital Management, LLC, and Convexity Capital Management LP.

² For purposes of this letter, a Trading Subsidiary must be 100% owned by the Parent Pool.

³ 7 U.S.C. § 1 *et seq.*

(ii) agreement, contract, or transaction described in section 2(c)(2)(C)(i) of this title or section 2(c)(2)(D)(i) of this title;

(iii) commodity option authorized under section 6c of this title; or

(iv) leverage transaction authorized under section 23 of this title.⁴

A definition of a “pool” is also provided in Commission regulation 4.10(d), which is substantively identical to the statutory definition of a commodity pool.⁵

Thus, a Trading Subsidiary that is used for the purpose of trading in commodity interests is considered to be a separate “commodity pool” or a “pool” apart from the Parent Pool.⁶

A definition of a CPO is provided in section 1a(11) of the Act, which states, in part:

The term “commodity pool operator” means any person—

(i) engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including any—

(I) commodity for future delivery, security futures product, or swap;

(II) agreement, contract, or transaction described in section 2(c)(2)(C)(i) of this title or section 2(c)(2)(D)(i) of this title;

(III) commodity option authorized under section 6c of this title; or

(IV) leverage transaction authorized under section 23 of this title; or

(ii) who is registered with the Commission as a commodity pool operator.⁷

A CPO is also defined in Commission regulation 1.3(cc), which is substantively identical to the statutory definition of a CPO.⁸

⁴ 7 U.S.C. § 1a(10).

⁵ See 17 CFR § 4.10(d).

⁶ See 77 FR 11260 (although the discussion is with respect to investment companies registered as such under the ICA and their controlled foreign corporations that are utilized to trade in commodity interests, the same analysis is applicable with respect to Parent Pools and their Trading Subsidiaries as well).

⁷ 7 U.S.C. § 1a(11).

Thus, if a person is a CPO of a Parent Pool that has a Trading Subsidiary, a CPO is required to register with the Commission as the CPO of such Trading Subsidiary and is subject to compliance with Part 4 of Commission regulations with respect to such Trading Subsidiary, unless such Trading Subsidiary can satisfy the criteria for an exemption or exclusion for its CPO from registration. Moreover, the analysis of whether a CPO of a Trading Subsidiary is subject to registration and compliance with Part 4 of Commission regulations is independent of whether the activities of the Parent Pool trigger registration of such Parent Pool's CPO. Therefore, even if the CPO of the Parent Pool is exempt from registration with respect to its operation of the Parent Pool, it is possible for that CPO to be required to be registered and subject to Part 4 of Commission regulations with respect to its operation of the Trading Subsidiary.

Once registered, a CPO has various filing requirements with respect to a commodity pool that it operates pursuant to such registration, including a Trading Subsidiary. One such requirement is provided in Commission regulation 4.22(c), which requires that "...each commodity pool operator registered or required to be registered under the Act...must electronically submit a copy of the Report and key financial balances from the Report to the National Futures Association pursuant to the electronic filing procedures of the National Futures Association, within 90 calendar days after the end of the pool's fiscal year...."⁹

CPOs operating commodity pools pursuant to an exemption under Commission regulation 4.7, on the other hand, are exempt "from the specific requirements of §4.22(c)" with respect to such exempt commodity pools.¹⁰ However, they are still required to file a streamlined annual report for such exempt commodity pools pursuant to Commission regulation 4.7(b)(3), which requires the CPO to electronically file with NFA an annual report (that is described in further detail in Commission regulation 4.7(b)(3)) for the exempt pool in lieu of the financial information and statements specified by Commission regulation 4.22(c).¹¹

Consequently, the CPO of a Trading Subsidiary must file an annual report with NFA pursuant to Commission regulation 4.7(b)(3) or 4.22(c), as applicable, independent of any obligations a CPO may have with respect to the Parent Pool.

In addition to the annual report filing requirements, a CPO must also comply with Commission regulation 4.27(c), which requires, among other things, a CPO to file with NFA a report with respect to the directed assets of each pool under the advisement of the CPO consistent with Appendix A of Part 4 of the Regulations (*i.e.* Form CPO-PQR).¹² Consequently, a CPO of a Trading Subsidiary is required to file a Form CPO-PQR with NFA with respect to the Trading Subsidiary for each reporting period as defined in Commission regulation 4.27 and the

⁸ See 17 CFR § 1.3(cc).

⁹ 17 CFR § 4.22(c).

¹⁰ 17 CFR § 4.7(b)(3)(i).

¹¹ *Id.*

¹² 17 CFR § 4.27(c)(1).

instructions to Form CPO-PQR independent of any obligations a CPO may have with respect to the Parent Pool.

Relief Requested

The Division has received numerous inquiries and several formal requests concerning the consolidation of financial statements in the annual report and Form CPO-PQR data. Based on these inquiries and formal requests, the Division believes that there is widespread and common desire among industry participants to permit a CPO of a Parent Pool to file with NFA: (1) an annual report for the Parent Pool that contains consolidated financial statements for the Parent Pool and its Trading Subsidiary in lieu of a separate annual report for the Trading Subsidiary pursuant to Commission regulation 4.7(b) or 4.22(c), as applicable; and (2) a Form CPO-PQR for the Parent Pool that contains consolidated Form CPO-PQR data for the Parent Pool and its Trading Subsidiary in lieu of a separate Form CPO-PQR for the Trading Subsidiary pursuant to Commission regulation 4.27(c).

No-Action Relief Granted

Based on the correspondence with industry participants concerning these relief requests, and given that the Division has issued similar relief to CPOs of investment companies registered as such under the ICA that utilize controlled foreign corporations for trading in commodity interests in CFTC Staff Letter No. 13-51,¹³ the Division believes that granting relief is appropriate. In particular, the Division notes that, by providing the relief described below with respect to Commission regulations 4.7(b) and 4.22(c), the participants in the Parent Pool, who are the ultimate participants in the Parent Pool's Trading Subsidiary, and NFA will continue to receive accurate, fair, and timely information on the overall trading performance and financial condition of the Parent Pool and its Trading Subsidiary. Furthermore, the Division notes that, by providing the relief described below with respect to Commission regulations 4.27(c), the Commission will still be able to assess risk posed by investment vehicles, including the Parent Pool and its Trading Subsidiary, to derivative markets and the broader financial system.

Commission regulations 4.7(b) and 4.22(c)

Accordingly, the Division will not recommend that the Commission take an enforcement action against a CPO of a Parent Pool that uses a Trading Subsidiary for failure to file with NFA an annual report for such Trading Subsidiary pursuant to Commission regulation 4.7(b) or 4.22(c), as applicable; provided that:

- (i) the CPO of the Parent Pool is also the CPO of the Trading Subsidiary;
- (ii) the exposure to the Trading Subsidiary by the participants in the Parent Pool are shared pro rata; and

¹³ See ICI and SIFMA AMG, CFTC Staff Letter No. 13-51 (September 5, 2013).

(iii) the CPO prepares and files with NFA an annual report for the Parent Pool that contains consolidated audited financial statements for the Parent Pool that includes the holdings, gains and losses, and other financial statement amounts attributable to the Trading Subsidiary.¹⁴

This no-action relief is not self-executing. Rather, a CPO that is eligible for this relief must file a claim to perfect the use of this relief consistent with the procedures set forth below. A claim submitted by a CPO will be effective upon filing, so long as the claim is materially complete.

Commission regulation 4.27(c)

Also, accordingly, the Division will not recommend that the Commission take an enforcement action against a CPO of a Parent Pool that uses a Trading Subsidiary for failure to file a report with NFA for such Trading Subsidiary pursuant to Commission regulation 4.27(c) (*i.e.* Form CPO-PQR); provided that:

- (i) the CPO of the Parent Pool is also the CPO of the Trading Subsidiary;
- (ii) the exposure to the Trading Subsidiary by the participants in the Parent Pool are shared pro rata; and
- (iii) the CPO provides a consolidated report for the Parent Pool that includes the data for the Trading Subsidiary to NFA pursuant to Commission regulation 4.27(c).

This no-action relief is not self-executing. Rather, a CPO that is eligible for this relief must file a claim to perfect the use of this relief consistent with the procedures set forth below. A claim submitted by a CPO will be effective upon filing, so long as the claim is materially complete.

Procedures to Claim Relief

To obtain the no-action relief provided in this letter, the notice of claim must:

- (i) state the name, main business address, and main business telephone number of the CPO claiming the relief;

¹⁴ If the Parent Pool and its Trading Subsidiary are subject to different annual report requirements (*e.g.*, the annual report for Parent Pool is subject to Commission regulation 4.7(b)(3) while the annual report for the Trading Subsidiary is subject to Commission regulation 4.22(c)), then the consolidated annual report for the Parent Pool must be prepared in accordance with the more stringent annual report requirement (*e.g.*, in the example above, Commission regulation 4.22(c)).

(ii) state the capacity (*i.e.* CPO) and the name of each Trading Subsidiary for which the claim is being filed and the name of the Parent Pool matched with each Trading Subsidiary;

(iii) be signed by the CPO;¹⁵ and

(iv) be filed with the Division via email using the email address dsionoaction@cftc.gov with the subject line of such email "Trading Subsidiary Letter 14-112".

The relief provided in this letter will automatically expire upon future rulemaking or other Commission action relating to the subject matter of this relief.

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 persons relying on it from compliance with any other applicable requirements contained in the Act or in the 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, Attorney-Advisor, at 202-418-5202.

Very truly yours,

Gary Barnett
Director
Division of Swap Dealer and
Intermediary Oversight

cc: Regina Thoele, Compliance
National Futures Association, Chicago

¹⁵ This may be accomplished by attaching a portable document format (PDF) file with a signature of the CPO.