

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:)	
)	
Fortis Investment Management USA, Inc.)	CFTC Docket No. <u>09-05</u>
)	
Respondent.)	
)	

Office of
Proceedings
Administrative Clerk

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**ORDER INSTITUTING PROCEEDINGS PURSUANT TO
SECTIONS 6(c) AND 6(d) OF THE COMMODITY EXCHANGE ACT, AS AMENDED,
MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that Fortis Investment Management USA, Inc. (“Fortis” or “Respondent”) has violated Commission Regulation (“Regulation”) 4.7(b)(3)(i), 17 C.F.R. § 4.7(b)(3)(i) (2008). Therefore, the Commission deems it appropriate and in the public interest that a public administrative proceeding be, and hereby is, instituted to determine whether Fortis has engaged in the violations as set forth herein and to determine whether an order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of this administrative proceeding, Fortis has submitted an *Offer of Settlement* (“Offer”), which the Commission has determined to accept. Without admitting or denying any of the findings herein, Fortis acknowledges service of this *Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, as amended, Making Findings and Imposing Remedial Sanctions* (“Order”).¹

¹ Fortis consents to the use of these findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party; provided, however, that Fortis does not consent to the use of this *Order* or the *Offer*, or the findings in this *Order* consented to in the *Offer*, as the sole basis for any other proceeding brought by the Commission, other than in a proceeding in bankruptcy or to enforce the terms of this *Order*. Nor does Fortis consent to the use of the *Offer* or this *Order*, or the findings in the *Order* consented to in the *Offer*, by any other party in any other proceeding.

III.

The Commission finds the following:

A. Summary

Fortis, a registered commodity pool operator (“CPO”), operated a commodity pool by the name of Harbor Absolute Return Fund Limited Partnership (the “Pool”). Fortis claimed for the Pool an exemption from recordkeeping, disclosure and reporting requirements under Regulation 4.7(b), 17 C.F.R. § 4.7(b)(2008). Pursuant to Regulation 4.7(b)(3)(i), Fortis was required to file with the National Futures Association (“NFA”) and distribute to each pool participant an annual report for the Pool within 90 days of the end of the Pool’s fiscal year. Regulations 4.22(f)(1) and (2) provide CPOs with extensions of this annual report deadline under certain circumstances and conditions.

Despite Fortis’s claims for extensions of time, Fortis failed to file with the NFA and distribute to pool participants one or more of the Pool’s annual reports in a timely manner, in violation of Regulation 4.7(b)(3)(i), 17 C.F.R. § 4.7(b)(3)(i)(2008).

B. Respondent

Fortis Investment Management USA, Inc. is located in Boston, Massachusetts. Fortis has been registered with the Commission as a CPO since October 11, 1996.

C. Facts

Fortis is a CPO for the Pool, which operates as a “fund of funds” (i.e., a pool that invests in one or more other collective investment vehicles). For the years ending December 31, 2003 through December 31, 2005, the Pool’s fiscal year ended on December 31st. Pursuant to Regulation 4.7(b), Fortis claimed for the Pool an exemption from recordkeeping, disclosure and reporting requirements under the Regulations. Accordingly, under Regulation 4.7(b)(3)(i), Fortis was required to file and distribute its annual reports for the Pool within 90 days of the end of its fiscal year on December 31st.

For fiscal years 2004 through 2006, Fortis claimed extensions of time under Regulation 4.22(f)(2) for the Pool, thus requiring it to file and to distribute its annual report for the Pool no more than 150 days after the end of the Pool’s fiscal year, *i.e.*, by May 30, 2007.

For fiscal years 2004 through 2006, Fortis failed to file with the NFA and distribute to pool participants one or more of the Pool’s annual reports in a timely manner.

D. Legal Discussion

Sections 4n(3) and (4) of the Commodity Exchange Act, as amended (the “Act”), 7 U.S.C. §§ 6n(3) and (4) (2006), provide, in relevant part, that every CPO registered with the Commission shall file such reports, and regularly furnish statements of account to each pool

participant, and that such reports and statements shall be in such form and manner as may be prescribed by the Commission. Regulation 4.22(c) requires a CPO to file with the NFA and distribute to pool participants within 90 days of the end of the pool's fiscal year annual reports for its commodity pools that contain the information required by and in accordance with Regulations 4.22(c) and (d).

Pursuant to Regulation 4.7(b)(3), a CPO may claim relief from the reporting requirements of Regulation 4.22(c) and (d) for certain pools where the CPO offers or sells participations in the pools solely to qualified eligible persons (as defined in Regulation 4.7), in an offering that is exempt from registration under the federal securities laws and the offering is not marketed to the public. However, a CPO claiming such exemption must, within 90 days after the end of the exempt pool's fiscal year, electronically file with the NFA and distribute to each pool participant an annual report that contains, at a minimum, certain financial information that is in lieu of the information required by Regulations 4.22(c) and (d). Regulation 4.7(b)(3)(i), 17 C.F.R. § 4.7(b)(3)(i) (2008).

Where a pool is a fund-of-funds, a CPO, under Regulation 4.22(f)(2), may claim by a notice filed with the NFA an extension of time to file and to distribute the pool's annual report. Under this extended deadline, the CPO is required to file and to distribute its pool's annual report no later than 150 days after the end of the pool's fiscal year (*i.e.*, up to 60 days beyond the original 90-day headline).

For fiscal years 2004, 2005 and 2006, Fortis claimed an extension of time under Regulation 4.22(f)(2) for the Pool, thus requiring it to file and to distribute the annual reports no more than 150 days after the end of the Pool's fiscal years.

As described above, between fiscal years 2004 and 2006, Fortis failed to file and distribute one or more of the Pool's annual reports in a timely manner. Fortis, therefore, violated Regulation 4.7(b)(3)(i), 17 C.F.R. § 4.7(b)(3)(i) (2008).

The furnishing of annual reports was designed to "provide [pool] participants with the information necessary to assess the overall trading performance and financial condition of the pool." *Commodity Pool Operators and Commodity Trading Advisors; Final Rules*, 44 Fed. Reg. 1918 (CFTC Jan. 8, 1979) (announcing the adoption of Regulation 4.22). Without timely and complete reporting, the Commission's goal of providing pool participants with complete and necessary data is hampered.

IV.

FINDINGS OF VIOLATIONS

Based upon the foregoing, the Commission finds that Fortis violated Regulation 4.7(b)(3)(i), 17 C.F.R. §§ 4.7(b)(3)(1) (2008).

V.

OFFER OF SETTLEMENT

Fortis has submitted the *Offer* in which it, without admitting or denying the findings herein:

- A. Acknowledges receipt of service of this *Order*;
- B. Admits the jurisdiction of the Commission with respect to all matters set forth in this *Order*;
- C. Waives: the filing and service of a complaint and notice of hearing; a hearing; all post-hearing procedures; judicial review by any court; any and all objections to the participation by any member of the Commission's staff in consideration of the Offer; any and all claims which it may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), and/or Part 148 of the Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2008), relating to, or arising from, this proceeding; any and all claims that it may possess under the Small Business Regulatory Enforcement Act, Pub. L. No. 104-121, 110 Stat. 847 (1996), as amended by Pub. L. No. 110-28, 121 Stat. 112 (2007), relating to or arising from this proceeding; and any claim of Double Jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief;
- D. Stipulates that the record upon which this *Order* is entered shall consist solely of the findings contained in this *Order* to which the Respondent has consented; and
- E. Consents, solely on the basis of the *Offer*, to entry of this *Order* that:
 - 1. makes findings by the Commission that Fortis violated Regulation 4.7(b)(3)(i), 17 C.F.R. § 4.7(b)(3)(i);
 - 2. orders Fortis and its successors and assigns to cease and desist from violating Regulation 4.7(b)(3)(i), 17 C.F.R. § 4.7(b)(3)(i);
 - 3. orders Fortis to pay a civil monetary penalty in the amount of seventy five thousand dollars (\$75,000) within ten (10) days of the date of entry of this *Order*; and
 - 4. orders Fortis and its successors and assigns to each comply with the undertaking consented to in the *Offer* and set forth below in Part VI of this *Order*.

Upon consideration, the Commission has determined to accept the Respondent's *Offer*.

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

A. Fortis shall cease and desist from violating Regulation 4.7(b)(3)(i), 17 C.F.R. § 4.7(b)(3)(i)(2008);

B. Fortis shall pay a civil monetary penalty in the amount of seventy five thousand dollars (\$75,000) within ten (10) days of the date of entry of this *Order*. Fortis shall pay this civil monetary penalty by making electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than electronic funds transfer, the payments shall be made payable to the Commodity Futures Trading Commission, and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
ATTN: Marie Bateman – AMZ-300
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: 405-954-6569

If payment by electronic transfer is chosen, Fortis shall contact Marie Batemen or her successor at the above address to receive payment instruction and shall fully comply with those instructions. Fortis shall accompany payment of the penalty with a cover letter that identifies Fortis and the name and docket number of this proceeding. Fortis shall simultaneously transmit copies of the cover letter and the form of payment to (1) the Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, N.W., Washington, D.C. 20581 and (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission, at the same address. In accordance with Section 6(e)(2) of the Act, as amended, 7 U.S.C. § 9a(2) (2001), if this amount is not paid in full within fifteen (15) days of the due date, Fortis shall be prohibited automatically from the privileges of all registered entities, and, if registered with the Commission, such registration shall be suspended automatically until it has shown to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of the payment has been made; and

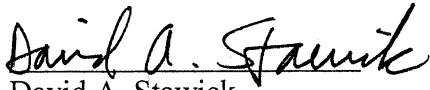
C. Fortis, and its successors and assigns, shall comply with the following undertaking set forth in its *Offer*:

Public Statements: Neither Fortis nor any of its successors, assigns, employees, agents, or representatives shall take any action or make any public statement denying, directly or indirectly, any finding in the *Order*, or creating, or tending to create, the impression that the *Order* is without a factual basis; provided, however, that nothing in this provision

affects Fortis's: (i) testimonial obligations; or (ii) right to take appropriate legal positions in other proceedings to which the Commission is not a party. Fortis and its successors and assigns shall undertake all steps necessary to assure that all of their agents and employees under their authority and/or actual or constructive control understand and comply with this undertaking.

The provisions of this Order shall be effective as of this date.

By the Commission.



David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: January 8, 2009