

CFTC letter No. 03-15**April 1, 2003****Exemption****Division of Clearing and Intermediary Oversight**Re: Request for Relief from Requirements of Rule 4.35(b)

Dear :

This is in response to your letter dated February 14, 2003 to the Division of Clearing and Intermediary Oversight (the "Division") of the Commodity Futures Trading Commission (the "Commission"). By your correspondence, you request an exemption from disclosing performance information required by Commission Rule 4.35(b).^[1]

Based upon the representations contained your correspondence, we understand the facts to be as follows: You are the sole principal of two different commodity trading advisors ("CTAs"), "X" and "Y". Each CTA has its own trading program and each company prepares its own Disclosure Documents. Currently, each company includes performance information for both companies in their Disclosure Documents.

Rule 4.35(b) states in relevant part: "*Performance to be disclosed.* Except as provided in § 4.35(a)(7)^[2], the commodity trading advisor must disclose the actual performance of all accounts directed by the commodity trading advisor and by each of its trading principals...." Rule 4.10(e)(2)(ii) defines a "trading principal," with respect to a CTA, as "a principal who participates in making trading decisions for the account of a client or who supervises or selects persons so engaged."

The CTA Disclosure Document is intended to provide protections to clients, particularly those who may be unsophisticated in financial matters, by apprising prospective clients of material facts before committing their funds.^[3] For over 20 years, the Commission's rules have provided that a CTA's past performance is a material fact that should be disclosed. Originally, the Commission required that a CTA disclose past performance for itself and each of its principals; this was narrowed to require disclosure by the CTA for itself and each of its trading principals in 1995.^[4] The Commission continues to believe that these disclosures are important and necessary so that CTAs cannot distort their overall performance record by showing prospective clients the past performance of only particular accounts rather than the past performance of all accounts directed by the CTA and its trading principals. Indeed, the staff has upheld this requirement and denied a relief request where a CTA wanted to exclude disclosure of past performance of certain accounts over which its principal held power of attorney but whose signals were generated by technical trading programs developed by a third party.^[5]

As represented in your correspondence, you are the trading principal for both CTA companies. Thus, although "X" and "Y" are two separate companies, one trading principal controls both companies. Rule

4.35(b) requires CTAs to disclose actual performance of all accounts directed by the CTA and by each of its trading principals. Because you are the trading principal for both firms, both firms must disclose the past performance of all accounts directed by you, meaning that each CTA company must include the performance data from both companies.

Accordingly, the Division does not believe that it is appropriate to grant the requested exemption. If you have any questions concerning this correspondence, please contact me at (202) 418-5439 or Trabue Bland, an attorney on my staff, at (202) 418-5466.

Very truly yours,

Lawrence B. Patent
Deputy Director

Compliance and Registration Section

^[1] Commission rules referred to herein are found at 17 C.F.R. Ch. I (2002).

^[2] Rule 4.35(a)(7) prohibits the inclusion of proprietary trading results in a Disclosure Document absent special labeling and accompanying discussion of differences in performance compared to the trading program. Rule 4.35(a)(7)(ii) defines proprietary trading results as the performance of any account in which fifty percent or more of the beneficial interest is owned or controlled by: (1) the CTA any of its principals; (2) an affiliate or family member of the CTA; or (3) any person providing services to the account.

^[3] 46 Fed. Reg. 26003, 26009 (May 8, 1981).

^[4] 60 Fed. Reg. 38145 (July 25, 1995).

^[5] CFTC Staff Letter 96-47 [1994-1996 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 26, 717 (May 31, 1996).