



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Matthew B. Kulkin
Director

May 23, 2019

Re: Request for No-Action Relief from the Requirement to Register as a Commodity Pool Operator under Section 4m(1) of the Commodity Exchange Act

Dear :

This is in response to your letter dated October 5, 2018 to the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”). In the letter, you request on behalf of “A” that the Division not recommend to the Commission an enforcement action against “A” for failing to register as a commodity pool operator (“CPO”) pursuant to section 4m(1) of the Commodity Exchange Act (“Act”)¹ in connection with its role as the general partner of “B”.

Background

Based on the representations made in your letter and other correspondence (“Correspondence”), we understand the structure involving “B” to be as follows. “B” is a part of a fund complex (“Fund Complex”)² that consists of seven private investment funds (“Funds,” each, a “Fund”)³ that generally invest in parallel.⁴ The primary rationale for creating parallel funds was to accommodate investors that had different tax, regulatory, or other sensitivities.⁵

¹ 7 U.S.C. 6m(1). The Act is found at 7 U.S.C. 1 *et seq.* (2016). It, and the Commission’s regulations, may be accessed through the Commission’s website, <http://www.cftc.gov>.

² For purposes of this letter, the Fund Complex consists of the Funds (defined below), “K” (defined below), the Investment Manager (defined below), “B”, and “A”.

³ The Funds are: (1) “C”; (2) “D”; (3) “E”; (4) “F”; (5) “G”; (6) “H”; and (7) “I”

⁴ The Funds are generally required by their organizational and offering documents to invest in parallel and will pursue the same investment strategy and generally invest side-by-side in the same positions as each other.

⁵ Some of the other sensitivities include investment restrictions and certain investors’ desire to not invest in commingled funds.

The investment manager of each Fund is “J” (“Investment Manager”).⁶ The general partner and operator of each Fund is “K”. “K” is exempt from registration as a CPO with respect to the Funds pursuant to Commission regulation 4.13(a)(3), because, among other things, each Fund engages in trading in only a limited amount of commodity interests.⁷

“A”, “K”, and the Investment Manager (together, “L”) are under common control and part of “M”, which is a global private investment firm.⁸ “B”, “K”, and the Investment Manager also have identical officers. You state that “M” routinely establishes discrete general partner entities that individually serve specific and very narrow functions, such as it did for this Fund Complex, in order to limit liability across “M”.

“B” is a special purpose entity that was primarily created for administrative efficiency and to segregate the Funds’ exposure to its commodity interest investment. “B” is operated by “A”, which is its general partner, and it has no direct investors other than the Funds, each of which invests less than 3% of its committed capital into “B”. “B” invests substantially all of its assets in “N” and does not engage in any material activities or operations other than holding and managing its investment in “N”. “N” is a fund that pursues a commercial real estate loan strategy and is a commodity pool, which, in turn, makes “B” a commodity pool in this situation. “N” is operated pursuant to Commission regulation 4.7 by “O” which is a registered CPO. “O” is not affiliated with “A”, “K”, or the Investment Manager.

“B” also has a revenue sharing arrangement with “P”, which is the corporate parent of “O”. “P” receives certain revenues generated by “O” and its affiliates. “B”, in turn, receives a portion of such revenues.⁹

Requested Relief and Legal Analysis

Based on the structure described above, “A” is required to register as a CPO under the Act and Commission regulations with respect to “B”, because “B” is a commodity pool that does not otherwise meet the terms of any available exemption or exclusion. In the Correspondence, you request that the Division not recommend to the Commission an enforcement action against “A” for failing to register as a CPO pursuant to section 4m(1) of the Act in connection with its role as the general partner of “B”. In the Correspondence, you provide a number of details to support your relief request. The Division notes the following relevant facts and circumstances.

First, requiring “A” to register as a CPO will not result in additional substantive disclosures or reporting to the Fund investors. The Funds are operated pursuant to the exemption in Commission regulation 4.13(a)(3), which means that “K” is not registered and is not subject to

⁶ The Investment Manager is subject to regulation by the Securities and Exchange Commission as a relying adviser of “Q”.

⁷ “K” is also not required to register (and is not in fact registered) with the Commission in any capacity.

⁸ “M” is the marketing name for a corporate holding structure that is controlled by “R” and “S”.

⁹ This arrangement is facilitated by “B’s” nominal and passive limited partnership ownership of “P”. The purpose of this ownership is to facilitate the revenue sharing arrangement and is not for investment purposes.

the disclosure and reporting requirements in Part 4 of the Commission’s regulations with respect to the Funds. As a result, regardless of whether or not “A” is registered, “K” is not required to, among other things, distribute the disclosure documents,¹⁰ periodic account statements,¹¹ or the audited annual reports¹² of each Fund to the respective Fund investors. Also, requiring “A” to register as a CPO will not mandate the distribution of such disclosures and reports concerning “B” to the Fund investors. This is because, under Commission regulations, the participants of “B” are technically the Funds and not their investors.¹³ Therefore, if “B” were to register, it would not result in the Fund investors being entitled to receive any additional disclosures or reports about “B” (or even the specific Fund itself) under the Commission’s regulations.

Second, “K” will prepare and distribute each Fund’s audited consolidated annual financial statements prepared in accordance with U.S. GAAP to the respective Fund investors, despite being exempt from doing so pursuant to Commission regulation 4.13(a)(3).¹⁴ These audited financial statements are required under the Funds’ organizational documents and the Securities and Exchange Commission’s Custody Rule.¹⁵ Each of these audited financial statements will include the Fund’s holdings in “B”, which will be set forth in the Combined Statement of Investments, consistent with other similarly sized portfolio investments of the Fund.

Third, if relief is granted, the Commission would still receive all of the applicable regulatory information about “B”, because “N” is operated pursuant to Commission regulation 4.7 by a registered CPO. This is the case because the only commodity interests held by “B” are through its investment in “N”. Therefore, the regulatory information filed about “N”, which include a copy of the audited annual report¹⁶ and Form CPO-PQR information,¹⁷ would cover all of the commodity interests held by “B”.

¹⁰ These are required under Commission regulation 4.21. These are not required to be distributed with respect to commodity pools that are operated pursuant to Commission regulation 4.7.

¹¹ These are required under Commission regulation 4.22(a) or 4.7(b)(2), as applicable.

¹² These are required under Commission regulation 4.22(c) or 4.7(b)(3), as applicable.

¹³ Commission regulation 4.10(c); *see also* Commission regulations 4.21(a)(2), 4.22(a)(4), and 4.22(c)(8). Furthermore, because “K” and “A” are under common control, these disclosures and reports are not required to be distributed to the participants of “B” (*i.e.*, the Funds).

¹⁴ In addition, you also state that “K” will distribute periodic account statements that generally comply with the requirements in Commission regulation 4.7(b)(2) to Fund investors. However, these periodic account statements will not have the oath and affirmation required under Commission regulation 4.22(h) and the change in net asset value of the pool from the end of the previous reporting period (although this could be determined by comparing previous periodic account statements).

¹⁵ 17 CFR 275.206(4)-2.

¹⁶ Commission regulation 4.7(c)(3).

¹⁷ Commission regulation 4.27(c). Also, “N” is operated pursuant to Commission regulation 4.7. As a result, “O” is exempt from providing disclosure documents to its prospective participants pursuant to Commission regulation 4.7(b)(1).

Finally, although “L” could have organized the Fund Complex differently to avoid the CPO registration issue, there were legitimate logistical and business reasons for organizing in this manner. The reason that the Fund Complex has a CPO registration issue with respect to “A” is because “B” is used as a conduit for the Funds’ *de minimis* commodity interest investment in “N” and their revenue sharing arrangement with “P”. The Funds could have invested directly in “N” and made direct arrangements to receive “P’s” revenues instead of channeling them through “B”. However, they utilized “B” for administrative efficiency, given that there are seven separate Funds, and also to limit the Funds’ exposure to their *de minimis* commodity interest investment in “N”. As a result, instead of the entire Fund Complex being able to operate safely within the exemption in Commission regulation 4.13(a)(3), “A” is required to register as a CPO.

Relief Granted

Based on the representations made in the Correspondence, the Division will not recommend to the Commission an enforcement action against “A” for failing to register as a CPO under section 4m(1) of the Act in connection with its current role as the general partner of “B”. This position is subject to and taken in reliance on all of the representations that you have made in connection with your relief request. The Division notes that no one factor is dispositive in granting the requested relief. Rather, the relief is based on a confluence of all of the factors present in this relief request and include, among other things, the following: (1) The operator of the Funds is exempt from registration pursuant to Commission regulation 4.13(a)(3); (2) the operator of the Funds will distribute audited annual financial statements prepared in accordance with U.S. GAAP to the Fund investors even though they are not required to be distributed under the Commission regulations applicable to them; (3) the Commission will receive all regulatory information about all of the commodity interests held by “B”; (4) “A”, “K”, and the Investment Manager are under common control and have identical officers; and (5) although “L” could have organized the Fund Complex differently to avoid the CPO registration issue, there were legitimate logistical and business reasons for organizing in this manner.

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 may 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 of any other office or division of the Commission.

“A”
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Should you have any questions, please contact Amanda Olear, Associate Director, at 202-418-5283, or Chang Jung, Special Counsel, at 202-418-5202.

Very truly yours,

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

cc: Regina Thoele, Compliance
National Futures Association, Chicago