## ALIGONAL STRADING COMMISSION AND STRADING COMMISSION A

Division of Clearing and Intermediary Oversight

## U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5430
Facsimile: (202) 418-5547
aradhakrishnan@cftc.gov

Ananda Radhakrishnan Director

CFTC letter No. 07-12 July 12, 2007 Exemption; Other Written Communication Division of Clearing and Intermediary Oversight

Re: <u>Regulation 4.7</u>

Dear:

This is in response to your letter dated July 14, 2005 to the Division of Clearing and Intermediary Oversight (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by your letter dated October 5, 2005, by your e-mail messages, and by telephone conversations with Division staff (the "correspondence"). By the correspondence, you request, on behalf of "A", a registered commodity pool operator ("CPO"), exemption from the qualified eligible person ("QEP") criteria of Regulation 4.7 in connection with its operation of (the "Fund") under the facts set forth below. <sup>1</sup>

Based upon the representations made in the correspondence, we understand the relevant facts to be as follows. The Fund commenced operations in 1991. "A" filed a notice of claim of exemption under Regulation 4.7 with respect to the Fund on "E" (the "Notice"). However, at that time, "A" permitted some non-QEP participants to continue as participants in the Fund, such that currently two persons who were not QEPs at the time "A" filed the Notice are still participants in the Fund. Your request seeks an exemption permitting the CPO to continue to claim relief under Regulation 4.7, despite the ongoing participation in the Fund of these persons. You represent that, since the filing of the Notice, "A" has admitted only QEPs as participants in the Fund and that, in the future, "A" will continue to admit only QEPs.

The two Fund participants at issue are "B" and "C". "B" is a co-founder of "A" and the former business partner of the CEO of "A" ("D"). When "A" filed the Notice (in 1999), "B" was

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Broadly speaking, Regulation 4.7 provides certain relief from the disclosure, reporting and recordkeeping requirements of Part 4 of the Commission's regulations where a CPO operates a pool in which the interests are offered and sold only to "qualified eligible persons," as that term is defined in the regulation. Commission regulations referred to herein are found at 17 C.F.R. Ch. I (2007). They can be accessed through the Commission's Internet website: http://www.cftc.gov/cftc/cftclawreg.htm.

a principal of "A". Prior to that time, Commission staff had issued numerous exemptive letters permitting CPOs to treat their principals as QEPs. Subsequently, effective August 4, 2000, the Commission amended Regulation 4.7 to include principals of the CPO within the QEP definition.

In light of the foregoing representations, the Division does not believe that the continued participation of "B" in the Fund is contrary to the public interest or the purpose of Regulation 4.7 – *i.e.*, to reduce unnecessary regulatory requirements for CPOs of pools offered only to persons who meet specified criteria and who do not appear to need the full protections afforded by Part 4 of the Commission's regulations. Accordingly, pursuant to the authority delegated in Regulation 140.93(a)(1), the Division exempts "A" from the QEP criteria of Regulation 4.7 so that it may treat "B" as a QEP.

Unlike "B", "C" was not, and currently is not, a principal of the CPO. Moreover, the Division does not believe that the information you have provided is sufficient to support this portion of your request.

Accordingly, in order to continue to claim relief under Regulation 4.7 with respect to the Fund, "A" must do either of the following within sixty days of the date of this letter:

(1) provide the Division with a written statement that, with respect to "C", from the time "A" filed a notice of claim of exemption under Regulation 4.7 with respect to the Fund, "A" has complied and will comply with the disclosure, reporting and recordkeeping requirements of Part 4 of the Commission's regulations as if "A" had not claimed exemption under Regulation 4.7; or

<sup>&</sup>quot;B" signed the Notice as President of "A". Registration records show that "B" withdrew as a principal of "A" on February 10, 2004.

<sup>&</sup>lt;sup>3</sup> See, e.g., CFTC Staff Letter No. 00-32 [1999 - 2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,066 (Feb. 29, 2000); and CFTC Staff Letter No. 99-53 [1999 - 2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,951 (Nov. 30, 1999).

<sup>&</sup>lt;sup>4</sup> See, 65 Fed. Reg. 47848 (Aug. 4, 2000).

<sup>&</sup>lt;sup>5</sup> See, 57 Fed. Reg. 3148 at 3150 (Jan. 28, 1992).

In the past, Commission staff has provided relief where a pool with one or more non-QEPs was converted to an exempt pool under Regulation 4.7, so long as the non-QEPs continued to receive the disclosure and financial reports the CPO was obliged to deliver prior to claiming exemption under Regulation 4.7. *See, e.g.*, CFTC Staff Letter No. 93-1 [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,531 (Dec. 10, 1992). Indeed, staff issued an Advisory to specifically alert interested persons to the availability of the relief. *See, Advisory for* 

## (2) redeem "C's" interest in the Fund.

This letter does not excuse "A" from compliance with any other applicable requirements contained in the Commodity Exchange Act (the "Act")<sup>7</sup> or in the Commission's regulations issued thereunder. For example, "A" remains subject to all antifraud provisions of the Act and the Commission's regulations, to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations, and to all other applicable provisions of Part 4. Also, this letter is applicable to "A" solely in connection with its operation of the Fund.

This letter is based upon the representations made to us. Any different, changed or omitted material facts or circumstances might render this letter and the exemption granted herein void. In this connection, you must notify us immediately in the event that the operations of "A" or the Fund change in a material way from those represented to us. Further, the exemption granted in this letter is prospective only. The Division takes no position with respect to the participation of any non-QEP in the Fund prior to the date hereof.<sup>8</sup>

*Interpretative Letters Nos. 93-1 and 93-2*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,935 (Jan. 7, 1993).

In this regard, the Division notes that, in adopting Regulation 140.99, which governs the issuance by Commission staff of exemptive, no-action and interpretative letters, the Commission stated that:

In the absence of extraordinary circumstances, a Letter issued with regard to ongoing activities will be prospective in terms of its coverage (and will not cover past activities or transactions). Thus, a Letter will not ordinarily relieve the person for whose benefit it is issued from the consequences of noncompliance that pre-dates the Letter. Nevertheless, persons (or their counsel) who become aware that their activities are not in compliance with the Act or Commission rules are urged to contact the staff as soon as possible. Although the staff generally reserves the right to refer prior violations for enforcement action in appropriate situations, the good faith demonstrated by efforts to regularize non-complying activities on a "going forward" basis will be carefully considered. 63 Fed. Reg. 68175 at 68176 (December 19, 1998).

<sup>&</sup>lt;sup>7</sup> 7 U.S.C. §1 *et seq.* (2000). The Act may be accessed at http://www.access.gpo.gov/uscode/title7/chapter1\_.html

If you have any questions concerning this correspondence, please contact me or Christopher W. Cummings, Special Counsel, at (202) 418-5445.

Very truly yours,

Ananda Radhakrishnan Director