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State of Utah
Department of Commerce
Division of Securities

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November 22, 2019

Kelly Hollingsworth
Kelly Hollingsworth, PLLC
9129 West Driftwood Drive
Coeur d'Alene, Idaho 83814

Via U.S. Mail and email: kelly@profitablecta.com

Re: Ross Paul Capital, LLC No-Action Request Letter

Dear Ms. Hollingsworth:

The Utah Division of Securities ("Division") has reviewed your September 27, 2019 request for a no-action letter concerning your client Ross Paul Capital, LLC ("RPC"). Your request for relief from the Division is authorized by Section 61-1-25(5) of the Utah Uniform Securities Act ("Utah Act") and Utah Administrative Code Rule R164-25-5.

As described in your letter, RPC intends to act as a commodity trading advisor ("CTA") in Utah that will exclusively trade exchange-traded futures contracts for clients on a discretionary basis, for compensation. RPC intends to initially operate as an unregistered CTA pursuant to the exemption contained in 7 USC § 6m of the Commodity Exchange Act ("CEA"), which provides that CEA registration requirements do not apply to a CTA "who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor." You further indicate that CTAs meeting that exemption do not register with the Commodity Futures Trading Commission ("CFTC") and do not become members of the National Futures Association ("NFA").

Your letter next states that the CEA generally confers exclusive jurisdiction on CFTC to regulate futures transactions, accounts, and agreements, and goes on to say you were surprised by provisions of the Utah Act that you read "create the impression that a CTA trading futures contracts within the state of Utah would be considered an investment adviser and required to become licensed as such." We note several points in response. First, in 1985 the North

American Securities Administrators Association (“NASAA”)¹ adopted a Model State Commodity Code (“Model Code”) which has been enacted in Utah and twenty-one other states. The definitions of both “commodity contract” and “commodity option” contained in the Utah Act Sections 61-1-13(1)(g) and (h) are substantively the same as those contained in the Model Code Sections 1.01(e) and (i) respectively, including the “carve out” language which is solely contained in the definition of “commodity option” in both acts. Thus, Utah is not an outlier in its definitions of those terms. Second, as stated in its Preamble, the Model Code “does not purport either to prohibit or regulate those commodity transactions preempted by the federal Commodity Exchange Act.” Rather, the Division and other states have “concurrent jurisdiction over contracts that are not conducted on or subject to the rules of a registered entity or exempt board of trade (i.e., off-exchange transactions).”² Because RPC intends to exclusively effect transactions in futures contracts that are traded on a board of trade designated as a contract market by CFTC, the Division lacks regulatory jurisdiction to impose licensing or other requirements of the Utah Act.

Accordingly, based upon the representations in your letter, we will not recommend any enforcement or administrative disciplinary action should RPC proceed with its business in Utah as an exempt CTA as set forth in the letter. As this recommendation is based upon the representations made to the Division, any different facts or conditions of a material nature might require a different conclusion. Furthermore, the relief granted herein is expressly limited to RPC and will have no precedential effect whatsoever for any other party.

It is our understanding that as an unregistered CTA, RPC must electronically file with NFA a notice of exemption from CFTC Part 4 requirements using NFA’s Exemptions System.³ We would appreciate receiving a copy of that notice filing or confirmation that it was made, and if RPC becomes registered at some point in the future would appreciate receiving notice of that as well. Finally, we note that RPC apparently has a web site located at www.rosspaulcap.com. We recommend you take steps to ensure the content of any publicly accessible web site does not constitute RPC holding itself out as a CTA, which would disqualify it from the § 6m exemption.

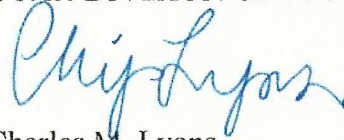
¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² Barry Taylor-Brill, *Cracking the Preemption Code: The New Model for OTC Derivatives*, 13 Va. L. & BUS. REV. 1 (2019) at 4-5; n.10 (citing 7 U.S.C. § 16(e)(1)).

³ <https://www.nfa.futures.org/electronic-filing-systems/exemptions.html>

Very truly yours,

UTAH DIVISION OF SECURITIES



Charles M. Lyons
Securities Analyst

cc: Ken Barton, Director of Compliance
Bryan Cowley, Director of Registration and Licensing



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September 27, 2019

Mr. Brian Cowley
Utah Division of Securities

Submitted via Email

Dear Mr. Crowley,

Thank you for your time on the phone last week. As discussed, my client is located in Utah and intends to organize a Utah limited liability company called Ross Paul Capital, LLC ("RPC"). RPC intends to operate as a commodity trading advisor ("CTA") by trading exchange-traded futures contracts on a discretionary basis for customers pursuant to a written power of attorney in exchange for compensation. For your reference, the term "commodity trading advisor" is defined in the Commodity Exchange Act ("CEA") at 7 USC § 1a(12).

Initially, RPC intends to operate as an unregistered CTA pursuant to 7 USC § 6m, which is considered the "friends and family" exemption for CTAs. This section of the CEA provides that the registration requirements of the CEA do not apply to any CTA "who during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor."

CTAs that avail themselves of this relief from registration do not register with the Commodity Futures Trading Commission ("CFTC"), and do not obtain membership with the National Futures Association ("NFA"). (NFA membership is available only to CFTC registrants).

As I mentioned, CTAs (whether registered or unregistered with the CFTC) are not subject to state investment adviser licensing requirements due to the federal preemption clause embedded in the CEA. 7 USC § 2 generally confers exclusive jurisdiction on the CFTC to regulate futures transactions, accounts, and agreements. This federal preemption clause has long been recognized to preclude states from regulating futures contracts as securities, and further from regulating CTAs as investment advisers. I'm attaching a fairly comprehensive analysis of the legislative and regulatory history behind the preemption clause for your convenience.

Given this legal and regulatory background, I was surprised to read that the Utah Uniform Securities Act appears to require CTAs that trade futures within the state of Utah to become licensed as investment advisers. Specifically, I note that:

- An investment adviser under the Utah Uniform Securities Act "means a person who: (A) for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities."
- Securities are defined to include "commodity contracts" which are defined to include "futures contracts."
- Investment advisers are required to become licensed in the state of Utah per § 61-1-3 (3), "[i]t shall be unlawful for a person to transact business in this state as an investment adviser... unless (a) the person is licensed under this chapter."); and

Taken together, these state code provisions create the impression that a CTA trading futures contracts within the state of Utah would be considered an investment adviser and required to become licensed as such.

Curiously, I note that a CTA trading commodity *options* (as opposed to futures contracts) within the State of Utah would apparently not be subject to a state licensing requirement. Although "commodity options" are considered securities under your code, there's an explicit carve-out for commodity options that are traded "on a board of trade designated as a contract market by the Commodity Futures Trading Commission."

There is not a parallel carve-out for futures contracts traded on a board of trade designated as a contract market by the CFTC, and RPC intends to trade exclusively in such instruments.

Accordingly, we seek the following from you:

- a) Confirmation that the Utah Uniform Securities Act should not be read to impose an investment advisory licensing requirement on CTAs that trade futures contracts within the state of Utah; and/or
- b) Confirmation that the Utah Division of Securities will not take action against RPC for operating as a registered or unregistered CTA within the state of Utah without obtaining a Utah state license as an investment adviser.

Thank you for your consideration of this request. Please contact me if you have questions or require additional information.

Sincerely yours,

Kelly Hollingsworth
Attorney & Counselor at Law