



## 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. 08-04  
February 26, 2008  
Exemption  
Division of Clearing and Intermediary Oversight

Re: Regulation 4.23 – Request for exemption from requirement to keep books and records at a CPO’s main business office

Dear :

This is in response to your letter dated from February 1, 2008, to the Division of Clearing and Intermediary Oversight (the “Division”) of the Commodity Futures Trading Commission (the “Commission”), as supplemented by telephone conversations between Division staff and “A”, Director of Compliance of “B” (the “correspondence”). By the correspondence, you request, on behalf of “B”, a registered commodity pool operator (“CPO”), exemption from certain provisions of Commission Regulation 4.23.<sup>1</sup>

Regulation 4.23 specifies the types of books and records a registered CPO must make in the course of operating a pool, and requires that those books and records be kept at the CPO’s main business office. The books and records must be available to pool participants for inspection and copying during normal business hours, and must be open and available for inspection by any representative of the Commission or the United States Department of Justice. The purpose of the regulation is “to enable pool participants and the Commission to ascertain whether the CPO is dealing properly with pool funds.”<sup>2</sup>

Based upon the representations made in the correspondence, we understand the relevant facts to be as follows. “B” has contracted with two firms to perform administrator, registrar and transfer agent functions, including keeping and maintaining required books and records, with respect to the pools “B” operates. “C” will perform such services with respect to “B’s” U.S.

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<sup>1</sup> 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>.

<sup>2</sup> 44 Fed. Reg. 1918 at 1922 (Jan. 8, 1979).

commodity pools (the “U.S. Pools”),<sup>3</sup> and “D” will perform such services with respect to “B’s” offshore commodity pool (the “Offshore Pool”).<sup>4</sup> “C” has agreed to maintain books and records required under Regulation 4.23(a)(1), (2), (4), (5), (6) and (8). Pursuant to a claim of exemption under Regulation 4.7, “B”, as the CPO of the Offshore Pool, is exempt from the specific requirements of Regulation 4.23, provided that “B” maintains the periodic reports and annual reports and all books and records prepared in connection with its activities as the CPO of the offshore pool (including without limitation, records relating to the qualifications of qualified eligible persons and substantiating any performance representations). Accordingly, “D” has agreed to maintain the records required under the proviso in Regulation 4.7(b)(4).

In order for “B” to be able to avail itself of the contractual provisions under which “C” and “D” would keep and maintain books and records for “B’s” pool, you request exemption from the location requirement of Regulation 4.23(a), such that books and records of the U.S. Pools may be kept by “C”, and from Regulation 4.7(b)(4), such that books and records of the Offshore Pool may be kept by “D”. “C” intends to keep such books and records at either “E”, or at “F”. “D” intends to keep such books and records at “G”.

You further ask for the same relief with respect to any future commodity pool for which “B” serves as the registered CPO.

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 “B” in connection with the operation of the U.S. Pools and the Offshore Pool from the requirements of Regulations 4.23 and 4.7 to keep required books and records at “B’s” main business office to the extent that such books and records are maintained at the offices of “C” or “D”, respectively. Consistent with prior practice,<sup>5</sup> the exemption from the books and records location requirement of Regulations 4.23 and 4.7 is subject to the conditions that: (1) “B” notify the Division if the location of any of the books and records required to be kept by Regulation 4.23 or Regulation 4.7 changes from that as represented to the Division; (2) “B” remain responsible for ensuring that all books and records required by Regulations 4.23 and 4.7 are kept in accordance with Regulation 1.31 and for assuring the availability of such books and records to the Commission, the National Futures Association (“NFA”), and any other agency authorized to review such books and records in accordance with the Commodity Exchange Act

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<sup>3</sup> The U.S. Pools are: “H”; “I”; “J”; “K”; “L”; “M”; “N”; and “O”.

<sup>4</sup> The Offshore Pool is “P”, an “X” domiciled public commodity pool.

<sup>5</sup> *See, e.g.*, CFTC Staff Letter 06-27 [2005-2007 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, subject to Commission and Department of Justice access, and continued responsibility of the CPO for compliance with recordkeeping requirements.)

(the “Act”)<sup>6</sup> and Commission regulations; (3) within forty-eight hours after a request by a representative of the foregoing (seventy-two hours in the case of books and records maintained by “D”), “B” obtain the original books and records from “C’s” offices or from “D’s” offices, as the case may be, and provide them for inspection at “B’s” main business office in “Q”; (4) “B” disclose in each U.S. Pool’s Disclosure Document and the Offshore Pool’s offering memorandum the location of its books and records that are required under Regulation 4.23 or Regulation 4.7, respectively; and (5) “B” remain fully responsible for compliance with Regulations 4.23 and 4.7.

With respect to any additional pool that “B” may operate in the future, the exemption provided above will apply, provided that the pool’s records that are not maintained at “B’s” main business office are maintained at the office of “C” or “D”, and provided further, that the representations made in this letter are true and the conditions stated above are met. In this regard, “B” must notify NFA in writing of the name of each such additional pool, and represent that “B” qualifies for the exemption as provided herein in connection with its operation of the pool.

This letter exempts “B” from provisions of Regulations 4.23 and 4.7, as stated above. It does not excuse “B” from compliance with any other aspect of the Commission’s disclosure, reporting and recordkeeping requirements for registered CPOs, nor does it excuse “B” from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder. For example, “B” remains subject to Regulation 1.31, and the Commission maintains its right under that regulation to inspect the required books and records of “B” at “C’s” offices and at “D’s” offices.<sup>7</sup> Additionally, “B” remains subject to all antifraud

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<sup>6</sup> 7 U.S.C. §1, *et seq.* (2000). The Act can be accessed through the Commission’s website, at: <http://www.cftc.gov/cftc/cftclawreg.htm>.

<sup>7</sup> Each of the service agreements between “B” and “C” for the U.S. Pools specifies which classes of records “C” intends to retain and provides that such records may be inspected by representatives of the Commission, NFA and U.S. Department of Justice “during normal business hours,” and that such records will be maintained for five years (and kept readily accessible during the first two years of such period). You represent that each of these agreements is identical in these respects, and you have provided as an example the relevant text from one of the agreements. A letter agreement between “B” and “D” provides that “D” intends to retain the records required under Regulation 4.7, that such records may be inspected by representatives of the Commission, NFA and U.S. Department of Justice “during normal business hours”, and that such records will be maintained for five years (and kept readily accessible during the first two years of such period). However, neither Regulation 4.23, 4.7, nor 1.31 (which is the Commission’s general recordkeeping regulation) limits to “normal business hours” the time during which a CPO’s books and records may be inspected by representatives of the Commission, NFA or the U.S. Department of Justice. Neither does the exemptive relief provided by this letter in any way modify the rights of the Commission, NFA or the U.S.

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 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 "B", "C" or "D" change in any material way from those represented to us.

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