

**CFTC letter No. 04-28**

**October 15, 2004**

**Exemption**

**Division of Clearing and Intermediary Oversight**

Re: Rule 3.12(g) – Request for Exemption from the Associated Person Registration Requirement

Dear :

This is in response to your letter dated April 15, 2004, to the Commodity Futures Trading Commission (the “Commission”), which has been referred to the Division of Clearing and Intermediary Oversight (the “Division”). By your letter, as supplemented by your email messages dated June 25, 2004 and July 13, 2004, and telephone conversations with Division staff (collectively, the “correspondence”), you requested relief on behalf of “X” from the requirement that certain of its “associated persons” (“APs”) be registered with the Commission.

Based upon the representations contained in the correspondence, we understand the facts to be as follows. “X” is registered with the Commission as a commodity trading advisor (“CTA”) and is a member of the National Futures Association (“NFA”). “X” provides various marketing-related services to agricultural farmers and producers designed to manage market risks associated with agricultural production. These risk management strategies may include, among other things, advising clients with respect to trading futures contracts and options on futures contracts. In connection with these advisory services, “X”, at the direction of certain of its clients, places orders on those clients’ behalf, provided that the clients execute a power of attorney granting “X” authority to act as their agent with respect to their commodity interest accounts. Although in practice “X” confirms each trade before placing any orders on a client’s behalf, the power of attorney is broadly worded and on its face grants “X” full power and authority to effect transactions on its clients’ behalf.

Section 4k(3) of the Commodity Exchange Act (the “Act”) requires generally that any natural person employed by, or associated with, a CTA in any capacity involving the solicitation of a client’s or prospective client’s discretionary account, must be registered with the Commission as an AP.<sup>[1]</sup> Because “X” trades certain of its clients’ accounts pursuant to powers of attorney granting “X” discretion over those clients’ commodity interest accounts, “X” is engaged in the solicitation of discretionary accounts as contemplated by Section 4k(3) of the Act and Rule 1.3(aa)(4).<sup>[2]</sup> Consequently, persons associated with “X” in connection with this soliciting activity, including its principals, must be registered with the Commission as APs.<sup>[3]</sup>

In light of the foregoing, the Division does not believe that it is appropriate to grant the requested relief, and your request for relief is hereby denied. If you have any questions concerning this correspondence, please contact R. Stephen Painter Jr., an attorney on my staff, at (202) 418-5416.

Very truly yours,

James L. Carley  
Director

<sup>[1]</sup> Specifically, Section 4k(3) of the Act provides that “[i]t shall be unlawful for any person to be associated with a commodity trading advisor as a partner, employee, consultant, or agent . . . in any capacity which involves (i) the solicitation of a client’s or prospective client’s discretionary account or (ii) the supervision of any person or persons so engaged, unless such person is registered with the Commission under this Act as an associated person of such commodity trading advisor[.]” Rule 1.3(aa)(4) defines the term “associated person” of a CTA for purposes of the Commission’s rules, essentially tracking the language of Section 4k(3) of the Act.

Both the Act and the Commission’s regulations may be accessed at: [http://www.access.gpo.gov/uscode/title7/chapter1\\_.html](http://www.access.gpo.gov/uscode/title7/chapter1_.html) and <http://www.gpoaccess.gov/ecfr/>, respectively.

<sup>[2]</sup> CFTC Staff Letter No. 93-85, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,851 (Aug. 31, 1993) (a CTA directs accounts over which it holds a power of attorney notwithstanding that clients may choose among several trading systems and reject trading system recommendations); *see also* CFTC Staff Letter No. 96-47, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,717 (May 31, 1996). *Cf. Premex, Inc. v. CFTC*, 785 F.2d 1403, 1406 n.7 (9<sup>th</sup> Cir. 1986) (“the obligation to meet the minimum financial requirements flows from the registrant’s *status* as an FCM [futures commission merchant] and not from the *nature of its current activities*”) (emphasis added). Copies of the staff letters cited herein are enclosed for your reference.

Because it is exercising discretionary authority over client accounts, “X” should review its Disclosure Document to ensure that the Document complies with all applicable requirements.

<sup>[3]</sup> Independent of the AP registration requirement of Section 4k(3) of the Act, NFA Bylaw 301(a)(iii) also requires that NFA members register at least one principal as an AP. Because NFA is permitted to adopt registration requirements with respect to its members that are more stringent than those required under the Act or the Commission’s rules, the Division generally does not consider requests for relief from those more stringent requirements. Consequently, NFA members must either comply with Bylaw 301(a)(iii), or, if they do not exercise discretionary authority over client accounts, they may discontinue their membership with NFA. CTAs that are not required to be members of NFA, but that are nevertheless required to be registered under the Act or that simply wish to register although not required to do so, may terminate their NFA membership and maintain their registered status with the Commission. Here, because, as explained above, “X” exercises discretionary authority over client accounts, it is required to be a member of NFA, and therefore must comply with Bylaw 301(a)(iii).