



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5430
Facsimile: (202) 418-5547
aradhakrishnan@cftc.gov

Division of Clearing and
Intermediary Oversight

Ananda Radhakrishnan
Director

CFTC Letter No. 10-22
Exemption
June 3, 2010
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 two commodity pools whose units of participation will be listed for trading on a national securities exchange

Dear :

This is in response to your letters dated March 31, 2010 and May 18, 2010, to the Division of Clearing and Intermediary Oversight (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by e-mail messages dated May 19, 20 and 21, 2010 (the "correspondence"). By the correspondence, you request on behalf of a registered commodity pool operator ("CPO"), "A" ("The CPO"), exemption from certain provisions of Commission Regulations 4.21, 4.22, and 4.23,¹ which concern, respectively, the disclosure, reporting and recordkeeping requirements applicable to registered CPOs, in connection with The CPO's operation of "B" and "C" (the "Funds" and each individually a "Fund").

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 the Fund's Shares will be listed for trading on a national securities exchange.² Each Fund has been structured and will be operated

¹ Commission regulations referred to in this letter are found at 17 C.F.R. Ch. I (2009). They can be accessed through the Commission's website, at: <http://www.cftc.gov>.

² Your request assumes, and the Funds' Registration Statements state, 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 the Funds 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 will comply 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 each Fund's Disclosure Document will advise participants of this location.

You state that The CPO intends that certain financial books and records of each Fund will be kept by the Fund's administrator, custodian and transfer agent (in each case "D" ("The Administrator")), a banking corporation organized under the laws of the "E") at the address specified in the correspondence. "F" ("The Distributor") has been appointed distributor for each of the Funds to assist The CPO and The Administrator with certain functions and duties relating to distribution and marketing. The Distributor will retain all marketing materials at the address specified in the correspondence.

The Administrator and the Distributor have each provided the Division with signed acknowledgments that the books and records of each 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.³ Included with The Administrator's and The Distributor's acknowledgments are schedules specifying the classes of books and records, by subparagraph of Regulation 4.23, that each of The Administrator and the Distributor will be keeping.

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.* (2006), and also may be accessed through the Commission's website, at: <http://www.cftc.gov>.

³ Upon a participant's request, copies of original books and records will be transmitted to the CPO and made available, within five business days following the request, for inspection and copying by the participant at the CPO's offices during normal business hours.

You further ask for confirmation that neither The Administrator nor The Distributor be deemed to be acting as a CPO solely by reason of keeping a Fund's records in the manner described in your correspondence, which the Division hereby so confirms. In this regard, the Division notes that neither The Administrator nor The Distributor will be acting in the manner contemplated by the statutory definition of a "commodity pool operator" – *e.g.*, neither will be promoting the pool 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) a Fund's commodity trading advisor, and to select (and to change) a Fund's futures commission merchant.⁴

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 each of the Funds from: (1) the requirement of Regulation 4.21(b) to obtain a signed acknowledgment of receipt of a Disclosure Document in the case of sales of Shares by the Authorized Participants to the public or sales of Shares on a national securities exchange, provided that the information required to be contained in the Disclosure Document is maintained and kept current on The CPO's website; (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 Administrator or The Distributor.

Consistent with prior practice,⁵ 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 The Administrator's or The Distributor's office, as the case may be, at the address previously specified, and provide them for inspection at The CPO's main business office in "G"; (4) The CPO disclose in the Disclosure Document of each Fund the location of its books and records that are required under Regulation

⁴ 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. 09-39 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,473 (Jul. 30, 2009) (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).

⁵ See, *e.g.*, Staff Letter 09-39.

4.23 (and update the Disclosure Document promptly to reflect any change in the location of that Fund's books and records) and to disclose the participant's right to inspect and copy original books and records at such location(s) or to have copies sent to The CPO for inspection and copying at The CPO's offices; and (5) The CPO remain fully responsible for compliance with Regulation 4.23.

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 The Administrator or The Distributor. 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 or either 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