



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and
Intermediary Oversight

Ananda Radhakrishnan
Director

CFTC Letter No. 08-15
August 20, 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 June 5, 2008, to the Division of Clearing and Intermediary Oversight (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by subsequent letters ("correspondence").¹ By the correspondence, you request on behalf of a registered commodity pool operator ("CPO"), ("The 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 The CPO's operation of certain commodity pools. Specifically, those pools are: (each a "Fund" and collectively, "Funds").

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 will be made pursuant to an effective registration statement filed with the Securities and Exchange Commission ("SEC") (the "Registration Statement"), and each Fund's Shares will be listed for trading on a national securities exchange.³ Each Fund has been structured and will be operated

¹ The letters were dated June 27, July 21, and August 4, 2008.

² Commission regulations referred to in this letter are found at 17 C.F.R. Ch. I (2008). They can be accessed through the Commission's website, at:
<http://www.cftc.gov/cftc/cftclawreg.htm>.

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

in a manner substantially similar to an exchange-traded fund, or ETF. As is explained more fully in the correspondence, the sale of Shares of a Fund to Authorized Participants will be conducted in compliance with Regulation 4.21. Authorized Participants will receive (and will provide to The CPO 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 The CPO will update in accordance with Commission requirements. The current Disclosure Document for each Fund will be posted on the Internet website maintained by The CPO, and The CPO expects that prospective and actual investors will utilize the services of a registered broker-dealer, who either will inform them where they can obtain the current Disclosure Document, or, upon request, will deliver a copy of the current Disclosure Document. The same information that would otherwise be provided in each Fund's monthly Account Statements, including the Fund's net asset value and the certification required by Regulation 4.22(h), similarly will be readily available via The CPO's website, and the Fund's Disclosure Document will advise participants of this location.

You state that The CPO intends that certain books and records of each Fund will be kept by the Funds' administrator and custodian, an "Alternate Recordkeeper", a banking corporation subject to regulation by the New York State Banking Department, at the address specified in your August 4, 2008 letter.⁴ This Alternate Recordkeeper has provided the Division with a signed 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 this Alternate Recordkeeper will be keeping (an "Alternate Recordkeeper Acknowledgement").

You further ask for confirmation that this Alternate Recordkeeper 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 this Alternate Recordkeeper 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

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 in this regard, we note that listing on a national securities exchange does not affect The CPO'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>.

⁴ That address is: "A"

will not have the authority to hire (and to fire) a Fund's commodity trading advisor, and to select (and to change) a Fund's futures commission merchant.⁵

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 The CPO in connection with its 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 Participants when Authorized Participants create additional Creation Baskets, provided that the information required to be contained in the Disclosure Document is maintained and kept current on The CPO's website;⁶ (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 CPO's website; and (3) the requirement of Regulation 4.23 to keep required books and records at The CPO's main business office to the extent that such books and records are maintained at the offices of the Alternate Recordkeeper (collectively, "Relief").

You also seek the Relief for "any similarly structured" commodity pools that The CPO may establish in the future ("Future Funds"). In this regard, by the correspondence you represent the following 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) The CPO will sell Future Fund Shares directly only to Authorized Participants; (4) The CPO will maintain the Future Fund's Disclosure Document on its website and will keep the Disclosure Document current pursuant to Regulation 4.26; (5) The CPO will make the Future Fund's monthly Account Statements available on its website, and will clearly disclose such availability in the Future Fund's Disclosure Document; and (6) Future Fund books and records not maintained at The CPO's main business office will be kept by an Alternate Recordkeeper ("Future Fund Representations").

Accordingly, pursuant to the authority delegated in Regulation 140.93(a)(1), and subject to the conditions stated below, The CPO 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.

⁵ 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. 08-01 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,795 (Jan. 11, 2008) (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.)

⁶ You also have requested exemption from Regulation 4.21(a). However, inasmuch as The CPO will be delivering a Disclosure Document for each Fund to prospective participants – albeit through an alternate means – the Division is declining to grant this request.

Consistent with prior practice,⁷ the exemption from the books and records location requirement of Regulation 4.23 is subject to the conditions that: (1) The CPO 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) The CPO 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, The CPO obtain the original books and records from an Alternate Recordkeeper's offices at the address previously specified, and will provide them for inspection at The CPO's main business office in Maryland; (4) The CPO 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) The CPO remain fully responsible for compliance with Regulation 4.23. Moreover, as a condition precedent to The CPO availing itself of the exemption from the books and records location requirement of Regulation 4.23 granted above with respect to a Future Fund, The CPO must deliver, or cause to be delivered, to NFA an Alternate Recordkeeper Acknowledgment and a schedule of the location of the required books and records.

This letter exempts The CPO from Regulations 4.21, 4.22 and 4.23, as stated above. It does not excuse The CPO from compliance with any other aspect of the Commission's disclosure, reporting and recordkeeping requirements for registered CPOs, nor does it excuse The CPO from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, The CPO remains subject to Regulation 1.31, and the Commission maintains its right under that regulation to inspect the required books and records of The CPO at the offices of any person who has executed an Alternate Recordkeeper Acknowledgment. Additionally, The CPO 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 The CPO, a Fund or a Future Fund change in any material way from those represented to us.

⁷ See, e.g., Staff Letter 08-01.

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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