

**TAXPAYER EXHIBIT**

**B3**

**September 16, 2015**

**John Nafeh and Ursula G. Burger Nafeh**

**785086**

**Statue**

Under CR&TC Section 18152.5 / IRC Section 1202, the term "qualified trade or business" means any trade or business other than:

(A) any trade or business involving the performance of services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees;

(B) any banking, insurance, financing, leasing, or similar business;

(C) any farming business (including the business of raising or harvesting trees);

(D) any business involving the production or extraction of products of a character with respect to which a deduction is allowable under Section 613 or 613A; and

(E) any business of operating a hotel, motel, restaurant, or similar business.

**STATE BOARD OF EQUALIZATION**



Appeal Name: John Nafeh & Ursula Burger Nafeh

Case ID: 785086 ITEM #. B3

Date: 09/16/15 Exhibit No: 9.4

**TP FTB DEPT PUBLIC COMMENT**



**Commodity Futures Trading Commission**  
Office of External Affairs (202) 418-5080  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

**Release: #4894-04**  
**For Release: February 20, 2004**

## CFTC DESIGNATES HEDGESTREET AS A CONTRACT MARKET AND AS A REGISTERED CLEARING ORGANIZATION

**Washington, D.C.** – The Commodity Futures Trading Commission (Commission) approved the application of HedgeStreet, Inc. (HedgeStreet) for designation as a contract market on February 18, 2004. The Commission concurrently approved HedgeStreet’s application for registration as a derivatives clearing organization (DCO). HedgeStreet is a for-profit Delaware corporation, formed in 2000. HedgeStreet intends to provide its members with fully electronic, non-intermediated trading over the Internet in cash-settled, European-style binary options on various proprietary and non-proprietary indices. HedgeStreet’s registration as a DCO is for the purpose of settling contracts between members. Unlike other DCOs, HedgeStreet does not offer novation or other credit enhancement.

HedgeStreet has contracted with the National Futures Association (NFA) to assist it in carrying out various self-regulatory responsibilities, including, among other things: market, trade practice and financial surveillance; and investigative and disciplinary functions. The NFA will also provide its arbitration forum for resolving member/member disputes and member/HedgeStreet disputes.

Copies of the Commission’s approval letter and other supporting material prepared by CFTC staff may be obtained by contacting the Commission’s Office of the Secretariat, Three Lafayette Centre, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581, (202) 418-5100.

### **Media Contacts**

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Office of External Affairs

### **Related Documents**

[Designation Memo](#)  
[DCM Order](#)  
[DCO Order](#)

## DECLARATION

I, Gregory J. Robbins, state and declare as follows:

1. I am the Chief Operating Officer and a Senior Managing Director of Mesirow Advanced Strategies, Inc., 353 North Clark Street, Chicago, IL 60654, (312) 595-7955.
2. Mesirow Advanced Strategies, Inc., is a global fund of hedge funds manager with over \$13 billion in assets under management.
3. Before joining Mesirow Financial in January of 2008, I was a partner in the Investment Funds and Advisers group at Sidley Austin LLP. I worked at Sidley Austin from September of 1999 to January of 2008.
4. My practice at Sidley Austin was focused on securities and commodities law. I specialized as well in the regulation of futures exchanges and clearing houses, and I am an expert in commodities laws and futures exchange and clearing house regulation.
5. While I was at Sidley Austin, I served as outside legal counsel for HedgeStreet, which was a client for more than five years. In my capacity as outside counsel for HedgeStreet, I advised HedgeStreet on all aspects of organizing and operating as a futures exchange and clearing house, offering and marketing the contracts traded on their exchange and cleared through their clearing house, and virtually all other aspects of their business, given that it was a heavily regulated futures exchange and clearing house that had to comply with a plethora of laws under the Commodity Exchange Act and regulations issued by the Commodity Futures Trading Commission.
6. HedgeStreet functioned as a futures exchange, as well as a futures clearing house. As an exchange, HedgeStreet served as a platform that matched buyers and sellers of futures contracts designed by HedgeStreet, and HedgeStreet's revenue was driven by the number of trades successfully matched on its exchange. As a clearing house, HedgeStreet guaranteed the performance of the futures contracts traded on its exchange by collecting the maximum possible loss value from the seller of the futures contract, holding that value until the expiration of the contract, and then paying the purchaser of the contract if the purchaser's contract was ultimately in a gain position.
7. As I understand HedgeStreet's business, HedgeStreet used 100%, and in any event at least 80% (by value), of its assets in its active business.
8. I have reviewed IRC Section 1202(e)(3). It lists those businesses that are not "qualified trades or businesses". HedgeStreet is an online futures exchange that lists contracts that may be purchased and sold directly by retail investors, or through institutional brokers. Therefore, HedgeStreet clearly falls outside of Section 1202(e)(3)(C), (D), and (E).
9. It appears that the FTB may have preliminarily concluded that HedgeStreet is a "trade or business involving the **performance of services** in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, consulting,

athletics, **financial services, brokerage services, or any trade or business where the principal asset of the trade or business is the reputation or skill of one or more of its employees.**" Section 1202(e)(3)(A) [emphasis added].

10. This conclusion makes no sense. By its plain language, Section 1202(e)(3)(A) is directed at professional services and entertainment firms. Specifically, Section 1202(e)(3)(A) applies to firms that are involved "in the performance of services" and that have as their principal asset "the reputation or skill of one or more . . . employees." HedgeStreet is not a professional services firm like a law firm, accounting firm, or the other similar firms that are specifically listed in 1202(e)(3)(A), or an entertainment firm like a performing arts or athletics firm. Instead, HedgeStreet is an exchange, like the NASDAQ or the New York Stock Exchange, where buyers and sellers of futures contracts place orders to be filled. Although like the NASDAQ and the NYSE, HedgeStreet is a financial marketplace, that is very different than being a financial services or brokerage services firm, which derive their revenues from the provision of investment advice and therefore have as their principal asset "the reputation or skill of one of more of [their] employees." HedgeStreet's principal assets are its systems used to match buyers and sellers and its regulatory licenses, which allow HedgeStreet to operate. Unlike the professional services and entertainment firms listed in 1202(e)(3)(A), HedgeStreet does not rely on the reputation or skill of its employees to generate profits, and does not count reputation or skill of its employees as a principal asset. To conclude otherwise would be to ignore the plain intent of 1202(e)(3)(A) to cover professional services and entertainment firms (as opposed to operating companies, like HedgeStreet) and the realities of HedgeStreet's business.

11. The FTB may also have preliminarily concluded that HedgeStreet is a "banking, insurance, financing, leasing, investing, or similar business" under Section 1202(e)(3)(B). Any such conclusion would be incorrect.

12. HedgeStreet does not have a banking or insurance license, and as a futures exchange is not engaged in banking or insurance activities -- HedgeStreet does not accept deposits, and does not issue insurance policies. HedgeStreet does not provide financing for any business, and similarly does not lease properties for itself or others. Additionally, HedgeStreet does not make investments for itself or others, and does not otherwise profit from movements in the price of any financial instrument. Therefore, HedgeStreet also is not a banking, insurance, financing, leasing, or investing business.

13. In addition, HedgeStreet is not similar to those types of businesses. Each of those businesses exists to generate profits through putting capital at risk. Banks depend for their profitability on making loans with capital from deposits at a higher rate than the bank pays on the deposit account. Insurance companies profit from investing premiums at a rate that outpaces claims paid. Financing businesses profit through providing capital to companies and profiting when the rates they charge or the stakes they take in those companies exceed their cost of capital. Leasing companies also depend for their profitability on a capital spread--between the cost of financing and maintaining a property on the one hand and the rental value obtained for that property on the other. Thus, each of these businesses derives its profit from the return on invested capital, and not from product or operating margins.

14. In contrast, HedgeStreet depends for its profitability on market participants buying and selling the products it offers, which are futures contracts listed on the HedgeStreet exchange. HedgeStreet charges an exchange fee for each transaction. Thus, HedgeStreet's profitability is driven solely by the volume of contracts traded multiplied by the per contract transaction fee less HedgeStreet's cost of maintaining its technology.

15. In this respect, HedgeStreet is much more like an internet company selling product, than it is like any of a bank, an insurance company, a financing company, a leasing company, or an investing company. In fact, if the FTB were to conclude that HedgeStreet is similar to those types of businesses, all retail internet businesses that sell product or offer participants the ability to trade with each other (e.g., eBay) would also need to be considered similar businesses, and such a conclusion is incorrect.

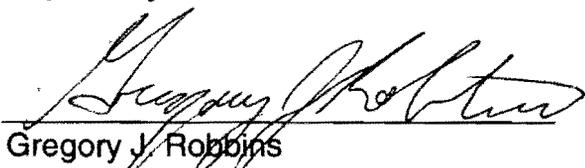
16. The FTB seems to have drawn some negative inference from the fact that HedgeStreet earns profits from exchange fees. I see no reference to exchange fees in Section 1202(e)(3)(A) or (B). Also, as noted above, the clear intent of Section 1202(e)(3)(A) is not to apply to businesses that generate fees or commissions, but instead to apply to professional services or entertainment businesses, which rely on their employees as their primary asset. Thus, the FTB's focus on exchange fees is, in my opinion, misplaced.

17. Based on the facts and the reasons stated above, HedgeStreet is not similar to the businesses listed in Section 1202(e)(3)(A) or (B).

I certify under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of November, 2013, in Chicago (Cook County), Illinois.

Respectfully submitted,

By:   
Gregory J. Robbins