



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

Division of Clearing and
Intermediary Oversight

Ananda Radhakrishnan
Director

CFTC Letter No. 08-02
January 29, 2008
Exemption
Division of Clearing and Intermediary Oversight

Re: Regulations 4.21, 4.22 and 4.23
Request for exemption from certain Disclosure Document, reporting and
recordkeeping requirements in connection with the operation of certain
commodity pools listed for trading on a national securities exchange

Dear :

This is in response to your letter dated November 21, 2007, to the Division of Clearing and Intermediary Oversight (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by subsequent letters and e-mail messages (the "correspondence").¹ By the correspondence, you request, on behalf of "A", a registered commodity pool operator ("CPO"), exemption from certain provisions of Commission Regulations 4.21, 4.22, and 4.23,² which concern, respectively, the disclosure, reporting and recordkeeping requirements applicable to registered CPOs, in connection with "A" serving as the registered CPO of certain commodity pools. Specifically, those pools are the "B" (in operation since _____); the "C" (in operation since _____); and the "D" (in operation since _____) (each a "Fund" and collectively the "Funds"). We note, as a preliminary matter, your representation that to date, "A" has been in compliance with the regulations from which it now seeks exemption with respect to its operation of each Fund.

Based upon the representations made in the correspondence, we understand the facts to be as follows: The offering and sale of units of participation ("Shares) of each Fund has been made pursuant to an effective registration statement filed with the Securities and Exchange Commission ("SEC") (the "Registration Statement"), and each Fund's Shares have been listed

¹ The letters were dated November 28, 2007, December 10, 2007 and December 26, 2007, and the e-mail messages were sent November 28, 2007 and January 23, 2008.

² Commission regulations referred to in this letter are found at 17 C.F.R. Ch. I (2007). They can be accessed through the Commission's website, at:
<http://www.cftc.gov/cftc/cftclawreg.htm>.

for trading on a national securities exchange (the “E”).³ Each Fund has been structured and will be operated in a manner substantially similar to an exchange-traded fund, or ETF. The sale of Shares of a Fund to the Authorized Purchasers (as defined in the correspondence) will be conducted only in compliance with Regulation 4.21. Authorized Purchasers have received (and they have provided to “A” written acknowledgement of such receipt) a Disclosure Document, which complies in full with the requirements in Part 4 of the Commission’s regulations, and which “A” updates in accordance with Commission requirements. The current Disclosure Document for each Fund is posted on the Internet websites maintained by “A” or the Fund (the “Website Sources”), and “A” expects that prospective or actual investors utilize the services of a registered broker-dealer, who either informs them where they can obtain the current Disclosure Document, or, upon request, delivers a copy of the current Disclosure Document. The same information that would otherwise be provided in each Fund’s monthly Account Statements, including the Funds’ net asset value and the certification required by Rule 4.22(h), is readily available via the Website Sources, of which availability the Disclosure Document advises participants.

You state that certain books and records of each Fund are kept by the Funds’ administrator, “F”, a banking corporation subject to regulation by the “G”, at the address as specified in your November 21, 2007 letter. “F” has provided the Division with a signed acknowledgment (“Acknowledgment”) that the books and records of the Funds may be inspected and copied by any representative of the Commission or the United States Department of Justice and may be inspected and copied during normal business hours by Fund participants. Included are schedules specifying the classes of books and records, by subparagraph of Regulation 4.23, that “F” will be keeping.

You further ask for confirmation that “F” will not be deemed to be acting as a CPO solely by reason of keeping the Funds’ records in the manner described in your correspondence, which the Division hereby so confirms. In this regard, the Division notes that “F” will not be acting in the manner contemplated by the statutory definition of a “commodity pool operator” – *e.g.*, it will not be promoting the pool by soliciting, accepting or receiving from others property for the purpose of commodity interest trading, and will not have the authority to hire (and to fire) a

³ Your request assumes, and each Fund’s Registration Statement states, that the Shares are securities for purposes of the U.S. federal securities laws and will be offered, sold and transferred as such. While we may not necessarily agree with this categorization, the Division will not recommend that the Commission commence any enforcement action against a Fund or market participants in connection with the offer, sale and transfer of Shares in the manner contemplated by your request and the Disclosure Documents for the Funds.

Further, you have represented that “E” listing does not affect “A’s” obligation to comply with any other provision of the Commodity Exchange Act (the “Act”) or the Commission’s regulations issued thereunder applicable to CPOs in particular or to persons in general. The Act is found at 7 U.S.C. §1, *et seq.* (2000), and also may be accessed through the Commission’s website, at: <http://www.cftc.gov/cftc/cftclawreg.htm>.

Fund's commodity trading advisor, and to select (and to change) a Fund's futures commission merchant.⁴

Based upon the representations made in the correspondence, the Division believes that granting your request would not be contrary to the public interest and to the purposes of the regulations at issue. Accordingly, pursuant to the authority delegated in Regulation 140.93(a)(1), the Division hereby exempts "A" in connection with the operation of the Funds from: (1) the requirement of Regulation 4.21(b) to obtain a signed acknowledgment of receipt of a Disclosure Document before accepting funds, securities or property from a prospective pool participant with respect to sales of Shares by Authorized Purchasers when Authorized Purchasers create additional Creation Baskets, provided that the information required to be contained in the Disclosure Document is maintained and kept current on the Website Sources; (2) the requirement of Regulation 4.22 to deliver monthly Account Statements to purchasers of Shares, provided that the information that would otherwise be contained in such reports is maintained on the Fund and "A" websites; and (3) the requirement of Regulation 4.23 to keep required books and records at "A's" main business office to the extent that such books and records are maintained at the offices of "F" (collectively, the "Relief").

Your letter also seeks the Relief for pools that "A" is in the process of establishing, as well as "any similarly structured funds it may establish in the future." ("Future Funds")⁵ In this regard, by the correspondence you represent the following (the "Future Fund Representations") for each such Future Fund: (1) Shares will be offered to the public pursuant to an effective registration statement under the Securities Act of 1933; (2) Shares will be listed for trading on a national securities exchange; (3) "A" will sell Future Fund Shares directly only to Authorized Purchasers; (4) "A" will maintain each Future Fund's Disclosure Document on "A's" or the Future Fund's Internet website and will keep the Disclosure Document current pursuant to Regulation 4.26; (5) "A" will make the Future Fund's monthly Account Statements available on "A's" or the Future Fund's Internet website, and will clearly disclose such availability in the Future Fund's Disclosure Document; and (6) Future Fund books and records not maintained at "A's" main business office will be kept by "F", who, as a condition precedent to "A's" availing itself of the Relief for the Future Fund, will have submitted to NFA an Acknowledgment and

⁴ See, e.g., 49 Fed. Reg. 4778, 4780 (Feb. 2, 1984) (Commission acknowledged staff practice of employing these criteria in determining whether a person is, or is not, a CPO); and CFTC Staff Letter No. 06-27 92005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,397 (Sep. 26, 2006) (Division granted a CPO an exemption to keep pool books and records with the pool's administrator and its distributor, neither of which was thereby deemed to be acting as a CPO of the pool.)

⁵ Three new funds are currently in the process of registration with the Securities and Exchange Commission ("SEC") and have had their prospectuses/Disclosure Documents reviewed by the National Futures Association ("NFA") and the Financial Industry Regulatory Authority ("FINRA").

schedule of books and records it intends to keep under the Relief, in the same form as it has submitted in connection with “A’s” request of Relief for the Funds.

Accordingly, pursuant to the authority delegated in Regulation 140.93(a)(1), “A” may claim the Relief for any Future Fund it operates by filing a notice with NFA identifying the Future Fund and stating therein that the Future Fund Representations are true and correct with respect to the Future Fund so identified.

Consistent with prior practice,⁶ any exemption effective hereunder from the books and records location requirement of Regulation 4.23 is subject to the conditions that: (1) “A” notify the Division and NFA if the location of any of the books and records required to be kept by Regulation 4.23 changes from that as represented to the Division; (2) “A” remain responsible for ensuring that all books and records required by Regulation 4.23 are kept in accordance with Regulation 1.31 and for assuring the availability of such books and records to the Commission, NFA, and any other agency authorized to review such books and records in accordance with the Act and Commission regulations; (3) within forty-eight hours after a request by a representative of any of the foregoing, “A” obtain the original books and records from “F’s” offices in _____, and will provide them for inspection at “A’s” main business office in _____; (4) “A” disclose in the Disclosure Document of each Fund or Future Fund, as the case may be, the location of its books and records that are required under Regulation 4.23; and (5) “A” remain fully responsible for compliance with Regulation 4.23.

This letter exempts “A” from Regulations 4.21, 4.22 and 4.23, as stated above. It does not excuse “A” from compliance with any other aspect of the Commission’s disclosure, reporting and recordkeeping requirements for registered CPOs, nor does it excuse “A” from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder. For example, “A” remains subject to Regulation 1.31, and the Commission maintains its right under that regulation to inspect the required books and records of “A” at “F’s” offices in _____. Additionally, “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.

This letter is based upon the representations made to us and is subject to compliance with the conditions set forth above. Any different, changed or omitted material facts or circumstances might render this letter and the exemptions granted herein void. In this connection, you must notify us immediately in the event that the operations of “A”, a Fund or a Future Fund change in any material way from those represented to us.

⁶ See, e.g., Staff Letter 06-27.

Page 5

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