



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5463
Facsimile: (202) 418-5547
gbarnett@cftc.gov

Division of Swap Dealer and
Intermediary Oversight

Gary Barnett
Director

CFTC Letter No. 14-35
Exemption
February 21, 2014
Division of Swap Dealer and Intermediary Oversight

Re: Request for Relief from the Disclosure Document Requirements of Commission Regulations 4.21, 4.24 and 4.25

Dear :

This is in response to your letter dated January 24, 2014, to the Division of Swap Dealer and Intermediary Oversight (“DSIO” or the “Division”) of the Commodity Futures Trading Commission (“Commission”), requesting on behalf of “A” or the “CPO”, the registered commodity pool operator for “B” (the “Trust” or “Pool”), certain relief from Commission Regulations 4.21, 4.24 and 4.25¹ such that the CPO would be able to provide investors with disclosure documents for certain of the series of the Trust, either in combination or separately, when discrete offerings of the Trust are made.

Based upon the representations made in your correspondence, we understand the relevant facts to be as set forth below. Formed as a Delaware Statutory Trust, the Trust constitutes a single cognizable legal entity that may sue and be sued, own property, enter into contracts and incur liabilities. Currently, the Trust is comprised of seven series: “C”, “D”, “E”, “F”, “G”, “H”, and “I”.

However, pursuant to the Delaware Act, Title 12, Section 3804(a)², each of the series is entitled to the Limitation on Inter-Series Liability, which provides that the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series are enforceable against the assets of such series only, and not against the assets of the Trust generally or any other series thereof, and none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the Trust generally or any other series thereof are enforceable against the assets of such series. To be entitled to the

¹ The Commission’s regulations referred to herein are found at 17 C.F.R. Ch. I (2013). They can be accessed through the Commission’s website at www.cftc.gov.

² 12 Del. C. § 3804(a).

Limitation on Inter-Series Liability, certain enumerated conditions must be satisfied, including, without limitation, that separate and distinct records are maintained for each series and the assets associated with such series are held in such separate and distinct records and accounted for in such separate and distinct records separately from the other assets of the Trust or any other series.

You explain that the Trust has been sponsored by the CPO for the purpose of making separately available to the public various exposures to the commodity futures markets and various commodity trading strategies. Each Series has a separate business purpose and pursues a different investment objective and investment strategy. The Trust has no assets or liabilities that are not attributable to one or another of the series and does not conduct any business except through one or another of the series.

Further, you state that the units of participation ("Shares") in each series have been registered with the Securities Exchange Commission ("SEC") under the Securities Act of 1933, as amended ("Securities Act").

Commission Regulation 4.20(a)(1) requires that a commodity pool operator "operate its pool as an entity cognizable as a legal entity." To the extent that the CPO offers discrete series of the Trust, these series are not cognizable as separate legal entities, and would not qualify as a pool pursuant to that regulation. As such, only the Trust itself would satisfy the regulatory definition of a pool. Accordingly, the CPO's obligations pursuant to Commission Regulations 4.24 and 4.25 would require reporting of the aggregated financials of the Trust, irrespective of the separated risks and strategies of each series under which the offerings of shares are made.

Currently however, the CPO operates the Trust pursuant to relief granted by the Division in a staff letter dated December 20, 2012 ("Prior Relief Letter") which permits the CPO to prepare a single combined disclosure document for the "C", the "D", the "E", the "F", the "G", and the "H", (together, the "J") as well as a separate disclosure document for the "I".

The ability to combine the "J" into a single disclosure document was based on the CPO's ability to combine such information into a common prospectus under SEC regulations. As a result of changes in the volume of certain shares outstanding ("public float") of the "G", this series is no longer eligible for continued combination with the remaining "J" in a combined prospectus under SEC regulations.

Accordingly, you request exemption from the provisions of Commission Regulations 4.21, 4.24 and 4.25 such that the CPO may prepare a combined disclosure document for the five remaining series³ as well as individual disclosure documents for each of the "G" and the "I".

Pursuant to the authority delegated to it by Regulations 140.93 and 4.12(a), and consistent with the Prior Relief Letter, the Division finds that it is consistent with the purposes of Part 4 and the public interest to provide no action relief to the Pool with respect to the

³ The five remaining series are the "C", the "D", the "E", the "F", and the "H" (collectively the "K").

requirement of Regulation 4.21 that “each commodity pool operator registered or required to be registered under the [Commodity Exchange] Act must deliver or cause to be delivered to a prospective participant in a pool that it operates or intends to operate a Disclosure Document for the pool.” Accordingly, the Division will accept modified disclosure documents with respect to the aforementioned series of the Pool that is otherwise compliant with Part 4 of the Commission’s regulations as substituted performance, subject to the following conditions.

Each disclosure document must contain all required information under Commission Regulation 4.24 for the offered series, including: the series-specific trading strategies; the Commodity Trading Advisor(s) managing the assets of the series, if applicable; the fees applicable to the offered series, including the break-even table; the plan of distribution for the offering of ownership interests in the offered series; and the risk factors specific to that series.

Additionally, each disclosure document must contain complete disclosure regarding all material aspects of the Pool, including, but not limited to, information regarding the management of the Pool and its organization; detailed disclosure regarding the material terms of the trust agreement; the tax consequences to pool participants; and identify all series being offered in the Pool. The disclosure document must also disclose to prospective participants their right to obtain information regarding other series in the Pool and the mechanism for doing so, if such information is not provided in the disclosure document.⁴

The statement below must be included in the discussion of principal risk factors as required by Commission Regulation 4.24(g):

This Fund is part of a Delaware Statutory Trust. Pursuant to Delaware law, the organization of the Trust provides that the assets and liabilities of this Fund are separate from the assets and liabilities of all other series of the Trust, as well as the larger Trust itself. Though such organization may, under state law, protect the assets of this Fund in an insolvency action brought by the creditors of another fund, or series of the Trust, this may be insufficient to protect the assets of this Fund from such creditors in an insolvency action in Federal court, or in a court in a foreign jurisdiction. Accordingly, an insolvency resulting from another series in the Trust or the Trust itself may have a material adverse effect on this Fund. The material risks associated with these

⁴ In the request letter as well and subsequent correspondence with Division staff, you note that with respect to the condition that the CPO must disclose to prospective participants their right to obtain information regarding other series in the Pool and the mechanism for doing so, that the current “I” disclosure document, prepared consistent with the Prior Relief Letter, is compliant for purposes of the “J” and the “I”. However, if relief is granted to allow the preparation of three disclosure documents for the Pool, such “I” disclosure document would not be updated to reflect the additional “G” standalone disclosure document until the next update of the “I” disclosure document. The Division therefore conditions compliance with this provision on the update of the “I” disclosure document to reflect this change no later than June 30, 2014.

separate entities have not been included in this disclosure document.

Regulation 4.24(n) requires the disclosure of past performance consistent with Regulation 4.25. For purposes of the disclosure detailed in Regulation 4.25, the Division believes that it is acceptable for the CPO to disclose the performance of the offered series consistent with the manner in which the performance of an offered pool must be disclosed under the Commission's regulations. The performance of the Pool's other series, as well as any other pools operated by the CPO and the past performance of the offered series's CTAs, must still be disclosed if the offered series does not have at least three years of trading history, consistent with Regulation 4.25(c).

When submitting a modified disclosure document, the CPO must inform the National Futures Association ("NFA") of its decision to avail itself of the substituted performance, as detailed herein, and make the following representations:

- The Pool is organized as a statutory trust in a jurisdiction whose statutes contemplate such an entity;
- The Pool's governing documents satisfy all of the requirements imposed by the Delaware Statutory Trust Act for the recognition of inter-series limited liability;
- The CPO will not commingle the property of any series of the Pool that it operates or intends to operate with the property of any other person, entity, or series of any operated Pool.
- The CPO will receive all funds, securities or other property from a prospective or existing pool participant for the purchase of an interest or an assessment on an interest in a series of the Pool that it operates or that it intends to operate in the name of the series of that Pool; and

Additionally, at the time of providing notice, the CPO must submit a copy of the duly executed documents evidencing the Pool's organization and operation as a Delaware Statutory Trust with inter-series limitation on liability to NFA.

This letter is based upon the representations made in your correspondence. Any different, changed, or omitted material facts or circumstances may render any opinion set forth in this letter void. You must notify the Division immediately in the event that the operations or activities of the CPO and/or the Pool change in any material way from those represented to the Division. Moreover, this letter represents an opinion expressed by the Division, and does not necessarily represent the views of the Commission or any other division or office of the Commission.

If you have any questions regarding this letter, please contact Amanda Olear, Associate Director or Michael Ehrstein, Attorney-Advisor at 202-418-5283 or aolear@cftc.gov and 202-418-5957 or mehrstein@cftc.gov respectively.

Very truly yours,

Gary Barnett
Director,
Division of Swap Dealer
and Intermediary Oversight