



## U.S. COMMODITY FUTURES TRADING COMMISSION

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

Division of Swap Dealer and  
Intermediary Oversight

Eileen T. Flaherty  
Director

CFTC Letter No. 17-43  
No-Action  
September 13, 2017  
Division of Swap Dealer and Intermediary Oversight

**RE: Request for No-Action Relief from CPO and CTA registration for “A” University with respect to its University Endowment Fund and Planned Giving Accounts**

Dear xx:

This is in response to your request dated September 5, 2017, to the Division of Swap Dealer and Intermediary Oversight (“DSIO” or “Division”) of the Commodity Futures Trading Commission (“CFTC” or “Commission”), as well as ongoing conversations, meetings, and supplemental responses with and to DSIO Staff (“Correspondence”). In the Correspondence, you request relief from commodity pool operator (“CPO”) and commodity trading advisor (“CTA”) regulation on behalf of “A” University (“A” or the “University”) with respect to (1) its collective management of an endowment fund that includes the funds of organizations affiliated with the University, and (2) the offering, solicitation, and operation of multiple planned giving arrangements for donors to “A” (“Planned Giving Accounts”).<sup>1</sup>

### **Background**

Based on the Correspondence, we understand the relevant facts to be as follows. “A” was founded in [xxxx], and is a specially chartered “X” state nonstock corporation that is recognized as a tax-exempt charitable organization under Section 501(c)(3) of the Internal Revenue Code (“IRC”) of 1986, as amended. The University “encompasses three major academic components, “A” College, “A”’s Graduate School of Arts and Sciences, and [xx] professional schools,” and includes “a wide array of research centers and programs, libraries, and museums,” with approximately xx students in attendance.

#### *The “A” Endowment*

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<sup>1</sup> You alternatively request interpretative relief that would determine “A” University not to be a commodity pool, as that term is defined in Section 1a(10) of the Commodity Exchange Act (“CEA” or “Act”). However, the Division need not address that request in light of the issuance of the instant no-action relief.

“A” University

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“A”’s endowment assets were valued at \$xxx billion as of June 30, 2016.<sup>2</sup> The endowment provided \$xxx billion (XX%) of the University’s operating revenues for the fiscal year ending June 30, 2016. In addition to receiving donations, the University historically has also permitted certain charitable organizations closely affiliated with “A” (“Affiliated Organizations”) to contribute assets to be invested and managed concurrently and collectively with the endowment.<sup>3</sup> In the Correspondence, you refer to “A”’s “Endowment Fund” or “Endowment Account,” but emphasize that it does not have an independent legal existence from the University and is not a separate investment vehicle. Rather, endowment assets and assets of the Affiliated Organizations are all assets held in the University’s name, are invested collectively as such, and are not legally segregated from any other physical or financial assets of the University, *e.g.*, its buildings, equipment, or museum collections. You explain that, historically, the variety of assets, regardless of source, has been held in the name of and/or transferred to “A” University; further, the University “never intended for Affiliated Organizations to have a different investment strategy, and the interests of the University and the Affiliated Organizations are completely aligned,” which, to the University, minimized the importance of asset segregation.

Management of Endowment Assets

“A”’s Endowment Account is managed by the “A” University Investments Office (“Investments Office”), led by “A”’s Chief Investment Officer, and is overseen by the University’s Investment Committee (“Investment Committee”). You state that, like many higher educational and other charitable institutions, the University uses “unitization,” an accounting method to manage investments more efficiently by commingling the assets from various sources, which, in turn, provides a measure of the *pro rata* share of any returns attributable to contributions from participating entities based on their proportional notional interest held in the Endowment Account.<sup>4</sup> You also note that the Investments Office directly manages only the portion of the Endowment Account comprised of fixed income portfolio assets, which is currently targeted to be XX% of the Endowment Account’s net asset value; the remaining XX% of Endowment Account assets are invested in third-party managed private funds and separate accounts.

The Investment Committee is formed pursuant to the University’s bylaws and includes at least XX members of the University’s governing Board of Trustees, the University President as

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<sup>2</sup> The endowment includes donations where the University is restricted in expending the principal of the donations, and “quasi-endowment” donations where the University is not restricted in expending the principal of the donations.

<sup>3</sup> You state in the Correspondence that the endowment assets are comprised of “over [XX] funds,” which you have clarified as, “charitable gifts that are made by various donors with the intent that such gifts not be wholly expendable on a current basis,” as well as quasi-endowment funds. Each gift may be given to the University as a whole, or to a particular cause, school, department, or academic program at the University, in the discretion of the donor. The Correspondence states that as of June 30, 2016, assets attributable to Affiliated Organizations managed by the University were valued at \$xx billion.

<sup>4</sup> You state additionally that while the concept of commingling and managing multiple endowment funds had been in practice at “A” since the 1940s, the single “unitized” Endowment Account was established in 19XX. You also note that as of June 30, 2016, when the Endowment Account was last audited, there were approximately xx million units in the unitized Endowment Account.

an *ex officio* member, and “A” alumni who have significant investment expertise. Except for the University senior staff, members of the Investment Committee serve on a voluntary basis without compensation in such capacity.<sup>5</sup> The Correspondence states that, “the Investment Committee meets quarterly, at which time members review asset allocation policies, investment performance, and strategies proposed by the Investments Office staff.”

### The Affiliated Organizations

In fiscal year 2016, the Endowment Account included, and “A” managed, \$xx billion in assets for XX Affiliated Organizations, which the Correspondence describes as “separately organized and governed tax-exempt charitable organizations [, many of whom] could have easily been a formal part of the University, but are legally separate for largely historic reasons.” Although the Correspondence describes the relationship between the University and each Affiliated Organization as “unique,” it represents that each relationship is generally defined by the following characteristics:

- The Affiliated Organization has a strong programmatic relationship to the University that brings enrichment to the University’s programs and student experience;
- The Affiliated Organization’s existence and mission are dependent on the University (*i.e.*, if there were no University, the Affiliated Organization would be defunct unless it completely overhauled its mission);
- The University has personnel dedicated to board, executive and/or administrative functions of the Affiliated Organization;
- The Affiliated Organization resides in or conducts its programs in a University facility (*i.e.*, is located on the University’s campus);
- The Affiliated Organization has a long historical relationship or affiliation with the University;
- The Affiliated Organization uses the “A” name or would be permitted to do so to explain its identity;
- The Affiliated Organization is incorporated into the University’s cash management system (*e.g.*, through agency accounts in which the University acts as a custodian or agent for the Affiliated Organization’s operating funds);
- The Affiliated Organization could have been operated within the University rather than as a separate entity, but is organized as a separate entity for historical reasons;
- The Affiliated Organization provides unique benefits or services to members of the University community; and
- The Affiliated Organization is supported by contributions from University alumni or other persons who have an association with the University.<sup>6</sup>

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<sup>5</sup> The Correspondence notes that the Investment Committee therefore has a role similar to that of the “Z” Fund Directors, who the Division granted no-action relief from CPO registration in CFTC Staff Letter 17-19, and “who serve in a volunteer capacity due to their affiliation, loyalty and dedication to the University.” (citing CFTC Staff Letter 17-19 (Apr. 4, 2017)).

<sup>6</sup> See Appendix A of the Correspondence for a list of current participating Affiliated Organizations. Currently, seven Affiliate Organizations are “supporting organizations” pursuant to IRC Section 509(a)(3).

The Correspondence states that, “[c]onsequently, there is no prospect of the Endowment [Account] containing assets attributable to any entity other than entities very closely linked to the University whose interests closely align with those of the University.”

The Correspondence also states that the first investment management relationship between the University and an Affiliated Organization began in 19xx, and to the University’s knowledge, all of the Affiliated Organizations approached the University first to request assistance in managing their assets. You represent that, in no case did an Affiliated Organization approach the University to invest alongside the Endowment as a result of advertisement or formal solicitation, and that requests to participate in the Endowment Account have been formally approved in each instance by the University’s Officers and/or Board of Trustees. Additionally, you represent that the University does not currently engage in any advertising or solicitation of Affiliated Organizations to facilitate or encourage their investment with the University, and that the Endowment Account is not made available or otherwise solicited to the general public.

While the Correspondence states that “a strong affiliation with [“A”] has historically been a key criterion for admission” to the Endowment Account, in late 2015, the University reinforced this standard by formalizing the process for approving Affiliated Organizations wishing to collectively invest their assets in the Endowment Account. This process requires that the University’s Officers and Board of Trustees find that the purpose of an organization that seeks to contribute assets to the University for investment must be “primarily, if not wholly limited to, serving the University, and ... the University must have a compelling interest in admitting the organization.”

Once approved for investment in the Endowment Account, an Affiliated Organization’s governing body is then required “to make an independent determination to appoint the University to manage the Affiliated Organization’s assets” before entering into any agreement with the University. Finally, the Affiliated Organization and the University enter into an investment management agreement (“Investment Agreement”), which generally provides for investment by the University, as part of the Endowment Account, of assets committed to the University by the Affiliated Organization and outlines generally the types of investments to be made and provides the University with broad authority to manage the Affiliated Organization’s contributed assets. Recent iterations of the Investment Agreement inform a potential Affiliated Organization participant that the University is not registered, does not intend to register as an investment adviser with the Securities and Exchange Commission (“SEC”), or as a CPO or CTA.<sup>7</sup>

According to the Correspondence, the standard form Investment Agreement “states clearly that, once funds have been transferred to the University, the Affiliated Organization has

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<sup>7</sup> “A” is exempt from registration as an investment company and as an investment adviser, with respect to its activities managing the Endowment Account and Planned Giving Accounts, based on its reliance on exemptions in Section 3(c)(10)(B) of the Investment Company Act and Section 203(b)(4) of the Investment Advisers Act, respectively; such exemptions were added by the Philanthropy Protection Act of 1995.

no ownership of any type in the assets in which the University invests and that the [notional] units [of the Endowment Account] held by the Affiliated Organization represent only a claim against the University to account to the Affiliated Organization for the value of the investments, and a right to payments in accordance with the Investment Agreement.” Each Affiliated Organization will receive either an annual or quarterly distribution of spendable income in respect of its units, which will be based on the same spending rate applicable to the University’s internal departments and programs.

You represent that the University charges no management fees or incentive fees for investing assets attributable to the Affiliated Organizations. The value of each notional unit in the Endowment Account reflects the performance of the assets held therein, net of investment costs, meaning that all Unitholders in the Endowment Account bear those costs *pro rata*, whether they are Affiliated Organizations, the University itself, or its departments or programs. Additionally, the University allocates general and administrative overhead costs incurred each year to the Unitholders through an “Administrative Charge,” which varies slightly depending on whether the Unitholder is a formal part of the University or an Affiliated Organization,<sup>8</sup> and which is designed to cover “allocable portions of direct and indirect costs relating to the University’s business and finance offices and support functions (*e.g.*, budgeting, business software, funds management), without which the University offices responsible for managing and accounting for the Endowment Account could not function.”

An Affiliated Organization is permitted to redeem or purchase additional units in the Endowment Account, pursuant to the applicable Investment Agreement, typically on a monthly basis. The University then generally assigns a number of Endowment Account notional units to the Affiliated Organization based on the value of the contributed assets on the date of transfer, and the value of the notional units as of the month-end (or year-end, as applicable) in which the transfer occurs.<sup>9</sup> Lastly, the Investment Agreements typically permit either party to terminate the agreement, without cause, as of the end of any month upon 30 days’ prior written notice.

In accordance with the standard form Investment Agreement, an Affiliated Organization receives quarterly reports showing the performance of its notional units (similar to a quarterly account statement), and an annual statement detailing the estimated annual spending distribution. The Correspondence describes the quarterly report as including, “the market value and historical value (*i.e.*, the value of the contributed assets when posted to the University’s books) of the units, the Affiliated Organizations remaining unexpended spendable income, and all changes in the balance of the units between the beginning and end of a fiscal quarter.” You emphasize that underlying investments are not the focus of any of these reports (rather, the change in value of the notional units is the primary focus), and describe the “nature and level of disclosure” as “consistent with the University’s underlying ownership of the assets.”

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<sup>8</sup> Most Affiliated Organizations pay a flat XX% of the spending distribution, while the internal departments and programs pay approximately XX-XX% of their spending distribution.

<sup>9</sup> You represent that, as of June 30, 2016, the Endowment Account was comprised of approximately xx million notional units.

Additionally, each Affiliated Organization also receives from the University’s Chief Investment Officer an annual letter discussing the investment performance of the Endowment Account, and has the opportunity to meet with senior staff of the Investments Office. Finally, the University publishes annually on its website the University’s audited financial statements, which are presented in accordance with U.S. generally accepted account principles, and a report that review the Endowment’s investment policy, spending policy, and investment performance for the most recently completed fiscal year.<sup>10</sup> The publicly available audited financial statements provide additional information on the University’s underlying investments, including specific information regarding the University’s exposure to commodity interests.

#### Investment Strategy of the Endowment Account

The Correspondence describes the investment strategy of the Endowment Account as “focused on investments in a diversified portfolio of XX.” You state that the University’s direct exposure to commodity interests with respect to the Endowment Account is generally for hedging purposes, or is otherwise incidental to the principal focus of the Endowment Account’s investment activity and objectives.<sup>11</sup> You also state that the University enters into these commodity interest transactions, as “A” University, because the Endowment Account has no legal capacity to enter into contracts, and recourse under these transactions is not limited to the assets of the Endowment Account. The Endowment Account additionally has indirect exposure to commodity interests through its investments in third-party managed, commingled funds and separate accounts that may transact in swaps or other commodity interests, in the discretion of those third-party investment managers. Based on the presence of commingled assets from numerous participants and the potential for both direct and indirect commodity interest exposure, the Endowment Account could be considered a commodity pool that is being operated and managed by “A” University (in particular, the Investments Office), the potential CPO.

#### *The Planned Giving Accounts*

In addition to the Endowment Account, and similar to many universities, colleges, and other educational institutions, the University regularly solicits planned giving donations from alumni and other donors. In “A”’s structure, planned giving donors have two options to choose from: 1) the pooled income fund (“PIF”), or 2) the charitable remainder trust (“CRT”).

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<sup>10</sup> The Correspondence notes that, although the report reviews the performance corresponding to the endowment itself, “the description of the [e]ndowment’s investment policy, spending policy and investment performance is equally applicable to the assets of the Endowment [Account] attributable to the Affiliated Organizations,” since they are invested collectively.

<sup>11</sup> Currently, the only direct commodity interest exposure in the Endowment Account consists of broad-based equity index swaps and foreign exchange currency swaps; but, in the past, the University has maintained other derivative positions for hedging purposes, *e.g.*, energy swaps. Additionally, you state that the direct commodity interest trading in the Endowment Account would meet the *de minimis* thresholds currently in place in Commission Regulation 4.13(a)(3). *See also* 17 CFR 4.13(a)(3). The University also enters into swap transactions for non-endowment purposes, which are primarily to manage interest rate exposure with its outstanding bonds and to hedge energy costs. The gains and losses of all such non-endowment swap transactions are excluded for purposes of determining the performance and the value of the Endowment Account units.

Under the PIF program, an individual donor makes a gift of cash or marketable securities to the University to the donor’s choice of one of three master trusts, each with a specific investment objective. Similar to the Endowment Account, the donor’s gift is assigned a specified number of units in the chosen master trust, equal to the fair market value of the gift divided by the value of a unit in that trust as of the date of the gift. On a quarterly basis, the PIF program pays a *pro rata* share of the PIF’s estimated net income to the person(s) designated by the donor in the gift instrument (“PIF Beneficiary”) for the life of such PIF Beneficiary.<sup>12</sup> Upon the death of the last designated PIF Beneficiary, the University severs the donor’s original contribution from the PIF master trust and then uses the assets for the University’s activities in accordance with instructions specified by the donor in the original gift instrument.<sup>13</sup> As of June 30, 2016, there were xx PIF Beneficiaries in the University’s XX PIF master trusts, which had an aggregate value of \$xx million.

The Correspondence defines a CRT as an irrevocable, unamendable trust that is funded by a donor and administered and invested by a separate trustee. The CRT pays income to beneficiaries of the donor’s choosing for life or for a term of years (not to exceed 20), and upon the death of the last CRT beneficiary, the CRT terminates and the principal is paid to the charitable organization designated by the donor. There are two basic types of CRTs: an annuity trust, which pays a fixed sum annually, or a unitrust, which pays an annual income equal to a percentage of the market value of the CRT determined each year.<sup>14</sup> As of June 30, 2016, the University acted as trustee to XX CRTs with an aggregate value of \$xx million.<sup>15</sup>

The University acts as sole trustee for each PIF and CRT and currently engages (“Bank”) as administrator and custodian of each. All assets of the PIFs and CRTs are titled and invested in the name of “A” University, as trustee of these trusts. Although the University does not charge any fees for its services as manager and trustee of the PIFs and CRTs, it does get reimbursed for the University’s costs of administering them. Each PIF and CRT bears the investment management fees from their underlying investments, as well as Bank’s administration and custody fees. PIF and CRT Beneficiaries also receive periodic account statements from the University – PIF Beneficiaries receive calendar year-end statements, showing the value of their PIF units and the investment performance of the PIF, and CRT beneficiaries receive quarterly account statements as well as annual summaries of investment results and trust valuations.

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<sup>12</sup> An incentive for this type of donation is the federal charitable income tax deduction available to the donor, which is based on the fair market value of the donated assets minus the present value of the life-income interest retained by the donor/PIF Beneficiary.

<sup>13</sup> Such instructions could, for instance, include limitations on which schools, academic programs, or supporting organizations the donated assets are used to support.

<sup>14</sup> You represent that, as of June 30, 2016, all but XX of the University’s CRTs are unitrusts.

<sup>15</sup> You also state that the University generally serves as the trustee of a CRT only if all of the following conditions are met: 1) the initial principal value of the CRT is at least \$100,000; 2) the University is irrevocably entitled to receive at least 50% of the total charitable remainder upon termination of the trust; and 3) the present value of the University’s remainder interest is equal to the greater of \$50,000 or 25% of the trust’s initial value. Like the PIF, there are tax incentives to encourage donors to use CRTs – in return, the donor is eligible for a federal income tax charitable deduction equal to the calculated present value of the amount the charitable organization may expect to receive upon termination of the trust.

The PIFs and CRTs are invested in XX commingled Planned Giving Accounts that are distinguished by their investment objectives.<sup>16</sup> The Correspondence states that none of the XXPlanned Giving Accounts invests directly in commodity interests. The Planned Giving Accounts could potentially have indirect exposure to commodity interests to the extent that commodity interests may be held by underlying mutual funds and ETFs in which the Planned Giving Accounts invest.<sup>17</sup>

### *Applicable State Law and Oversight*

The Correspondence also explains that the University is subject to both the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”) and the Uniform Prudent Investor Act (“UPIA”), which the state legislature has adopted in “X” state, and both of which would be enforced on behalf of the public interest by the Attorney General of “X”. You describe the UPMIFA as a uniform state law that governs the investment of institutional funds (which includes endowment funds ...) by charitable organizations, and the UPIA as another uniform state law that regulates the investment responsibilities of trustees of charitable trusts, among other trusts. You state that these statutes address the fiduciary and prudential standards applicable to the management of the relevant assets, and provide meaningful protections to those committing funds for investment by charitable institutions. Specifically, you state that the UPMIFA dictates the type of costs that can be incurred, imposes due diligence requirements, lists specific economic factors that must be considered in the management of institutional assets, and imposes a duty to invest institutional assets in good faith and subject to an ordinarily prudent person legal standard, unless special skills or expertise are considered or present that would require applying a higher standard of conduct. You state that the UPIA imposes a “prudent expert standard” when managing assets in the form of a trust, requiring the trustee to invest and manage the trust assets solely in the interest of the beneficiaries and act impartially in investing and managing trust assets, taking into account any differing interests of the beneficiaries.

Like the UPMIFA, the UPIA also dictates the types of costs that may be incurred, imposes due diligence requirements, and presents specific economic factors that must be considered in the management of trust assets. According to these explanations in the Correspondence, the Division understands that the UPMIFA would govern the Endowment Account, while the UPIA would apply to the PIF and CRT structures offered by the University.

### **Need for Relief and Legal Analysis**

“A” University could be required to register as a CPO or a CTA, with respect to its operational, solicitation, and collective investment management activities related to the Endowment Account and the Planned Giving Accounts, in which “A” has commingled assets of multiple sources, with direct and/or indirect exposures to commodity interests. Absent the relief provided herein, the Endowment Account and Planned Giving Accounts could also be subject to

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<sup>16</sup> “A” also allocates the PIF and CRT assets among the Planned Giving Accounts according to XX standard allocation strategies offered to PIF and CRT donors.

<sup>17</sup> You emphasize that given the nature and orientation of these underlying funds as “primarily securities funds,” any such indirect exposure to commodity interests is “likely limited and incidental to their investment objectives.”

certain of the Commission’s regulations, *i.e.*, Part 4, which govern CPOs, CTAs, and the operational compliance required of commodity pools and managed accounts. Based on the description of the Endowment Account and Planned Giving Accounts in the Correspondence, the Division believes that, in addition to relief from CPO and CTA registration, relief from the requirements of Regulation 4.20 would also be required to permit the acceptance and holding of third-party assets in “A”’s own name, as well as the commingling of those assets, currently characteristic of both structures.<sup>18</sup>

The Division believes that granting “A” University no-action relief from CPO and CTA registration and the requirements of Regulation 4.20 is appropriate based on the facts presented by this request and subject to the specific conditions of relief outlined below. The Division finds that, with respect to the Endowment Account, multiple factors are in favor of granting such no-action relief. Much like CFTC Staff Letter 17-19, the interests of the University and the Affiliated Organizations are very closely aligned, and, in particular, further the mission of the University as a whole.<sup>19</sup>

You also state that the Affiliated Organizations are largely defined by their relationship to the University, and the Division agrees that it is that relationship that both permits and causes the Affiliated Organizations to commit assets to the University’s Endowment Account. Additionally, you represent that the University does not engage in the solicitation of Affiliated Organizations for investments, and the sole clients of the Investments Office continue to be the University itself through the Endowment Account (as well as the Planned Giving Accounts). These facts, among others as represented, distinguish the management of the Endowment Account from the typical arms-length, business relationship that CPOs and commodity pools generally have with their participants, and which CPO registration and the corresponding compliance regime are designed to address.

While the Division will permit Affiliated Organizations that have historically and are currently invested in the Endowment Account to continue to do so, any future Affiliated Organization participants should be appropriately limited in scope to ensure the existence of aligned interests and a close relationship between such participants and the University. Therefore, as a condition of relief, the Division has proposed, and you have agreed, that future Affiliated Organizations will be limited to two groups: (1) tax-exempt entities who are supporting organizations of “A” University, pursuant to IRC Section 509(a)(3),<sup>20</sup> or (2) tax-

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<sup>18</sup>Commission Regulation 4.20 provides, in pertinent part, that a CPO: (1) Must operate a pool as an entity cognizable as a legal entity separate from that of the CPO; (2) Receive funds from existing and prospective pool participants in the name of the pool; and (3) Must hold property of a pool separate from property of any other person.

<sup>19</sup> CFTC Staff Letter 17-19 (Apr. 4, 2017).

<sup>20</sup> The Manual for the Internal Revenue Service explains that, “IRC 509(a) thus divides organizations described in [and therefore, tax-exempt under] IRC section 501(c)(3) into two classes: A. private foundations, and B. organizations other than private foundations (sometimes called ‘public charities’ by way of distinction...).” IRS Manual Section 1.72.1.1, “Introduction to Private Foundations,” available at [http://www.irs.gov/irm/part7/irm\\_07-026-001.html](http://www.irs.gov/irm/part7/irm_07-026-001.html) (internal citations omitted).

exempt entities meeting an alternative four-factor test outlined below, also designed to limit permitted Endowment Account participants to those entities intimately linked to, if not indistinguishable from, “A” University.

The Division believes that limiting Affiliated Organizations in this manner is appropriate because it ensures that such organizations participating in the Endowment Account have significant ties to “A”, and thus, possess interests and goals aligned with the University and its community as a whole. With appropriate conditions in place, the Division believes granting the no-action relief herein to “A” University for its operation of the Endowment Account benefits the University, the Affiliated Organizations, and the “A” community as a whole, by permitting the ongoing management of Endowment Account assets with limited regulatory or public interest risk.

With respect to the Planned Giving Accounts, the Division believes that, the resulting tax benefits and income streams notwithstanding, the principal purpose of committing assets to the University through a PIF or CRT continues to be making a charitable donation in support of the University. This conclusion is supported by the outright donation by an individual of the principal amount of the contribution to the University and, consistent with “A”’s policy discussed above, other designated IRC Section 501(c)(3) charitable organizations with no expectation whatsoever of receiving those assets back. Further, any ancillary benefits, whether through tax deductions or income streams resulting from such a donation, have been legislated by Congress or otherwise adopted by the IRS to encourage individuals to support charitable causes, *e.g.*, higher education, and thus, should not be deemed to “convert” such a donation into an investment.

Additionally, similar to the Endowment Account, the University has an ongoing interest, aligned with the donor, in prudently managing the Planned Giving Account assets to maximize the principal asset donations reverting to “A” at the termination of each PIF Beneficiary’s interest and CRT. As stated above, such aligned interests distinguish this transactional structure from that of typical CPO-CTA arrangements. Therefore, although the University solicits from the public and provides investment choices, the Division concludes that with this conduct, “A” is soliciting donations to financially support its educational and academic goals and mission, rather

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In particular, IRC Section 509(a)(3) deems an entity, organized and operated in the following manner, a “supporting organization” of a 501(c)(3) tax-exempt charitable organization that would also be considered a public charity:

- (A) Is organized, and at all times thereafter, is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more specified organizations in paragraph (1) or (2),
- (B) Is –
  - (i) operated, supervised, or controlled by one or more organizations described in paragraph (1) or (2),
  - (ii) supervised or controlled in connection with one or more such organizations, or
  - (iii) operated in connection with one or more such organizations, and
- (C) Is not controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers and other than one or more organizations in paragraph (1) or (2).

than to provide any investment management or advisory services to its planned giving donors. Consequently, the Division believes that granting no-action relief for “A” from CPO and CTA registration with respect to the Planned Giving Accounts is also appropriate.

Importantly, in CFTC Staff Letter 17-19, no-action relief was granted, in part based on the existence of appropriate regulatory and compliance obligations applicable to the recipient of relief, a state university system. You state that the Endowment Account and the Planned Giving Accounts are subject to relevant state statutes, the UPMIFA and UPIA, which are specifically designed to govern institutional investment structures, including both endowment assets and donations managed through charitable trusts and similar structures. Given that these structures are distinguishable from commodity pools and/or accounts managed by CPOs and CTAs, the Division agrees that the application of the UPMIFA’s and UPIA’s regulatory structure and compliance obligations, rather than the CEA or Commission regulations, to the Endowment Account and Planned Giving Accounts is sufficient given the facts presented.

Based on the foregoing, the Division has determined that it will not recommend to the Commission that it take an enforcement action against “A” University, its Board of Trustees, its Investments Office, its Investments Committee, or any individuals employed by or members of the foregoing, for failure to register as a CPO or CTA, or to comply with Commission Regulation 4.20, with respect to the collective management of endowment and Affiliated Organization assets in the Endowment Account, and the offering, solicitation, and operation of the Planned Giving Accounts, *provided* that “A” meets the following conditions of relief:

- Grandfathered Endowment Account Participants: Pursuant to this letter, and subject to the remaining conditions of this relief, the Division will not recommend an enforcement action if current Affiliated Organizations continue their participation in the Endowment Account, with respect to their existing and any future investments they may make in the Endowment Account.
- Standard for any New Affiliated Organization Participant in the Endowment Account: Any new Affiliated Organization participant in the Endowment Account is required to be
  - (i) a tax-exempt entity that is a supporting organization of “A” University, pursuant to IRC Section 509(a)(3); or
  - (ii) a separate legal entity that
    - is itself tax-exempt under IRC Section 501(c)(3).
    - has an integral relationship with “A” University to the extent that it is generally regarded by “A” as part of the university community or as closely aligned with “A”;
    - provides services to and/or receives services from “A” or other organizations, groups, or individuals within the “A” community; and
    - could not feasibly operate in the absence of its affiliation with “A” without a fundamental change to its operations or purpose.
- Third-Party Investment Managers and Advisors: To the extent that the University invests Endowment Account assets in pooled investment vehicles that are commodity pools or

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receives commodity trading advice in the management of the Endowment Account or Planned Giving Accounts, such collective investment services and advice must only be provided by persons or entities registered with the Commission as CPOs or CTAs, exempt from such registrations, or excluded from the CPO or CTA definitions.<sup>21</sup>

The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the Commodity Exchange 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. The Division retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the relief provided herein in its discretion. Finally, this letter and the position taken herein represent the views of this Division only, and do not necessarily represent the views of the Commission or any other office or division of the Commission.

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,

Eileen T. Flaherty  
Director  
Division of Swap Dealer and  
Intermediary Oversight

cc: Regina Thoele, Compliance  
National Futures Association

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<sup>21</sup> This condition is consistent with that imposed on similar relief granted by the Division’s predecessor to an organization exclusively managing university and college endowment assets, and on no-action relief recently granted by this Division to a university system with respect to its endowment and other university assets. See CFTC Staff Letter 85-22, p. 7, and CFTC Staff Letter 17-19, p. 12.

“A” University

**RE: Request for No-Action Relief for “A” University**

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**Appendix A: Grandfathered Affiliated Organizations**

**\*\*\*REDACTED\*\*\***