



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and
Intermediary Oversight

Ananda Radhakrishnan
Director

CFTC Letter No. 09-36
Interpretation
August 3, 2009
Division of Clearing and Intermediary Oversight

Re: Regulation 4.10(d) and Section 1a(5) of the Act

Dear :

This is in response to your letter dated July 1, 2009, to the Division of Clearing and Intermediary Oversight (“DCIO” or “Division”) of the Commodity Futures Trading Commission (“Commission”), as supplemented by your email dated July 15, 2009 (“correspondence”). By the correspondence, you request the Division to confirm your interpretation that The (“Foundation”) would not be a commodity “pool” as that term is defined in Commission Regulation 4.10(d)¹ and, accordingly, that no “Foundation related party”² would be a commodity pool operator (“CPO”) as that term is defined in Section 1a(5) of the Commodity Exchange Act (“Act”)³ if the Foundation trades commodity interests.⁴

¹ Commission regulations referred to herein are found at 17 CFR Part 1 (2009). They can be accessed through the Commission’s website, www.cftc.gov.

² The correspondence defines this term to include “without limitation, any member, director or officer of the Foundation acting in such capacity.” “A”, a director and officer of the Foundation and the sole member of the investment committee of the Board of Directors of the Foundation, authorized the filing of the request. The other member of the Board of Directors is “B”.

³ 7 U.S.C. 1a(5) (2006). The Act similarly can be accessed through the Commission’s website.

⁴ Alternatively, you request a “no-action letter” from DCIO stating that the Division will not recommend that the Commission commence any enforcement against any Foundation related party for failure to register as a CPO in the event the Foundation trades commodity interests. In light of the position taken below, it has been unnecessary for the Division to separately consider this alternate request.

Based upon the representations made in the correspondence, we understand the relevant facts to be as follows: The Foundation is qualified as a charitable organization under Section 501(c)(3) of the Internal Revenue Code of 1986 (“Section”), with its purpose being to make grants to charitable, educational, scientific or literary organizations which themselves qualify under the Section (“Charitable Organizations”). It has been primarily funded through charitable contributions by three siblings (“Donors”), although it may in the future receive contributions from other sources. No Donor, or any other source who may make contributions in the future, will, under any circumstance, be entitled to receive any of the assets, net earnings, income or profits of the Foundation. Similarly, no Charitable Organization has any entitlement on an annual or other basis to a contribution from the Foundation. While it is possible that the Foundation would elect in its discretion to give the same Charitable Organization a contribution more than once, as a rule, the recipients of contributions from the Foundation vary from year to year.

The Foundation is authorized to invest its assets in securities and commodities (including commodity interests). To date, it has not, however, traded commodities.

Regulation 4.10(d)(1) defines the term commodity “pool” to mean “any investment trust, syndicate or similar enterprise operated for the purpose of trading commodity interests.” Section 1a(5) of the Act defines the term “commodity pool operator” to mean “any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise and who, in connection therewith, solicits, accepts or receives from others, funds . . . for the purpose of trading [commodity interests].

In *Lopez v. Dean Witter Reynolds, Inc.*⁵ the Court noted that those (other) courts which had raised the issue of what criteria were necessary to find that a trading vehicle was a commodity pool required, among others, the following factors to be present: (1) an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity futures contracts; and (2) participants share pro rata in accrued profits or losses from the commodity futures trading. Neither of these criteria is present in the instant case. Indeed, there are no pool “participants,” as that term is defined in Regulation 4.10(c), in the Foundation inasmuch as no person has any direct financial interest in the Foundation, as a limited partner or otherwise.

Accordingly, based upon the representations you have made to us, the Division believes that the Foundation would not be a commodity pool if it traded commodity interests and that no Foundation related party would be a CPO thereof.

This letter is applicable to the Foundation and the Foundation related parties solely in connection with a determination of whether they come within Regulation 4.10(d)(1) or Section 1a(5) of the Act, respectively. It does not excuse the Foundation or any Foundation related party

⁵ 805 F.2d 880 (9th Cir. 1986).

from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, the Foundation remains a "person" for purposes of the Act and the regulations and, as such, is subject to all of the antifraud provisions of the Act and the Commission's regulations and to the reporting requirements for traders set forth in Parts 15, 18, and 19 of the regulations.

This letter is based upon the representations made in the correspondence. Any different, changed, or omitted material facts or circumstances might render the interpretations taken in this letter void. You must notify us immediately in the event that the operations or activities of the Foundation or any Foundation related party change in any material way from those represented to the Division. Moreover, this letter represents an interpretation of the Division only and does not necessarily represent the views of the Commission or any other division or office of the Commission.

If you have any questions regarding this letter, please contact Barbara S. Gold, Associate Director, DCIO, at (202) 418-5450.

Very truly yours,

Ananda Radhakrishnan
Director