



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and
Intermediary Oversight

Kevin P. Walek
Assistant Director

CFTC Letter No. 09-10
Exemption
May 19, 2009
Division of Clearing and Intermediary Oversight

Re: "A", a registered commodity pool operator for "B"

Dear :

This is in response to your correspondence dated March 31, 2009, to the Division of Clearing and Intermediary Oversight ("Division") of the Commodity Futures Trading Commission ("Commission"), as well as subsequent communications with Division staff. You request on behalf of "A," the commodity pool operator ("CPO") for "B" (the "Pool), an exemption from the requirement of Commission Regulation 4.12(b)(2)(iii), which requires the CPO to file an annual report for the Pool within 90 calendar days of the end of the Pool's fiscal year (here, December 31, 2008) that satisfies the requirements of Regulation 4.12(b)(2)(iii)(A) and (B).¹ You additionally request on behalf of the CPO an exemption from the requirements of Commission Regulation 4.22(c), which requires the CPO to file a final liquidation report for the Pool within 90 days of the permanent cessation of trading. You finally request on behalf of the CPO an exemption from the requirement of Commission Regulation 4.12(b)(2)(iii)(B), which requires the Pool's annual report be certified by an independent public accountant, and an exemption from the requirement of Commission Regulation 4.22(d), which requires the Pool's final liquidation report be certified by an independent public accountant.

You propose instead that the CPO be permitted to file a single, uncertified, 15-month report, styled as a report "in liquidation," and covering the period from January 1, 2008 through March 31, 2009. You request that this final "in liquidation" report satisfy both the annual report for the Pool required under Commission Regulation 4.12(b)(2)(iii) and the final liquidation report for the Pool required under Commission Regulation 4.22(c).

Based upon the representations made in your correspondence, we understand the facts to be as follows. The CPO has filed an exemption from registration for the Pool under Commission Regulation 4.12(b). You state that as of August 6, 2008, the Pool had closed out any commodity trading positions. You state that, as of August 21, 2008, the CPO, upon informing Pool participants, commenced liquidation of the Pool. Participants were given two options in the

¹ Commission Regulations referred to herein are found at 17 C.F.R. Ch. I (2009).

liquidation: Option One - participants could either cash-out their entire interest as of September 30, 2008; or Option Two - participants could receive cash distributions for the liquid portion of their interest in the Pool, retaining a proportionate interest in the Pool's remaining illiquid investment. You state that the Pool's remaining illiquid investment (the "illiquid investment") is a limited partnership interest in a private partnership.

By September 11, 2008, the CPO had successfully liquidated all assets, except for the remaining illiquid investment. An audit of the Pool's financial statements was completed for the period of January 1, 2008 through September 30, 2008. Total assets as of the September 30, 2008 final valuation date amounted to \$8X,XXX,XXX, and were comprised as follows:

- \$7X,XXX,XXX in capital withdrawals payable (XX.X% of the Pool's total assets);
- \$10,XXX,XXX in the illiquid investment (XX.X% of the Pool's total assets);
- \$3XX,XXX in net other assets to be withheld as reserve until the final distribution (X.X% of the Pool's total assets).

Approximately XX% of the total participants' capital (XX total participants) chose Option Two, thereby receiving a distribution of XX.X% of their respective capital. Approximately XX% of the total participants' capital chose Option One, thereby receiving a distribution of 100.0% of their respective capital. The CPO distributed the entire amount of capital withdrawals payable, \$7X,XXX,XXX, to the Pool's participants.

You have additionally represent that the CPO has not deducted from or charged to the Pool any form of management fee since September 30, 2008, nor has the Pool incurred any expenses since that date (the only cash outflows since September 30, 2008 have been the payment of fees and expenses that were accrued prior to September 30, 2008).

Commission Regulation 4.12(b)(2)(iii) requires a CPO to file an annual report, satisfying the requirements of Regulation 4.12(b)(2)(iii)(A) and (B), on behalf of a 4.12(b)-exempt Pool within 90 calendar days of the end of the Pool's fiscal year. Commission Regulation 4.12(b)(2)(b)(iii)(B) requires that the annual report filed pursuant to Regulation 4.12(b)(2)(iii) be certified by an independent public accountant. Commission Regulation 4.22(c) requires a CPO to file a final liquidation report on behalf of a Pool within 90 calendar days of the permanent cessation of trading in order to terminate the CPO's obligations under Part 4 of the Commission's Regulations. Commission Regulation 4.22(d) requires that a final liquidation report filed pursuant to Regulation 4.22(c) be certified by an independent public accountant.

Pursuant to the CPO's plan to orderly liquidate the Pool's remaining illiquid investment, you request, an exemption from the requirement of Commission Regulation 4.12(b)(2)(iii), which requires the CPO to file an annual report for the Pool within 90 calendar days of the end of the Pool's fiscal year, December 31, 2008. You additionally request on behalf of the CPO an exemption from the requirements of Commission Regulation 4.22(c), which requires the CPO to file a final liquidation report for the Pool within 90 days of the permanent cessation of trading. You finally request on behalf of the CPO an exemption from the requirement of Commission

Regulation 4.12(b)(2)(iii)(B), which requires the Pool's annual report be certified by an independent public accountant, and an exemption from the requirement of Commission Regulation 4.22(d), which requires the Pool's final liquidation report be certified by an independent public accountant. You propose instead that the CPO be permitted to file a single, uncertified, 15-month report, styled as a report "in liquidation," and covering the period from January 1, 2008 through March 31, 2009. You request that this final "in liquidation" report constitute the annual report for the Pool required under Commission Regulation 4.12(b)(2)(iii) and the final liquidation report for the Pool required under Commission Regulation 4.22(c).

The Division has determined that, under the circumstances delineated above and pursuant to the authority delegated by Regulation 140.93 and 4.12(a), a single, uncertified, 15-month report, styled as a report "in liquidation," and covering the period from January 1, 2008 through March 31, 2009 is acceptable as a liquidation report would satisfy the CPO's obligations under Part 4, despite the fact that the Pool is unable to make a final distribution to participants due to its remaining illiquid investment. This relief is conditioned upon the Pool's 15-month "in liquidation" report including a subsequent event footnote explaining that the Pool is currently in liquidation, but due to the illiquid nature of certain assets, the Pool cannot presently provide its participants with a final liquidation report. In addition, the Pool's 15-month "in liquidation" report must be filed with the Commission and distributed to the Pool's remaining participants, and must disclose the following:

- The Pool has ceased trading;
- A description of and the pertinent facts regarding the illiquid investment, including, but not limited to, the value of the illiquid investment;
- A representation that no additional management fees will be deducted from or charged to the assets held by the Pool;
- The pertinent facts regarding the disposition of any income generated by the illiquid investment held by the Pool, if any, and
- A representation regarding the distribution of assets on a pro rata basis to participants.

This relief is further conditioned upon the CPO providing quarterly reports to its participants until the Pool has fully completed its liquidation. Additionally, the CPO must make a final disclosure that is to be both filed with the Commission and distributed to the Pool's participants representing that all interests in and assets of the Pool have been redeemed, distributed or transferred on behalf of the Pool's participants.

If the CPO is unable or unwilling to make the above listed representations to the Commission and the Pool's participants or does not otherwise wish to liquidate the Pool, the CPO must continue to comply with the requirements of Part 4.

Page 4

This relief is based upon the representations that you have made to the Division. Any different or omitted facts may result in a different determination. Should you have any questions, please do not hesitate to contact me at (202) 418-5463, or Amanda Olear, a member of my staff, at (202) 418-5283.

Very truly yours,

Kevin P. Walek

cc: Regina Thoele, Compliance
National Futures Association, Chicago