



July 15, 2014

Via Electronic Mail

Mr. Gary Barnett
Director
Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Delegation of Commodity Pool Operator (“CPO”) Obligations

Dear Mr. Barnett,

Managed Funds Association¹ (“**MFA**”) is writing to request that the Staff of the Division of Swap Dealer and Intermediary Oversight (“**DSIO Staff**” or the “**Staff**”) of the Commodity Futures Trading Commission (the “**CFTC**”) clarify the criteria for CPO delegation (the “**Delegation Criteria**”) set forth in Section IV.A.1 of CFTC Staff Letter No. 14-69 (“**CFTC Letter 14-69**” or “**Letter**”). We respectfully request this guidance in order to clarify how prevalent fund structures (particularly common with respect to offshore funds) involving a board of directors, trustees or managers,² may comply with the Delegation Criteria. We believe that our requested clarifications are consistent with achieving the Staff’s objectives through the streamlined approach for no-action relief.

MFA appreciates the Staff’s streamlined, expedited no-action relief process for CPO delegations set forth in CFTC Letter 14-69. We are concerned, however, that without further clarification, there is uncertainty as to whether CFTC Letter 14-69 applies to a broad group of similarly-situated persons whose circumstances are approximate to those described in CFTC Letter 14-69, and whom we believe the Staff intended CFTC Letter 14-69 to cover. Without further clarification, a broad swath of the fund industry will either need to seek individual no-action relief or reorganize the composition of their boards of directors (or similar governance

¹ Managed Funds Association (“MFA”) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

² In many cases, a fund may be structured to comply with local regulatory requirements.

structures, as discussed further below) for their respective funds.³ We believe that our requested clarifications are in line with the Letter, and will help further the Staff's policy objectives in adopting it. Accordingly, we believe that the Staff should clarify that the expedited no-action relief process set forth in CFTC Letter 14-69 applies to a wide range of comparable fund structures that were intended to fall within the scope of the Letter. Our requested clarifications should thus obviate the need for many individuals/entities to request individual no-action relief for CPO delegation by making the streamlined, expedited no-action relief process under CFTC Letter 14-69 available to them. MFA's requested clarifications will reduce the burden both on the Staff in processing requests from similarly-situated persons for relief for CPO delegations, and for the applicants, the funds and their investors with respect to the legal and regulatory costs associated with compliance or seeking no-action relief for CPO delegation.

Section I below provides a brief description of the typical structure for offshore funds, including the functions typically performed by offshore fund directors. Section II sets forth our requested clarifications to the Delegation Criteria. Unless otherwise defined in this letter, capitalized terms have the same meaning as set forth in CFTC Letter 14-69.

I. Structure of Offshore Funds

Offshore funds (*i.e.*, funds established outside the United States) are generally structured as corporate entities (rather than, for instance, as limited partnerships, as is common in the United States) and are governed by a board of directors. Other entities (including both offshore and domestic entities), such as trusts and limited liability companies, may also be governed by boards of trustees or boards of managers that operate in a similar manner to the board of directors of a corporation. Regardless of its legal status, the board of directors (or trustees or managers) generally does not act as the fund's CPO or commodity trading advisor ("CTA") itself. Rather, the fund (through its directors or equivalent) generally appoints a separate entity to serve as the fund's CPO (the "**Designated CPO**"). While the Designated CPO also may provide commodity interest trading advice and/or investment advice to the fund, often the Designated CPO appoints a separate entity (or entities) for this purpose. (As used in this letter, an entity that provides commodity interest trading advice and/or investment advice to a fund is referred to as the "**investment manager**"). Similarly, with respect to domestic funds, it is often the case that the general partner of a limited partnership will appoint a separate entity to be the Designated CPO, which may, in turn appoint another entity (or entities) as investment manager.

The board of directors or equivalent is generally composed of both independent directors and those who are affiliated with the fund's Designated CPO or CTA (or investment adviser if the fund is also engaged in securities activities). Independent directors are generally appointed to the board in order to meet investor demands and/or corporate and tax law requirements, and to provide independent oversight of the fund's operations as a mechanism for good corporate

³ We appreciate the opportunity to meet with Staff recently to discuss typical structures for private investment funds, and the legal and regulatory framework under which such funds operate. As discussed at MFA's meeting with Staff, because we believe the Staff did not mean to exclude the persons who are the subject of this letter, neither outcomes is desirable for the CFTC, Staff, funds or their investors.

governance. Affiliated directors are generally senior personnel of the fund's Designated CPO or CTA, whose expertise and knowledge of the fund's operations and investment strategy qualify them to assume responsibility for oversight of the fund in their capacity as directors, and to keep independent directors informed about the day-to-day operations of the fund. Typically, these senior personnel of the fund's Designated CPO or CTA are involved in solicitation activities and portfolio management activities, but are **not** engaged in those activities in their roles as directors or equivalent.

II. Request for Clarification of Delegation Criteria

To better take account of the way in which funds operate, we respectfully request that the Staff clarify the Delegation Criteria outlined in the Letter to reflect (i) the appointment of separate entities to act as a fund's Designated CPO and CTA; and (ii) the ordinary course fund-related activities performed by affiliated directors of a fund outside of their roles as directors.

Criterion 1a: Delegation of Investment Management Authority

Criterion 1a of the Delegation Criteria requires that:

Pursuant to a legally binding document, the Delegating CPO has delegated to the Designated CPO all of its **investment management authority** with respect to the commodity pool [emphasis added];

For the reasons set forth below, MFA respectfully requests the Staff to clarify that satisfaction of this criterion is not precluded where a Delegating CPO or the Designated CPO appoints one or more third parties to serve as investment manager(s) to the pool, provided that each such person who is engaged in providing commodity interest trading advice to the pool is registered as a CTA or is exempt from such registration pursuant to the Commodity Exchange Act (the "CEA") and the CFTC's regulations.⁴ In either case, the Delegating CPO will not be exercising investment management authority over the pool except to the extent that the Delegating CPO appoints the investment manager or to the extent permitted by Criterion 1c, as clarified by this letter.

As described in Section I, while some funds appoint the same entity to serve as the fund's Designated CPO and investment manager, it is fairly common for the Designated CPO to appoint a separate entity (or entities) as the investment manager. Criterion 1a, however, requires a Delegating CPO to delegate all "investment management authority" to the fund's Designated CPO. Read literally, this would preclude arrangements in which different entities serve as a fund's CPO and investment manager. However, there seems to be no policy reason why Criterion 1a should preclude structures in which separate entities serve as a fund's CPO and investment manager *provided that* in structures that the investment manager provides commodity

⁴ See, e.g., CEA Section 4m(1) and Regulation 4.14, which concern registration requirements and exemptions therefrom for CTAs.

interest trading advice to the fund, the investment manager is registered, or exempt from registration, as a CTA with the CFTC. This condition ensures that investors are subject to the same protections as they would receive where the fund's Designated CPO also acts as the fund's CTA. Thus, permitting a separate entity to act as the fund's CTA should not raise any investor protection concerns. This is reflected in the CFTC Rules, which generally acknowledge that different entities may function as a fund's CPO and CTA. In order to address fund structures in which different entities serve as a fund's CPO and investment manager, we thus respectfully request the Staff to clarify that the Delegating CPO or Designated CPO may appoint a separate entity or entities to act as the fund's investment manager.

Criterion 1b: Solicitation Activities of Fund Directors

Criterion 1b requires that:

The Delegating CPO does not participate in the solicitation of participants for the commodity pool;

For the reasons set forth below, MFA respectfully requests the Staff to clarify that satisfaction of this criterion is not precluded where the Delegating CPO is also an associated person ("AP") of the Designated CPO, or exempt from registration as such, and the person participates in the solicitation of pool participants solely in such capacity.⁵ Thus, a person may dually serve as a Delegating CPO in his or her own right and as an AP of the Designated CPO and still comply with Criterion 1b so long as the person is only engaging in solicitation activities as an AP of the Designated CPO.

As noted in Section I above, affiliated directors of a fund may conduct solicitation activities on behalf of the fund in their capacity as APs of the Designated CPO. This benefits investors by enabling senior personnel with knowledge and expertise of a fund's operations to interface with investors as part of the fund's marketing efforts.

Where directors of a commodity pool engage in solicitation activities on behalf of the fund, they are generally required to register with the CFTC as APs of the Designated CPO, and pass the appropriate examination (generally, the Series 3).⁶ Further, individuals registered as APs of a Designated CPO would be required to conduct their solicitation activities in accordance with applicable CFTC and NFA Rules,⁷ and are subject to ongoing supervision with respect to

⁵ The person must be registered as an AP of the Designated CPO or exempt from registration as such. *See* CEA Section 4k(2) and Regulation 3.12, which concern the registration requirements and exemptions therefrom for APs of CPOs.

⁶ Note that directors (or their equivalent) of a commodity pool may solicit participants to invest in the pool, without registration as APs of the pool's CPO if, for example, they are located outside the United States and solicit persons located outside the United States. *See* CFTC Rule 3.12(h)(1)(iv).

⁷ *See, e.g.*, CFTC Rule 4.41 (advertising by CPOs and CTAs); NFA Compliance Rule 2-29 (communications with the public and promotional material).

their solicitation activities.⁸ To the extent that any fund directors conduct solicitation activities on behalf of the fund's Designated CPO, investors would be subject to the same protections as they receive with respect to solicitation activities conducted by the Designated CPO's other sales personnel. Thus, permitting fund directors to conduct solicitation activities should not raise any investor protection concerns, and would, in fact, give investors access to the fund's senior personnel who have ultimate oversight responsibility for the operation of the fund. Conversely, if fund directors are not permitted to conduct solicitation activities, many funds would need to reconstitute their boards in order to claim CPO delegation relief under CFTC Letter 14-69, which would be burdensome to funds, of no benefit to investors, and may even prove to be harmful to investors by depriving the board of a member informed about the day-to-day operations of the fund.

Accordingly, we respectfully request the Staff to clarify that Criterion 1b permits fund directors to conduct solicitation activities if registered (or exempt from registration) as APs of a fund's Designated CPO. This request is consistent with prior Staff no-action letters, which contemplated that U.S. directors of an offshore fund may be APs of the fund's Designated CPO.⁹

Criterion 1c: Portfolio Management Activities of Fund Directors

Criterion 1c requires that:

The Delegating CPO does not manage any property of the commodity pool.

For the reasons set forth below, MFA respectfully requests the Staff to clarify that satisfaction of this criterion is not precluded where the Delegating CPO is also a principal or employee subject to supervision of either the Designated CPO or the CTA of the pool; provided that the person exercises these management responsibilities solely in his or her capacity as a principal or employee subject to supervision of the Designated CPO or the CTA, and not as a separate CPO or CTA of the pool. In addition, the Division notes that for the purpose of Criterion 1c, the term "management responsibilities" does not include responsibilities of an administrative, clerical or ministerial nature.

As a preliminary matter, we note that funds may appoint individuals to function as both portfolio managers and fund directors. This benefits investors by enabling senior portfolio

⁸ See, e.g., CFTC Rule 166.3 and NFA Compliance Rule 2-9 with respect to supervisory requirements of CFTC-registered firms.

⁹ See, e.g., *CFTC No-Action Letter 94-65*, in which the Staff noted (on page 2) that, "You note, however, that the Fund anticipates adding an additional Director to its board. This additional Director would be "A", a United States person who is the current chairman and a principal and **registered associated person ("AP")** of "W" [the pool's CPO and CTA]...You further represent that **any future Director...will be either an AP** or listed as a principal of "W" or "Y", a registered commodity trading advisor and a United States affiliate of "W" [emphasis added]. See also *CFTC No-Action Letter 97-73* (cited in CFTC Letter 14-69), in which the Staff noted (on page 2) that "You represent that any future Director who is a United States person will be either **registered as an associated person ("AP")** or listed as a principal of X [the CPO] [emphasis added]." (We note that in Letter 97-73, solicitation activities were carried out by the CPO's affiliated FCM.)

managers with knowledge and expertise of the fund's investment strategy to assume responsibility for oversight of the fund in their capacity as directors.

Where a fund director acts as a portfolio manager, the individual is required to act on behalf of the fund's Designated CPO or CTA (with respect to transactions in CFTC-regulated products), or investment adviser (with respect to transactions in securities).¹¹ These individuals would be required to conduct their commodity interest trading activities in accordance with applicable CFTC and NFA Rules,¹² and would be subject to ongoing supervision with respect to their commodity interest trading activities. To the extent that any fund directors conduct commodity interest trading activities, investors would be subject to the same protections as they would with respect to commodity interest trading activities of the Designated CPO's or CTA's other portfolio managers. Thus, permitting fund directors to conduct commodity interest trading activities on behalf of the fund's CPO or CTA should not raise any investor protection issues, and would, in fact, enable those individuals with expertise concerning the fund's trading strategy to assume oversight responsibility in their capacity as fund directors.¹³ Conversely, if fund directors are not permitted to conduct portfolio management activities on behalf of the fund's Designated CPO, CTA or investment adviser, many funds would need to re-constitute their boards in order to claim CPO delegation relief under CFTC Letter 14-69, which would be burdensome to funds, of no benefit to investors, and may even prove to be harmful to investors by depriving the board of a member informed about the day-to-day operations of the fund. Accordingly, we respectfully request the Staff to clarify that Criterion 1c permits fund directors to conduct portfolio management activities as employees or agents of the fund's Designated CPO, CTA or investment adviser, as appropriate.

III. Conclusion

MFA appreciates the streamlined approach the Staff is providing for Delegating CPOs to seek CPO delegation relief on an expedited basis in accordance with CFTC Letter 14-69. In order to clarify that the expedited relief set forth in the Letter applies to similarly-situated Delegating CPOs, we respectfully request the Staff to clarify the Delegation Criteria, as described above. We believe that such clarifications are consistent with CFTC precedent and retain the substantive requirements and intent of the relevant Delegation Criteria, while taking into account the way in which funds operate.

¹¹ While the same entity typically acts as CTA and investment adviser, we refer to both types of entity in our requested clarification, in order to address those situations in which a fund appoints different entities as CTA and investment adviser.

¹² These would include, without limitation, compliance with Part 150 of the CFTC Rules (position limits), Part 18 (large trader reporting), Rule 1.35(a-1)(5) (post-execution allocation of bunched orders), and CFTC and exchange rules relating to block trades and exchange of futures for physicals.

¹³ Similar considerations apply to fund directors that perform investment advisory services on behalf of a fund's investment adviser.

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Please do not hesitate to contact Jennifer Han or the undersigned at (202) 730-2600 if you have questions or require further information.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
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General Counsel