



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and  
Intermediary Oversight

Thomas J. Smith  
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CFTC letter No. 06-03  
August 29, 2005  
Exemption  
Division of Clearing and Intermediary Oversight

Re: Regulations 4.24 and 4.25 – Request for Relief Regarding Commodity Pool Operator  
Past Performance Disclosure

Dear :

This is in response to your letter dated March 1, 2005, to the Division of Clearing and Intermediary Oversight ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by telephone conversations with Division staff. By your correspondence, you requested, on behalf of "X", relief from the requirement of Rule 4.25(c) to disclose in a pool's disclosure document the past performance of pools and accounts other than the offered pool.<sup>1</sup>

X is registered under the Commodity Exchange Act ("Act")<sup>2</sup> as a commodity pool operator ("CPO") and a commodity trading adviser ("CTA"). In 2001, X commenced offering interests in "Y", which participates in the commodity futures markets, as well as other markets. In October 2002, units in Y ceased to be offered to the public, and have been offered exclusively to X's employees who participate in the X 401(k) Plan. These employees include principals, knowledgeable employees, and clerical staff. Units in Y are offered on a continuing basis at the net asset value per unit as of each month-end closing date on which subscriptions are accepted. As of September 30, 2004, Y held approximately "\$Z" million in assets.

Commission Rule 4.25(b) specifies that where a pool has operated for three years or more, the pool's disclosure document must present the performance of the offered pool, but is not required to disclose any additional performance of the CPO, CTA(s), trading manager, or their respective principals. However, Rule 4.25(b)(2) requires that for such three year period or longer, seventy-five percent or more of the contributions to the pool must have been made by persons unaffiliated with the CPO, CTA(s), trading manager, or their principals. Due to the limitation of participation in the pool to X employees who participate in the X 401(k) Plan, pool contributions by persons unaffiliated with the CPO are below the seventy-five percent threshold, even though the pool has operated for more than three years.

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<sup>1</sup> Commission rules referred to herein are found at 17 C.F.R. Ch. I (2005).

<sup>2</sup> 7 U.S.C. §6m(1) (2000).

Where the offered pool has not operated for more than three years with at least seventy-five percent of contributions by persons unaffiliated with the CPO, Rule 4.25(c) requires that the pool disclosure document include the past performance of other pools operated, and other accounts traded, by the CPO. Absent the limitation on participation to employees of X, the CPO would be required to disclose only the performance of the offered pool. You are requesting that X be permitted to exclude from Y's disclosure document the performance that would otherwise be required under Rule 4.25(c). Your request notes that relief from the requirement to disclose the additional performance of other pools and accounts traded by the CPO would alleviate operational and administrative expenses that affect Y's net asset value. In addition, X intends to make such performance available to prospective and existing Y participants upon request.

As stated by the Commission in proposing the requirements regarding the performance of the offered pool, the purpose of the threshold for outside participation is "to assure that the three-year performance history would not represent the performance of a significantly dissimilar trading vehicle."<sup>3</sup> With respect to Y, it is the limitation on participation to employees of X that precludes the pool from reaching the seventy-five percent level for unaffiliated participants. In this case, the composition of pool participants would not appear to cause the performance of the offered pool to be dissimilar in light of its being offered only to prospective participants who are similarly situated to the existing participants – i.e., employees of X.

Based upon the foregoing, it appears that granting your request would not be contrary to the public interest or the purposes of Rule 4.25. Accordingly, by the authority delegated under Rule 140.93(a)(1), the Division exempts X from the requirements of Rule 4.25(c). This exemption is subject to X's compliance with the following condition: that X provides a notice in Y's disclosure document, and periodically notify its employees, that performance disclosures for X's other pools and accounts are available upon request to any employee.

This letter, and the relief granted herein, is based upon the representations that have been made to the Division and are subject to compliance with the conditions set forth above. Any different, changed, or omitted facts or conditions might render the exemption void. You must notify the Division immediately in the event that the operations or activities of X change in any material way from those represented to us.

This letter exempts X solely from the requirement that Y's disclosure document include the performance of other pools and accounts traded by X. It does not excuse X from compliance with any other aspect of the Commission's disclosure requirements, nor does it excuse X from compliance with any other applicable requirements contained in the Act or the Commission's regulations issued thereunder.

If you have any questions concerning this correspondence, please contact Eileen R. Chotiner at (202) 418-5467.

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<sup>3</sup> 59 FR 25351, 25356 (July 25, 1995).

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Very truly yours,

Thomas J. Smith  
Chief Accountant

cc: Regina Thoele  
Vice-President, Compliance  
National Futures Association