



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and
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CFTC Letter No. 09-39
No-Action and Exemption
July 30, 2009
Division of Clearing and Intermediary Oversight

Ananda Radhakrishnan
Director

Re: Section 4m(1)
Request for exemption from requirement to register as a commodity pool operator

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 the Fund.

Regulations 4.31 and 4.36
Request for exemption from Disclosure Document requirements in connection
with advising the Fund.

Dear :

This is in response to your letter dated June 22, 2009, to the Division of Clearing and Intermediary Oversight (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by subsequent e-mail messages¹ (the "correspondence"). By the correspondence, you request, on behalf of "A" exemption from the requirement under Section 4m(1) of the Commodity Exchange Act (the "Act")² to register as a commodity pool operator ("CPO") in connection with serving as trustee of (the "Fund"). You further request, on behalf of "B", a registered CPO, exemption from certain provisions of Commission Regulations 4.21, 4.22, and 4.23, which concern, respectively, the disclosure, reporting and recordkeeping requirements applicable to registered CPOs, in connection with "B" serving as the registered CPO of the Fund.³ Finally, you request, on behalf of "C", a registered commodity trading advisor ("CTA"), relief from Regulations 4.31 and 4.36, which concern, respectively, Disclosure

¹ Specifically, those e-mail messages were dated June 29, 2009 and July 7, 2009.

² 7 U.S.C. §1, *et seq.* (2000). The Act may be accessed through the Commission's website, at: <http://www.cftc.gov/>.

³ Commission regulations referred to in this letter are found at 17 C.F.R. Ch. I (2009). The regulations may also be accessed through the Commission's website, at: <http://www.cftc.gov/>.

Document delivery and filing requirements applicable to registered CTAs, in connection with “C” serving as the registered CTA of the Fund.⁴

Background

Based upon the representations made in the correspondence, we understand the relevant facts to be as follows. Interests (“Shares”) in the Fund will be offered and sold to the public, pursuant to an effective registration statement filed with the Securities and Exchange Commission (“SEC”) (the “Registration Statement”).⁵ The Shares of the Fund will be both publicly-offered and listed for trading on NYSE Arca (the “Exchange”), and it is this latter fact that causes “B” to seek the requested exemption.⁶

The Fund will be operated in a manner substantially similar to an exchange-traded fund, or ETF. Among other things, the Fund will trade foreign currency forward contracts and exchange-traded futures contracts that may involve physical commodities, currencies, interest rates and stock or bond indices.⁷ The Fund will not seek to track the performance of any index or other benchmark.

Shares will be issued only in one or more blocks of Shares (“Baskets”), and in the first instance, only to an initial purchaser, anticipated to be (the “Initial Purchaser”), a registered broker-dealer and affiliate of “B”. The Initial Purchaser will purchase Baskets in advance of the

⁴ You initially requested this relief also in connection with the operation and advising of unnamed “future funds” as discussed more fully in your June 22, 2009 letter. However, by your June 29, 2009 e-mail message, you withdrew that portion of your request.

⁵ Prior to making the instant request, “B” filed the relevant offering materials for review with both the National Futures Association (“NFA”) and the SEC.

⁶ Your request assumes, and the Registration Statement states, that the Shares constitute 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 your categorization on this issue, the Division will not recommend that the Commission commence any enforcement action against a Fund or market participants in connection with the offer, sale and transfer of Shares in the manner contemplated by your request and the Disclosure Document for the Fund.

Further, we note that Exchange listing will not affect “B’s” obligation to comply with any other provision of the Act or the Commission’s regulations issued thereunder applicable to CPOs in particular or to persons in general.

⁷ For example, the Registration Statement states that the Fund “may enter into foreign currency forward contracts which will primarily involve currencies in the twenty-five most liquid or actively-traded currencies as measured by turnover in the most recent Triennial Central Bank Survey of Foreign Exchange and Derivatives Market Activity coordinated by the Bank for International Settlements.”

effective date of the Registration Statement (the “Effective Date”). Prior to the Effective Date, the Initial Purchaser will not solicit or actively seek purchasers for Shares, and no person (other than the Initial Purchaser) will have any opportunity to purchase Shares prior to effectiveness of the Registration Statement and the listing of the Shares on the Exchange.⁸ Subsequent to effectiveness of the Registration Statement, the Initial Purchaser will accept and fill orders and make an orderly market for the Shares. Additionally, the Fund may sell Baskets to “Authorized Participants” (certain registered broker-dealers who are also participants in the Depository Trust Corporation (“DTC”)), rather than directly to the public.

Investors will be able to purchase Shares in different contexts, then. First, upon effectiveness of the Registration Statement, from the Initial Purchaser, or if Authorized Participants decide to create additional Baskets, investors may purchase Shares from those Baskets. Second, investors may purchase Shares on the Exchange in the secondary market.

“C” will serve as the Fund’s CTA. “C” and “B” (the Fund’s CPO) are both indirect subsidiaries of “D”, and as such, they share several principals. Currently, “C” provides commodity interest trading advice pursuant to a claim of exemption under Regulation 4.7.⁹ As such, it is not required to prepare and deliver a Disclosure Document to its prospective clients, nor is it required to file a Disclosure Document with NFA.

Discussion

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.¹⁰ In support of your request that “B”, and not “A”, serve as the CPO of the Fund, you represent that pursuant to the Trust Agreement (“Trust

⁸ There will be no “road show” or other selling effort with respect to the Shares prior to the Registration Statement’s effectiveness and the Shares’ listing on the Exchange.

⁹ Regulation 4.7 makes available an exemption from CTA Disclosure Document and recordkeeping requirements where a CTA advises only “qualified eligible persons” (“QEPs”) as that term is defined in the regulation.

To date, “C” has advised only QEPs. It filed a notice of claim of exemption under Regulation 4.7 on August 9, 1993.

¹⁰ 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).

Agreement”) that will be entered among “B”, “A” and “E”, a Delaware banking company,¹¹ “A”, as trustee will be responsible only for certain day-to-day administrative matters with respect to the Fund.¹²

Pursuant to the Trust Agreement, “B”, as the Fund’s CPO, has the authority to direct “A” in the administration of the Fund. To the extent that “A”, as trustee, has any authority under the Trust Agreement, it is expected that “B” will direct “A” as to such matters and accordingly that “A” will not exercise independent discretion over the Fund and its assets. “B” will also have exclusive authority to remove “A” as the trustee of the Fund at any time after the first anniversary of the date of the Trust Agreement and to replace “A” if it is so removed or otherwise resigns.

In further support of this request, you state that you have been advised that neither “A”, any of its directors, any of its senior management nor any holder of a 10 percent or greater interest in “A” is currently subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Act.

Regulation 4.21

Regulation 4.21(a) requires each registered CPO to deliver a Disclosure Document to prospective pool participants at or before the time the CPO delivers a subscription agreement for the pool. Regulation 4.21(b) requires the CPO to obtain a signed and dated acknowledgment that a prospective pool participant has received a Disclosure Document before the CPO may accept money or other property in exchange for shares or other units of interest in the pool. The purpose of the regulation is “to protect pool participants – particularly those who are

¹¹ You state that “E” will serve as the Delaware trustee for the Fund. Under the Trust Agreement, “E” will not be entitled to exercise any powers or have any of the duties and responsibilities that are subject to the Act or the Commission’s regulations. “E” will have the sole and limited purpose of fulfilling the requirements of Section 3807 of the Delaware Statutory Trust Act (the “Delaware Act”) and for taking such actions as are required to be taken by a Delaware trustee under the Delaware Act. The duties (including fiduciary duties), liabilities and obligations of “E” will be limited to (i) accepting legal process served on the Trust in the State of Delaware and (ii) executing any certificates required to be filed with the Delaware Secretary of State that “E”, in its capacity as the Fund’s Delaware Trustee, is required to execute under Section 3811 of the Delaware Act.

¹² These include (1) processing orders for the creation and redemption of Baskets, (2) coordinating with “B”, in its capacity as sponsor of the Trust, as to receipt and delivery of consideration in connection with the creation and redemption of baskets, (3) calculating the net asset value of the Trust and the Shares on each Business Day, (4) calculating net income and realized capital gains and losses for the Trust, (5) administering payment by the Trust of various expenses and other amounts and (6) maintaining certain books and records.

unsophisticated in financial matters – by ensuring that they are informed about the material facts regarding the pool before they commit their funds.”¹³

You request exemption from the Disclosure Document delivery requirement of Regulation 4.21 in the case of sales by the Initial Purchaser to the public and to the extent, if any, that Authorized Participants may subsequently create additional Baskets and sell those Shares to the public. In support of your request for exemption, you state that the Internet websites maintained by “B” and the Exchange (the “Website Sources”) will contain a current Disclosure Document for the Fund. You further state that “B” expects that prospective or actual investors will utilize the services of a registered broker-dealer, who will either inform them where they can obtain the current Disclosure Document, or, upon request, will deliver a copy of the current Disclosure Document.¹⁴

With respect to secondary market purchases on the Exchange, you conclude that “B” is not subject to Regulation 4.21. The Division agrees with this conclusion.¹⁵

Regulations 4.22(a) and (b)

Regulation 4.22(a) requires a registered CPO to distribute to pool participants periodic unaudited Account Statements, which must include, among other information, Statements of Income (Loss) and of Changes in Net Asset Value. Regulation 4.22(b) provides that Account Statements be distributed monthly for pools with net assets of more than \$500,000 and otherwise

¹³ 44 Fed. Reg. 1918, 1920 (Jan. 8, 1979).

¹⁴ The only instances where the services of a registered broker-dealer would not be utilized would be where an investor has an account with a bank or trust company that is exempt from the requirement to register as a broker-dealer.

¹⁵ The CPO’s obligation to deliver a Disclosure Document (and the requirement to obtain a signed acknowledgment of receipt) extends to the direct purchaser of units of participation, and not to persons who purchase from that purchaser. In this regard, the Commission has stated that, with respect to the transfer of a participation unit in a commodity pool, the CPO of the pool “is not required to provide a Disclosure Document (Rule 4.21) to a person who purchases a unit of participation or interest in the pool from a pool participant if the pool operator did not solicit the purchase.” 44 Fed. Reg. 25658, 25659 (May 2, 1979).

at least quarterly.¹⁶ The purpose of these rules is to “ensure that participants have a reasonably current knowledge of the pool’s trading performance and operating costs.”¹⁷

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 distribution requirement on the grounds that it would be unduly burdensome and costly to require “B” to ascertain on a monthly basis the identities of purchasers of Shares in the secondary market in order to comply with the requirement under Rules 4.22(a) and (b) to distribute monthly Account Statements to participants in each Fund.¹⁸ In this regard, you explain that, because of the secondary market for each Fund’s shares on the Exchange, ownership of a 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 each Fund’s monthly Account Statements, including the Fund’s net asset value via the Website Sources, and that monthly and annual reports conforming to the form and content requirements of Regulation 4.22, including the certification required by Regulation 4.22(h), will be posted on the Fund’s website, of which availability the Disclosure Document will advise participants.¹⁹

Regulation 4.23

Rule 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

¹⁶ Regulation 4.22(c) requires a registered CPO to distribute a certified Annual Report to pool participants. You have not requested exemption from Regulation 4.22(c) in connection with the operation of the Fund, and, in fact, you represent that “B” will comply with Regulation 4.22(c) in connection with its operation of the Fund. Distribution of the Annual Report is required once a year, whereas distribution of monthly Account Statements requires continuous monitoring of changes in ownership of shares.

¹⁷ 44 Fed. Reg. at 1922 (Jan. 8, 1979).

¹⁸ We understand that you make this request not only with respect to investors purchasing Shares in the secondary market, but also with respect to purchasers from the Initial Purchaser or from an Authorized Participant. Once an investor has purchased Shares, whether directly from the Initial Purchaser, from an Authorized Participant, or on the Exchange, the Shares can be freely sold on the secondary market, and the same difficulties will be encountered in tracking the current owner.

¹⁹ Pursuant to Regulation 4.22(h), a representative duly authorized to bind the CPO must sign an oath or affirmation that, to the best of the knowledge and belief of the individual making the oath or affirmation, the information contained in the Account Statement is accurate and complete.

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.”²⁰

You request exemption from the location requirement of Regulation 4.23(a) such that books and records of the Fund may be kept at the offices of “A”; a Massachusetts banking corporation (the “Trust Administrator”); and a Pennsylvania corporation (the “Processing Agent”) at their respective addresses as specified in your June 22, 2009 letter.²¹

You further ask for confirmation that neither “A”, the Trust Administrator nor the Processing Agent 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 “commodity pool operator” – *e.g.*, neither will be promoting the Fund by soliciting, accepting or receiving from others property for the purpose of commodity interest trading, and neither will have the authority to hire (and to fire) the Fund’s commodity trading advisor, and to select (and to change) the Fund’s futures commission merchant.²²

Regulations 4.31 and 4.36

Regulations 4.31 and 4.36 respectively require each registered CTA to provide a Disclosure Document for the trading program pursuant to which the advisor seeks to direct or guide a prospective client’s account to the prospective client by no later than the time the CTA delivers to the prospective client the advisory agreement, and to file the Disclosure Document with NFA. Where the CTA’s prospective client is a commodity pool, the CTA provides the Disclosure Document to the CPO of the pool. In turn, the CPO utilizes the information in the

²⁰ 44 Fed. Reg. at 1922.

²¹ Each of “A”, the Trust Administrator and the Processing Agent 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 or the United States Department of Justice and may be inspected and copied during normal business hours by Fund participants. Your June 22, 2009 letter specifies the classes of books and records, by subparagraph of Regulation 4.23, that each of “A”, the Trust Administrator and the Processing Agent will be keeping.

²² 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. 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, neither of which was thereby deemed to be acting as a CPO of the pool.)

CTA's Document in preparing the Disclosure Document that the CPO delivers to prospective participants in its pool. However, although "C" is a registered CTA, because it has claimed exemption under Regulation 4.7 from the requirements of Regulation 4.31, "C" is not currently required to prepare and deliver a Disclosure Document.²³

Thus, you have requested relief from Regulations 4.31 and 4.36, such that "C" would not have to deliver a Disclosure Document to "B", its corporate affiliate. In support of your request, you note that: (1) "B" and "C" are both indirect subsidiaries of "D"; and (2) they share certain management personnel. In further support of your request, you represent that "C" will make available to "B" all of the information that "B" needs in order to prepare the Fund's Disclosure Document in accordance with Regulation 4.21.

Conclusion

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 Act and the regulations at issue. Accordingly, the Division will not recommend that the Commission take any enforcement action against "A" for failure to comply with Section 4m(1) of the Act, based solely upon an "A's" failure to register as a CPO in connection with serving as trustee of the Fund, provided that "B" serves as the CPO of the Fund. This position is, however, subject to the following conditions: (1) "B" remains registered as a CPO; and (2) neither "A" nor any present or future principal of "A" is subject to any statutory disqualification under Section 8a(2) or 8a(3) of the Act.

Further, pursuant to the authority delegated in Regulation 140.93(a)(1), the Division hereby exempts "B" 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 by the Initial Purchaser and by Authorized Participants when Authorized Participants create additional Baskets, subsequent to effectiveness of the Registration Statement, provided that the information required to be contained in the Disclosure Document is maintained and kept current on the Website Sources; (2) the requirement of Regulation 4.22 to distribute monthly Account Statements to purchasers of Shares, provided that the information that would otherwise be contained in such reports is maintained on the Fund's website; and (3) the requirement of Regulation 4.23 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 "A", the Trust Administrator or the Processing Agent.

Consistent with prior practice,²⁴ the exemption from the books and records location requirement of Regulation 4.23 is subject to the conditions that: (1) "B" notify the Division if

²³ See n. 9, *supra*.

²⁴ See, e.g., Staff Letter 06-27.

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) “B” 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, “B” obtain the original books and records from the offices of “A”, the Trust Administrator, or the Processing Agent, as the case may be, and will provide them for inspection at “B’s” main business office in “F”; (4) “B” disclose in the Fund’s Disclosure Document the location of its books and records that are required under Regulation 4.23; and (5) “B” remain fully responsible for compliance with Regulation 4.23.

Finally, pursuant to the authority delegated in Regulation 140.93(a)(1), the Division hereby exempts “C” from the Disclosure Document requirements of Regulation 4.31 and 4.36 in connection with providing commodity interest trading advice to the Fund.

This letter relieves “A” from registration as a CPO under Section 4m(1) of the Act, “B” from Regulations 4.21, 4.22 and 4.23, and “C” from Regulations 4.31 and 4.36, as stated above. It does not excuse “A”, “B” or “C” from compliance with any other aspect of the Commission’s disclosure, reporting and recordkeeping requirements for registered CPOs and CTAs, nor does it excuse “B” or “C” from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder. For example, “B” and “C” remain subject to Regulation 1.31, and the Commission maintains its right under that regulation to inspect the required books and records of “B” at the offices of “A”, the Trust Administrator, or the Processing Agent at the addresses provided in the correspondence. Additionally, “A”, “B” and “C” remain 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, the no-action position taken herein, and the exemptions granted herein void. In this connection, you must notify us immediately in the event that the operations of “B”, “A”, “C” or the Fund 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