



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and
Intermediary Oversight

Ananda Radhakrishnan
Director

CFTC Letter No. 10-06
No Action; Exemption
March 29, 2010
Division of Clearing and Intermediary Oversight

Re: Section 4m(1); Regulations 4.21, 4.22 and 4.23

Dear :

This is in response to your letter dated October 20, 2006 to the Division of Clearing and Intermediary Oversight (the "Division") of the Commodity Futures Trading Commission (the "Commission" or "CFTC"), as supplemented by letters and e-mail messages to Division staff dated from October 31, 2006 to December 12, 2009, (the "correspondence"). By the correspondence, you request, on behalf of certain trustees (the "Individual Trustees") of the Fund,¹ relief from the requirement under Section 4m(1) of the Commodity Exchange Act (the "Act")² to register as a commodity pool operator ("CPO"), such that "A", a registered CPO, may serve as the Fund's CPO in lieu thereof. Assuming that "A" may serve as the Fund's CPO, you further request on behalf of "A" exemption from certain provisions of Regulations 4.21, 4.22 and 4.23,³ which concern, respectively, the disclosure, reporting and recordkeeping requirements applicable to registered CPOs.

Background

Based upon the representations you made in the correspondence, we understand the relevant facts to be as follows. The Fund's shares will be offered and sold to the public pursuant to an effective registration statement (the "Registration Statement") filed with the Securities and Exchange Commission ("SEC"). The shares will also be listed for trading on NYSE Amex LLC ("NYSE Amex"). Generally speaking, and for the purposes of responding to your request, the

¹ You have been authorized by the Individual Trustees to request this relief on their behalf.

² 7 U.S.C. §6m(1) (2006). The Act can be accessed through the Commission's website, www.cftc.gov.

³ Commission regulations referred to in this letter are found at 17 C.F.R. Ch. I (2009). Like the Act, they can be accessed through the Commission's website.

Fund's operation will be the same as that of the publicly-offered, exchange-traded commodity pool that was the subject of CFTC Staff Letter 09-39.⁴

The Fund is organized as a Delaware statutory trust, with "B" serving as the Fund's resident trustee.⁵ The Fund's organizational documents grant all authority and responsibility for managing and operating the Fund to "A". Thus, "B's" duties and responsibilities will be restricted to fulfilling the in-state residency requirement under Delaware law, accepting legal process on behalf of the Fund and making certain filings under the Delaware Statutory Trust Act. It will have no duty or responsibility to conduct any of the business affairs or operations of the Fund – *e.g.*, it will not solicit Fund participants, nor will it engage Fund service providers.⁶ You thus claim, and the Division agrees, that "B" will not be acting as the Fund's CPO or performing any functions that could require it to be registered as such.

In addition, the Fund will have a board of trustees that will be comprised of natural persons who are independent within the meaning of the Securities Exchange Act of 1934 (the "Exchange Act") and the NYSE Amex listing requirements (the Individual Trustees).⁷ This board of trustees is required because the Fund will actively trade commodity interests. Specifically, because it will actively trade commodity interests, pursuant to Rule 10A-3 under the Exchange Act (the "SEC Rule") and the listing requirements of NYSE Amex, the Fund must have an audit committee composed of at least three independent trustees, such that those independent trustees comprise a majority of the Fund's board of trustees.⁸

In accordance with the SEC Rule, the Individual Trustees will be responsible for matters relating to the Fund's public accounting firm – *i.e.*, for its engagement, compensation, retention and oversight. In accordance with NYSE Amex listing requirements, the Individual Trustees also will nominate for election additional Individual Trustees. Other than these responsibilities, the Individual Trustees will have no authority or responsibility to direct or manage the affairs of the Fund. You note that under the Fund's Amended and Restated Trust Agreement ("Trust Agreement"), the Individual Trustees are prohibited from: (1) engaging in any solicitation of

⁴ [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,473 (Jul. 30, 2009), also available on the Commission's website.

⁵ Under Section 3807 of the Delaware Statutory Trust Act, the Fund must have at least one trustee that is a resident of (or that has a principal place of business in) Delaware.

⁶ *See, e.g.*, 49 Fed. Reg. 4778, 4780 (Feb. 8, 1984), where the Commission stated that such solicitation and engagement are among the sorts of activities that bring a person within the statutory definition of the term "commodity pool operator" in Section 1a(5) of the Act.

⁷ Each Individual Trustee also sits on the board of numerous other investment companies managed by "C" (an investment adviser registered with the SEC and, like "A", a wholly-owned subsidiary of the privately-held holding company "D").

⁸ 17 C.F.R. §240.10A-3 (2009).

prospective participants in the Fund; (2) providing any commodity interest trading advice to the Fund; (3) engaging in any commodity interest related activities with respect to the Fund or any other person; and (4) supervising any such activities.⁹ Further, none of the Individual Trustees is, and no future Individual Trustee will be, subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Act.¹⁰

It is intended that “A”, a registered CPO, will be the operator of the Fund. As is explained above, pursuant to the organizational documents of the Fund, the operation and management of the Fund resides with “A”.

Analysis

Section 4m(1): Commission staff previously has taken the position that where a commodity pool is organized as a trust, each trustee of the pool is a CPO and, absent relief, would be required to register as a CPO under Section 4m(1) of the Act.¹¹ We note, and in support of your request that “A” and not the Individual Trustees serve as the CPO of the Fund, you acknowledge, that when CFTC staff previously has provided relief from the CPO registration requirement in Section 4m(1) as it applies to directors of commodity pools, staff has typically based the relief upon the existence of several factors: (1) delegation by the board of directors to a registered CPO of responsibility for the operation of the pool, and acceptance of that responsibility by the CPO; (2) a representation that the registered CPO would continue to serve as the pool’s CPO; (3) identification of the pool’s directors; and (4) cross acknowledgments of joint and several liability among the directors and the registered CPO for any violation of the Act and Commission regulations by any of them in connection with

⁹ The Trust Agreement contains a broad delegation of all management authority to “A”, including the authority to act as the Fund’s CPO. The Individual Trustees retain only such authority as is necessary to comply with the SEC Rule and NYSE Amex listing requirements.

¹⁰ 7 U.S.C. §12a(2) or §12a(3)(2000). The commodity pool that was the subject of Staff Letter 09-39 met the audit committee requirement of the SEC Rule and NYSE Amex listing requirements by means of a separate LLC, with a board composed of natural persons who performed the required duties. Here, there is no separate entity and the natural persons (the Individual Trustees) occupy positions that ordinarily would require CPO registration. Moreover, but for the fact that the Fund will not be “passively owning or holding” commodity interests, the SEC Rule would provide an exemption for a trust from the requirement to have an audit committee, and the requirement to have a board of directors. Thus, this issue never arose in prior Staff Letters involving exchange-listed commodity pools which intended to passively hold commodity interests in order to track designated indices.

¹¹ See, CFTC Staff Letter 86-8 [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,014 (Apr. 4, 1986) (two trustees of a master trust, who would otherwise be required to register as CPOs, granted registration relief because underlying trusts would have each been excluded from the definition of CPO under Regulation 4.5).

operating the pool.¹² However, in none of those other letters were the shares of the commodity pools at issue traded on a national securities exchange. Thus, none of the commodity pools at issue in those other letters would be subject to the SEC Rule.

In this regard, you explain that the Individual Trustees can meet all of the factors enumerated above except for the last factor, and you offer the following explanation why this condition should not apply to any Individual Trustee. Section 803A of the NYSE Amex Company Guide (the “Guide”) requires an affirmative determination by a listed company’s board of directors that an independent director (here, a trustee) “does not have a relationship that would interfere with the exercise of independent judgment.” Thus, you claim that any agreement by an Individual Trustee to accept joint and several liability for any violation of the Act and Commission regulations by “A” would create a conflict of interest between the Individual Trustee’s fiduciary duties to the Fund’s shareholders and his own personal interests, which conflict could interfere with the exercise of the Individual Trustee’s independent judgment. To further explain, you offer the following:

For example, the [Individual] Trustees, as members of the Fund’s audit committee, are charged with the supervision and oversight of the Fund’s auditors. If the [Individual] Trustees have information regarding a possible violation by the CPO that impacts the Fund’s financial statements, they may be less willing to communicate that information to the Fund’s auditors if they would also be liable for that violation. If the [Individual] Trustees were required to agree to joint and several liability, [“A”] has informed us that it believes the Fund may not be able to comply with Section 803A of the Guide, which would preclude the Fund’s shares from listing on NYSE Amex.

Thus, you ask that in considering the request to relieve the Individual Trustees from the requirement to register as CPOs, the Division deem sufficient an acknowledgment solely from “A” that it will be jointly and severally liable for any violation of the Act and Commission regulations applicable to CPOs by any of the Individual Trustees.¹³

Regulation 4.21: The Shares will be offered and sold to the public in a firm commitment underwriting pursuant to the Registration Statement. During the period after the filing of the Registration Statement and before the SEC declares the Registration Statement effective, the

¹² See, e.g., CFTC Staff Letter 97-73 [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27153 (Aug. 20, 1997).

¹³ You enclosed this acknowledgment with your letter dated December 8, 2009. Compare, e.g., Staff Letter 09-03 [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,378 (May 21, 2009) and Staff Letter 09-02 [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,377 (May 21, 2009), in which (unlike here) the registered CPO and the entity or entities relieved of registering as a CPO were under common ownership and control, and all executed acknowledgments of joint and several liability.

Fund's underwriters and distributors (all registered as broker-dealers ("B/Ds") under the Exchange Act) will have solicited interest and received non-binding commitments to purchase Shares from prospective investors with the use of a preliminary prospectus that has been reviewed by the SEC's Division of Corporation Finance and by the National Futures Association ("NFA"), and that complies with the requirements for Disclosure Documents in Part 4 of the Commission's regulations. After the initial public offering, the purchase and sale of Shares will be effected in the secondary market through registered B/Ds. With respect to secondary market purchases on NYSE Amex, you conclude that "A" is not subject to the Disclosure Document delivery requirement under Regulation 4.21, a conclusion with which the Division agrees.¹⁴

The preliminary prospectus/Disclosure Document will be posted on the "D" website (www. "D".com) and kept current, from and after such time as the underwriters and distributors begin soliciting interest from prospective investors – which will commence before the Registration Statement becomes effective. The underwriters and distributors will contractually commit with "A" to keep records of the names and addresses of the persons to whom they deliver copies of the Disclosure Document/preliminary prospectus, and to make those records available to any representative of the Commission, NFA or the U.S. Department of Justice. Notwithstanding this commitment, "A" will remain responsible under Regulation 4.23(a)(3) for compliance with this commitment by the underwriters and distributors.

Regulations 4.22(a) and (b): An issuer of exchange-traded shares held in book-entry form through DTC (such as the Fund) typically does not readily know the identities of its ultimate beneficial owners. You request exemption from the Account Statement delivery requirement on the grounds that it would be unduly burdensome and costly to require the Fund's CPO to ascertain on a monthly basis the identities of purchasers of Shares in the secondary market in order to comply with the requirement under Regulations 4.22(a) and (b) to deliver monthly Account Statements to Fund participants.¹⁵ In this regard, you explain that, because of the secondary market for the Fund's shares on NYSE Amex, ownership of the Fund's shares is expected to change frequently on a daily basis.

In support of your request, you note that the same information that would otherwise be provided in the Fund's monthly Account Statements, including the Fund's net asset value and the certification required by Rule 4.22(h), will be readily available via the "D" website, of which availability the Disclosure Document will advise participants.

Regulation 4.23: You request exemption from the location requirement of Regulation 4.23(a) such that books and records of the Fund and the Master Fund, may be kept by its service

¹⁴ See, 44 Fed. Reg. 25658, 25659 (May 2, 1979).

¹⁵ You make this request not only with respect to purchasers in the initial public offering, but also with respect to investors purchasing Shares in the secondary market. Once an investor has purchased Shares, whether in the initial public offering or on NYSE Amex, the Shares can be freely sold on the secondary market, and the same difficulties will be encountered in tracking the current owner.

providers, *i.e.*, “E”, the Fund’s custodian, accounting agent and transfer agent, and “F”, to which “E” has subcontracted certain transfer agency services, in each case at their respective addresses as specified in Exhibit B to your October 20, 2006 letter.¹⁶

You further ask for confirmation that neither “E” nor “F” will be deemed to be acting as a CPO solely by reason of keeping Fund records in the manner described in your correspondence, which the Division hereby so confirms. In this regard, the Division notes that neither firm will be acting in the manner contemplated by the statutory definition of a CPO (as described above in connection with “B”).¹⁷

Relief

Based upon the representations made in the correspondence, and consistent with prior staff practice in this area, the Division believes that granting your request would not be contrary to the public interest or to the purposes of those sections of the Act and Commission regulations from which you have sought relief. Accordingly, the Division will not recommend that the Commission take any enforcement action against any Individual Trustee for failure to comply with Section 4m(1) of the Act, based solely upon an Individual Trustee’s failure to register as a CPO in connection with serving as a trustee of the Fund, provided that “A” serves as the CPO of the Fund. This position is, however, subject to the following conditions: (1) “A” remains registered as a CPO; and (2) no present or future Individual Trustee is subject to any statutory disqualification under Section 8(a)(2) or (a)(3) of the Act.

Further, pursuant to the authority delegated in Regulation 140.93(a)(1), the Division exempts “A” in connection with the operation of the Fund 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 in the Fund’s initial public offering, provided that the information required to be contained in the Disclosure Document is maintained and kept current on the “D” website;¹⁸ (2)

¹⁶ Each of “E” and “F” has provided the Division with signed acknowledgments that the books and records of the Fund may be inspected and copied by any representative of the Commission, NFA or the United States Department of Justice and may be inspected and copied during normal business hours by Fund participants. Exhibit A to your October 20, 2006 letter is a schedule specifying the classes of books and records, by subparagraph of Regulation 4.23, that each of “E” and “F” will be keeping.

¹⁷ *See, e.g.*, 49 Fed. Reg. 4778, 4780 and Staff Letter 09-39 (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).

¹⁸ You also ask the Division to concur that “A” can comply with the requirement under Regulation 4.26 that a CPO correct any material inaccuracy in its Disclosure Document and distribute the correction to all existing pool participants by posting a current Disclosure Document on the “D” website *in lieu* of delivering a hard copy. The Division so concurs in light

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 “D” website; 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 “E” or “F”. The exemption from the signed acknowledgment requirement of Regulation 4.21(b) is subject to the conditions that: (1) “A” notifies the Director of the Division and NFA in writing of the name of each underwriter and distributor within ten business days following the date on which such underwriter or distributor signs an underwriting or distribution agreement, as the case may be, with “A”; and (2) the underwriters and distributors maintain records of names and addresses of persons to whom Disclosure Document/preliminary prospectuses are delivered and make those records available to Commission, NFA and Department of Justice representatives in accordance with Regulation 1.31. Consistent with prior practice,¹⁹ the exemption from the books and records location requirement of Regulation 4.23 is subject to the conditions that: (1) “A” notify the Director of the Division 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 the foregoing, “A” obtain the original books and records from “E’s” offices in Boston, Massachusetts, or from “F’s” offices in Canton, Massachusetts, as the case may be, and will provide them for inspection at “A’s” main business office; (4) “A” disclose in the Fund’s Disclosure Document 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 does not excuse “A” or any Individual Trustee 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 “E’s” offices in Boston Massachusetts and at “F’s” offices in Canton, Massachusetts. Additionally, “A” and the Individual Trustees remain subject to all antifraud provisions of the Act²⁰ and the Commission’s regulations, to the reporting requirements for traders set forth in Parts 15, 18 and

of: (1) the obligation under the Federal securities laws to correct and recirculate the preliminary prospectus in the event of a material inaccuracy prior to effectiveness; (2) the fact that in most instances, Fund shareholders will hold their shares in book-entry form; and (3) the fact, as noted above (*see* footnote 14), that a CPO’s obligation to deliver a Disclosure Document does not extend to a person who purchase shares in the secondary market from someone other than the CPO.

¹⁹ *See, e.g.*, Staff Letter 09-39.

²⁰ *See, e.g.*, Sections 4b and 4o, 7 U.S.C. §§6b and 6o (2000).

19 of the Commission's regulations, and to all other applicable provisions of the Act and the regulations.

This letter is based upon the representations made to us, is subject to compliance with the conditions set forth above, and is applicable solely in connection with the operation of the Fund. Any different, changed or omitted material facts or circumstances might render this letter void. In this connection, you must notify us immediately in the event that the operations of "A", any Individual Trustee or the Fund change in any material way from those represented to us. Further, the no-action position taken herein represent the views of this Division only and does not necessarily represent the views of the Commission or of any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact me or Christopher W. Cummings, Special Counsel, at (202) 418-5430.

Very truly yours,

Ananda Radhakrishnan
Director