NYC Department of Finance

Please note that this Broker-Dealer Ruling does not reflect the current analysis of DOF with respect to the application of the Broker-Dealer Provisions because DOF has determined that the Representations in the Broker-Dealer Ruling are not reliable. For additional information visit Update on Audit Issues regarding Business Income Taxes – Income Allocation dated November 25, 2016

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March 28, 2014

Re: Request for Ruling
XXX
Unincorporated Business Tax
FLR 13-4950/UBT

Dear XXX:

This responds to your request, received October 18, 2013, on behalf of XXX (the "Taxpayer") that it qualifies as a registered securities broker or dealer and a registered commodities broker or dealer for purposes of determining the source of its receipts under New York City Unincorporated Business Tax (the "UBT"). This office received additional information concerning this request on December 12 and 20, 2013.

FACTS

You have presented the following facts:

Taxpayer is a XXX limited partnership involved in the securities and commodities businesses. XXX (the "Partnership") a XXX limited partnership, owns 99 percent of Taxpayer through intermediaries, with an affiliated entity owning the remaining one percent. XXX (the "Parent') is a corporation that, through intermediaries, owns XXX percent of the interests in Partnership. Disregarded for federal and New York income tax purposes, Partnership is treated as a division of Parent.

Partnership manages various investment funds in securities and commodities on behalf of the funds' investors. It receives, through various fund advisor entities, asset-based management fees directly from investors in the securities and commodities funds it manages. Taxpayer, in turn, solicits investors for Partnership's various investment funds in securities and commodities. Both Partnership, through managing the investment funds in securities and commodities, and Taxpayer, in soliciting customers for the investment funds managed by Partnership, trade in securities and commodities.

Federal regulation of securities and commodities trading. Trading in securities

and commodities is generally subject to various forms of registration with, and oversight by, agencies and instrumentalities of the federal government. In the case of trading in securities, significant agencies include:

- The Securities and Exchange Commission (the "SEC"), with has broad authority, under the Securities Exchange Act of 1934, codified in title 15 of the U.S.C., (the "'34 Act") to license, register and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities Self-Regulatory Organizations ("SROs");

- The Financial Industry Regulatory Authority ("FINRA"), the largest SRO, writes and enforces rules, which are reviewed and approved by the SEC. Under those rules, FINRA can discipline members for improper conduct and establish measures to ensure market integrity and investor protection. As an SRO, FINRA is overseen by the SEC.

- The Central Registration Depository (the "CRD") maintains a computerized database that is the central licensing and registration system for the securities industry. That database information about registered securities and broker firms is obtained through forms completed by brokers, brokerage forms, regulators as part of the securities industry registrations and licensing process.

In the case of trading in commodities, significant agencies include:

- The Commodities Future Trading Commission (the "CFTC"), established under the Commodities Exchange Act, codified as chapter 1 of title 7 of the U.S.C. (the "CEA"), is an independent agency mandated to regulate commodities futures and option markets and administer the CEA. Under the CEA, the CFC has authority to establish regulations under title 17 of the Code of Federal Regulations.

- The National Futures Association (the "NFA"), an independent SRO, oversees and protects investors from fraudulent commodities and futures activities. Membership in NFA is mandatory for every firm or individual who conducts futures trading business with public customers.

  Persons doing in business in commodities futures must register with NFA in a designated category of business activity, such as a Commodity Pool Operator ("CPO")[1] or a Commodity Trading Advisor ("CTA")[2].

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[1] On its website, the NFA defines a CPO as:

Taxpayer's registration in securities trading. Partnership is registered as a "broker-dealer" by the SEC and FINRA, and maintains CRD number XXXXX. Taxpayer is registered with FINRA as an organization affiliate of Partnership and maintains CRD number XXXXXX. Unlike Partnership, Taxpayer is not registered as a broker-dealer with the SEC.

Over twenty of Taxpayer's employees, however, are registered representatives of Partnership (the "Registered Representatives"). The Registered Representatives have passed both the Series 7 (General Securities Representative Examination) and Series 63 (Uniform Securities Agent State Law Examination) exams. Those Registered Representatives have also filed and maintain updated Forms U4, *Uniform Application for Securities Industry Registration or Transfer* with FINRA, and maintain CRD numbers. In addition, the Registered Representatives comply with FINRA's continuing education requirements, which are required beginning with the Registered Representatives' second anniversary of their initial registration and every three years thereafter.

The Registered Representatives are considered "associated persons" of Partnership. In such capacity, they can solicit investors for Taxpayer's commingled investment vehicles, involving the purchase of securities, for example, by acquiring limited partnership interest in investment funds managed by the Taxpayer.

As a result, Taxpayer can act a broker-dealer, perform all functions of a security broker or dealer, hold itself out to customers as a broker or dealer, and be treated as a broker-dealer by all parties with which it interacts. The SEC has not required the Taxpayer to formally register with it.

> An individual or organization which operates a commodity pool and solicits funds for that commodity pool. A commodity pool is an enterprise in which funds contributed by a number of persons are combined for the purpose of trading futures contracts, options on futures, retail off-exchange forex contracts or swaps, or to invest in another commodity pool.

[2] On its website, the NFA defies a CTA as:

> An individual or organization which, for compensation or profit, advises others as to the value of or the advisability of buying or selling futures contracts, options on futures, retail off-exchange forex contracts or swaps.
>
> Providing advice includes exercising trading authority over a customer's account as well as giving advice based upon knowledge of or tailored to customer's particular commodity interest account, particular commodity interest trading activity, or other similar types of information.

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Taxpayer's registration in commodities trading. Unlike the SEC, the CFTC does not have a specific registration or designation for "broker" or "dealer." Taxpayer is registered with the CFTC as both a CPO and a CTA. Taxpayer's NFA ID number is XXXXXX. Apart from acting as a CPO and CTA, Taxpayer does not engage in any other commodities-related activities. As a CPO and CTA, Taxpayer performs the functions of a commodities broker and dealer, acts as a broker and dealer, and is treated as a broker and dealer by all parties with which it acts, as those terms are commonly understood.

ISSUES

You have requested the following rulings:

1. Taxpayer meets the requirements to be considered a registered securities broker or dealer for purposes of determining the source of its receipts under UBT; and

2. Taxpayer meets the requirements to be considered a registered commodities broker or dealer for purposes of determining the source of its receipts under UBT.

CONCLUSIONS

Based on the facts presented, we conclude that:

1. Taxpayer meets the requirements to be considered a registered securities broker or dealer for purposes of determining the source of its receipts under UBT; and

2. Taxpayer meets the requirements to be considered a registered commodities broker or dealer for purposes of determining the source of its receipts under UBT.

As discussed further below, this ruling does not address which, if any, of the Taxpayer's receipts are derived from services enumerated in (a) through (g) of Code section 11-508(e-3)(1) and thus eligible for the special allocation provisions.

DISCUSSION

The UBT is imposed on the unincorporated business taxable income of every unincorporated business carried on within New York City (the "City"). Section 11-503(a) of the New York City Administrative Code (the "Code"). Code

section 11-502(a) defines an unincorporated business as "any trade, business, profession, or occupation conducted... by an unincorporated entity." An unincorporated business carried on both within and outside the City must allocate to the City a fair and equitable portion of its business income. Code § 11-508(a). To do that, a taxpayer multiplies its adjusted business income against a business allocation percentage consisting of a fraction dividing the taxpayers NYC property, payroll, and receipts by the taxpayer's property, payroll, and receipts everywhere. Code § 11-508(c).

The source of receipts from services. To determine the fraction of a taxpayer's receipts within and outside the City, the sources for a taxpayer's receipts need to be determined. Generally the UBT treats the source of receipts derived from the provision of services to be the location where the services are performed. Code § 11-508(c)(3). In those cases, the location of the customer or the place of payment for the services is not a factor.

The UBT was amended by chapter 21 of the Laws of 2009 to add Code section 11-508(e-3), which provides special rules for determining the source of receipts derived from certain services performed by "registered securities or commodities brokers or dealers." Under those rules, receipts from designated services are allocated to the mailing addresses of the taxpayer's customers rather than to the location where the services are performed. When those rules apply, even if the services are performed in the City, if the mailing address of the customer is outside the City, receipts from the services will not be considered to arise from sources within the City. Those rules may be used, assuming other requirements are met, to source receipts from certain specific types of services identified in Code section 11-508(e-3)(1)(a) - (g). For example, under Code section 11-508(e-3)(1)(a), the rules may be used to source brokerage commissions derived from the execution of securities or commodities purchase or sales orders for the accounts of customers, and, under Code section 11-508(e-3)(1)(g), the rules may be used to source certain fees for management or advisory services. As result, even if a taxpayer meets the requirements to be a "registered securities or commodities broker or dealer," the special rules apply only to receipts that are derived from one of the services designated in designated (a) through (g) of Code section 11-508(e-3)(1).

Code section 11-508(e-3)(2) defines the term "registered securities or commodities broker or dealer" for purposes of Code section 11-508(e-3) to mean a "broker or dealer registered as such by the Securities and Exchange Commission or the Commodities Futures Trading Commission…."

Here, Taxpayer receives receipts for providing services in securities and commodities, and you have asked that we rule that it should be treated as a

registered securities broker-dealer and a registered commodities broker-dealer for purposes of Code section 11-508(e-3)(2). This ruling addresses only the Taxpayer's treatment as a registered securities and commodities broker; it does not address which, if any, of its receipts are derived from services enumerated in (a) through (g) of Code section 11-508(e-3)(1) and thus eligible for the special allocation provisions.

Registered securities broker-dealer. As a preliminary matter, for Code section 11-508(e-3)(2) to apply, the Taxpayer must be registered as a securities "broker" or "dealer." The '34 Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others," and a "dealer" as "any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise." 15 U.S.C. § 78c(a)(4)(A) and (a)(5)(A). You have represented that Taxpayer is a "broker" and "dealer" under the '34 Act.

Second, for Code section 11-508(e-3)(2) to apply, the Taxpayer must be "registered with the [SEC]" as a broker or dealer for purposes of the '34 Act and other federal authority. Under federal law, a broker-dealer may not effect transactions in securities unless and until it completes several steps. One step involves formally registering with the SEC by filing a Form BD, Uniform Application for Broker Dealer Registration with the SEC and completing the registration process. 15 U.S.C. section 78o(a)(1); "Guide to Broker-Dealer Registration," Division of Trading and Markets, U.S. Securities and Exchange Commission (April 2008) (the "Guide"), Part III.

The '34 Act provides certain exceptions to the formal registration requirement. For example, under 15 U.S.C. section 78o(a)(1), a natural person "associated with a broker or dealer" may lawfully act as a broker-dealer in securities without formally registering with the SEC. Under the '34 Act, the term a "person associated with a broker or dealer" means any partner, officer, director, branch manager, or employee of the broker-dealer, any person performing similar functions, or any person controlling, controlled by, or under common control with, the broker-dealer. 15 U.S.C. § 78c(18). A broker-dealer must file a Form U-4 with the applicable SRO for each associated person who will effect transactions in securities. An associated person involved in effecting securities transactions also must meet qualification requirements, including passing an SRO securities qualification examination, such as the comprehensive "Series 7" exam. Guide, Part III, E.

The SEC, at its discretion, may require any person associated with a broker or dealer to formally register with the SEC.

In addition to meeting the registration requirement, to effect transactions in securities, a broker-dealer must become a member of an SRO, such as FINRA. The broker-dealer also must file a copy of the Form BD with the CRD.

Here, you have represented that Taxpayer has not filed a BD with, or become formally registered by, the SEC, but is able to act a broker-dealer under exceptions to the formal registration requirements. For example: Partnership, which owns and controls Taxpayer, is registered with the SEC; over twenty of Taxpayer's employees are Registered Representatives of Partnership, who as "associated persons" of Partnership can solicit investors for Taxpayer's commingled investment vehicles; Taxpayer is registered with FINRA as an organization affiliate of Partnership and maintains its own CRD number; and, most importantly, while Taxpayer has performed all functions of a security broker or dealer, held itself out to customers as a broker or dealer, and has been treated as a broker and dealer by all parties with which it interacts, to date, FINRA has accepted Form U-4 allowing the Taxpayer and its employees to conduct securities business in connection with Partnership's registration, and the SEC has not exercised its discretion to require Taxpayer to formally register as a broker-dealer.

The legal issue presented here is whether the phrase "broker or dealer registered as such by the [SEC]," as used in Code section 11-508(e-3)(2), requires that a taxpayer have filed a BD with, and become formally registered by, the SEC. While the statute does refer to "registering" as a broker or dealer with the SEC, the SEC provides exceptions to the registration requirement, with the result that certain persons can act as brokers or dealers in securities without taking the specific step of becoming formally registered with the SEC. In that context, to interpret the statute as requiring that specific step would have the effect of carving out a significant portion of the entities acting as broker-dealers under authority of the SEC from the tax treatment afforded by Code section 11-508(e-3), resulting in inconsistent application of the Code among similarly situated entities. We do not believe that it is the intent of the statute to create differing tax treatments for brokers or dealers in securities where they have complied with requirements under federal law to act as a broker or dealer. Applying the well-established rule in statutory construction to effectuate the intent of the legislature (see, e.g., 1605 Book Center Inc. v. Tax Appls. Tribunal of State of N. Y., 83 N.Y. 2d 240 (1994)), we conclude the that the phrase "broker or dealer registered as such by the [SEC]" does not require that a taxpayer have filed a BD with, and become formally registered by, the SEC, but rather that the taxpayer have complied with all requirements of the SEC to act as a broker or dealer in securities.

As a result, based on your representations, we conclude that the hypothetical facts presented indicate that Taxpayer has performed the requisite actions and meets the requirements to be a broker-dealer registered with the SEC for purposes of Code section 11-508(e-3).

Registered commodities broker-dealer. Code section 11-508(e-3)(2) defines the term registered commodities broker or dealer for purposes of Code section 11-508(e-3) to mean a "broker or dealer registered as such by the [CFTC]." As a threshold matter, the terms "broker" and "dealer" are not defined in the CEA, and there is no formal designation as a "broker-dealer" of commodities under the CFTC. While there is no registration as a broker-or-dealer as such, all individuals and firms that wish to conduct futures-related business with the public must register under the CEA, and must apply for NFA Membership or Associate status. (NFA website, Registration.)

The CFTC has delegated its registration functions under the CEA to NFTA. Section 3.2 of title 17 of the Code of Federal Regulations (the "CFR"). Business in commodities futures is conducted under several different designations, in addition to CPO and CTA, such as Futures Commission Merchant, Swap Dealer, Major Swap Participant, Retail Foreign Exchange Dealer, Introducing Broker, Associated Person, Principal, Floor Broker, Floor Trader, Notice Registered Futures Commission Merchant, and Introducing Broker. Each of these is specifically defined by NFTA on its website. Registration by NFA in one or more of those designations constitutes registration with the CFTC. 17 CFR § 3.2.

Here, you have represented that the Taxpayer trades in commodities as a broker and dealer, as "broker" and "dealer" are commonly used, and it has registered as a CPO and CTA with the CFTC and has been assigned an NFA ID number... It has, however, not registered with the CFTC as a "broker" or dealer" because the CFTC does not provide the option to register under either of those designations.

The legal issue presented here is whether the phrase "broker or dealer registered as such by the [CFTC]," as used in Code section 11-508(e-3)(2), requires that a taxpayer have registered with the CFTC under the specific designation of "broker" or "dealer." While the statute refers to registering as a "broker or dealer" with the CFTC, the CFTC does not provide a designation of broker or dealer. Rather, it requires registration under one or more specific designations, with the result that a person can trade in commodities as a broker or dealer without being registered as a "broker" or "dealer." In that context, to interpret the statute as requiring registration as "broker" or "dealer" would have the effect that no person, even though trading in commodities in compliance with the CFTC, could take advantage of the tax treatment afforded by Code section

11-508(e-3). We do not believe that it is the intent of the statute to set up a requirement that cannot be met in practice. Applying the fundamental rule in statutory construction to effectuate the intent of the legislature (see, e.g., 1605 Book Center Inc., supra) we conclude the that the phrase "broker or dealer registered as such by the [SEC]" does not require that a taxpayer have registered as a "broker" or "dealer" with the CFTC, but rather that the taxpayer have complied with all registration requirements of the CFTC to act as a broker or dealer in commodities.

As a result, based on your representations, we conclude that the facts presented indicate that Taxpayer has performed the requisite actions and meets the requirements to be a broker-dealer registered with the CFTC for purposes of Code section 11-508(e-3).

Summary. Based on the representations submitted, we rule that Taxpayer meets the requirements to be considered a registered securities and commodities broker and dealer for purposes of determining the source of its receipts under UBT.

* * *

This opinion is based on the facts as presented. The Department of Finance reserves the right to modify its opinion in the event that the facts upon which this opinion is based are other than as described above.

Very truly yours,

Dara Jaffee
Acting General Counsel
Office of Legal Affairs

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