

CFTC letter No. 04-10

March 5, 2004

Interpretation

Division of Clearing and Intermediary Oversight

Re: Re: Rule 1.55 – Request for Interpretation that Making the Required Risk Disclosure Statement Available on an FCM’s Internet Website Constitutes Compliance with the Requirement of Rule 1.55(a)(1)(i)

Dear:

This is in response to your letter dated November 14, 2003 to the Division of Clearing and Intermediary Oversight (the “Division”) of the Commodity Futures Trading Commission (the “Commission”), as supplemented by telephone conversations with Division staff. By this correspondence, you request, on behalf of “X”, the Division’s views on whether the procedure you propose to employ in order to furnish prospective customers with the required risk disclosure statement complies with the requirements of Rule 1.55(a)(1)(i).^[1]

Based upon the representations made in your correspondence, we understand the facts to be as follows. “X” is registered under Section 4d^[2] of the Commodity Exchange Act (the “Act”) as a futures commission merchant (“FCM”). It provides an Internet-based electronic trading platform, including analytic tools, real-time market data and direct-access order placement and trade execution.^[3]

Persons who apply to open an account with “X” are sent hard-copy account opening documents in the mail. You propose to include among the provisions in the Account Application and Agreement a statement that the applying customer has visited the “X” website, has followed links on the home page to access, and has “fully read and understood” twelve listed documents, one of which is “Risk Disclosure Statement For Futures and Futures Options.”^[4] The applicant’s signature on the Account Application and Agreement would also constitute the signed acknowledgement required by Rule 1.55(a)(1)(ii).

In support of your proposed delivery method, you state that the people who open accounts with “X” are self-directed active traders, who seek out the software trading tools “X” provides, and who wish to place virtually all of their trades themselves through “X’s” online electronic trading platform. You contend that in directing prospective customers to the website to review important information and risk disclosures you are also directing them to detailed product and service information, as well as fee schedules, so that the customers can make a well-informed decision whether to use your firm.

Rule 1.55(a)(1) provides that an FCM may not open a commodity futures account for a customer (other than an “institutional customer” as defined in Rule 1.55(f)) unless the FCM first:

(i) Furnishes the customer with a separate written disclosure statement obtaining only the language set forth in paragraph (b) of this section (except for nonsubstantive additions such as captions) or as otherwise approved under paragraph (c) of this section; *Provided, however*, that the disclosure statement may be attached to other documents as the cover page or as the first page of such documents and as the only material on such page; and

(ii) Receives from the customer an acknowledgement signed and dated by the customer that he received and understood the disclosure statement.

[emphasis added]

The Commission intended that if the risk disclosure statement is incorporated into other materials, it should effectively be the first thing that the customer sees. A table of contents or a customer application cannot precede the risk disclosure statement.^[5] The Division does not believe that having a prospective customer affirm, as part of his application, that he has separately looked up the risk disclosure statement on “X’s” website and read it is consistent with the expressed intention of the Commission in adopting Rule 1.55.

Accordingly, the Division cannot confirm that your proposed delivery method for the Rule 1.55 risk disclosure statement would comply with the requirements of the rule.

This letter is based upon the representations that have been made to us. Any different, changed or omitted material facts or circumstances might render this letter void. Further, this

letter represents the position of this Division only and does not necessarily reflect 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) 418-5445.

Very truly yours,

James Carley
Director

^[1] Commission rules referred to herein are found at 17 C.F.R. Ch. I (2003).

^[2] 7 U.S.C. §6d (2000).

[3] “X” connects directly to the CME and CBOT for market data and order execution, and it clears all futures trades through “Y” on a fully-disclosed basis. “X” provides no trading advice or recommendations and has no discretionary accounts.

[4] The corresponding hyperlink at the bottom of “X’s” home page links to a page containing the Generic Risk Disclosure Statement in Appendix A to Rule 1.55(c).

[5] *See* 58 Fed. Reg. 17495, 17500. “One commenter asked that the Commission confirm that the “first page” of a booklet is the first page that contains substantive text and that a table of contents or customer application could therefore precede the “first” page. The Commission intends, however, that the risk disclosure statement appear on the cover page or the first page of the booklet, by which it means the page immediately following the cover page. Consequently, there may be no intervening table of contents or other material between the cover page and the disclosure statement.”