92-5

COMMODITY FUTURES TRADING COMMISSION
2033 K STREET, N.W., WASHINGTON, D.C. 20581
(202) 254-8955
(202) 254-3534 FACSIMILE

DIVISION OF
TRADING AND MARKETS

April 14, 1992

Re: Request for No-Action Position
Concerning Customer Acknowledgments

Dear :

This is in response to your letter dated January 24, 1992 to the Division of Trading and Markets (the "Division"), as supplemented by telephone conversations with Division staff. In your letter, you request, on behalf of the Futures Industry Association's Law & Compliance Division ("LCD"), that the Division confirm that it will not recommend that the Commodity Futures Trading Commission (the "Commission") take enforcement action against any futures commission merchant ("FCM") if such FCMs, with respect to customers within specified categories, do not obtain the separate acknowledgments required under Commission rules 1.55, 30.6, 32.5, 33.7 and 190.10 recording the customer's receipt and understanding of the disclosure statements[1/] which an FCM must provide the customer, as well as several elections[2/] which under Commission

---

1/ Under the following Commission rules, an FCM (or, where applicable, an introducing broker) is prohibited from opening a commodity interest account without first providing the customer with certain disclosure statements and receiving a signed customer acknowledgment form stating that the risk disclosure statements have been received and understood by the customer: Rule 1.55 (domestic futures trading risk disclosure statement); Rule 30.6 (foreign futures and options risk disclosure statement); Rule 32.5 (commodity options customer summary disclosure statement); Rule 33.7 (domestic exchange-traded commodity options risk disclosure statement); and Rule 190.10 (bankruptcy disclosure statement for non-cash margin).

Commission rules referred to herein may be found at 17 C.F.R. Ch. I (1991).

2/ Rule 180.3 provides, among other things, that if an arbitration or other customer dispute settlement agreement between a commodity professional and its customer is contained as a clause or clauses within a broader agreement, the customer must separately endorse the clause or clauses constituting the arbitration or

(continued...)

rules are required to be provided to the customer before an account can be opened with an FCM. The no-action relief requested would be subject to the condition that the FCM obtain a single acknowledgment from the customer at the end of the FCM's customer account agreement or on a separate page. In support of your request, you have submitted a proposed Form of Acknowledgment of Receipt of Required Disclosures for use with respect to such customer accounts. The form provides a list of disclosure statements and elections, which the customer acknowledges by checking a box next to the appropriate acknowledgment and election, and provides a single signature line at the bottom of the page intended to apply to all such acknowledgments and elections. The required wording of disclosures and elections, as well as the required wording of the various risk disclosure statements, would remain unchanged.

The relief requested would be limited to FCMs opening accounts for customers in the following categories: entities qualifying for relief under Rule 4.5[3/]; entities which would qualify for relief under proposed Rule 4.7;[4/] and foreign entities which are otherwise

---

2/ (...continued)
settlement agreement and the cautionary language specified in the rule. Rule 190.06(d) requires a commodity broker to provide each customer the opportunity, when undertaking its first hedging contract, to specify whether in the event of a bankruptcy such customer prefers that open contracts held in a hedging account be liquidated without seeking customer instructions in the event of bankruptcy.

3/ Rule 4.5(a)(1)-(4) identifies the following "otherwise regulated" entities: (1) registered investment companies; (2) state regulated insurance companies; (3) state or federally regulated financial depository institutions; and (4) certain pension plans subject to regulation under the Employee Retirement Income Security Act of 1974 ("ERISA").

4/ Generally, under the proposed rule, the term qualified eligible participant ("QEP") comprises three types of investors: (1) brokers or dealers registered under the Securities and Exchange Act or FCMs as well as certain commodity pool operators("CPOs") and commodity trading advisors ("CTAs") registered under the Commodity Exchange Act; (2) natural persons and entities including certain corporations, partnerships or similar entities, commodity pools, banks, savings and loan associations, insurance companies, registered investment companies, and employee benefit plans, which meet a portfolio requirement and in certain instances other requirements with respect to total assets, net worth and annual income; and (3) entities in which all the equity owners are QEPs. Under category (2) above, the portfolio requirement requires that
(continued...)

authorized to engage in futures related transactions under applicable law and are analogous to the entities specified in Rule 4.5 and proposed Rule 4.7.

The Division has previously granted no-action relief permitting the use of a single customer acknowledgment in place of the multiple acknowledgments required under Commission rules with respect to certain limited categories of institutional customers. Specifically, the Division has granted an FCM no-action relief concerning the use of a single acknowledgment and signature line in customer account documents for institutional hedge and asset (non-speculative) customers falling within the categories of "otherwise regulated" institutional entities which, pursuant to Rule 4.5(a)(1)-(4), are excluded from commodity pool operator regulation.[5] Subsequently, the Division granted similar no-action relief permitting use of customer account documentation employing a single acknowledgment and signature line for foreign trading vehicles analogous to the entities specified in Rule 4.5 in that they are subject to foreign regulatory frameworks comparable to those specified in Rule 4.5 and having assets of $250 million or more.[6]

4/ (...continued)
the person or entity: (i) own or control in excess of $ 5 million in securities of unaffiliated issuers; (ii) have deposited in excess of $1 million in initial margin and option premiums for commodity interest trading at an FCM; or (iii) a combination of (i) and (ii). See 57 Fed. Reg. 3148, 3156 (January 28, 1992).

5/ Unpublished letter dated July 22, 1987 from Andrea M. Corcoran, Director of the Division of Trading and Markets, Commodity Futures Trading Commission, to ,
The no-action relief granted applied to the account disclosure and acknowledgment requirements contained in Rules 1.55, 32.5, 33.7, 190.10, 180.3 and 190.06(d). The relief was conditioned upon the Commission-required disclosures remaining unchanged and being separately furnished to the customer where required.

6/ Unpublished letter dated September 21, 1989 from Susan C. Ervin, Chief Counsel, Division of Trading and Markets, to
The no-action relief granted applied to the account disclosure and acknowledgment requirements contained in Rules 1.55, 32.5, 33.7, 190, 180.3 and 190.06(d). The relief was conditioned upon the single acknowledgment and signature format being used with respect to customers analogous to Rule 4.5 entities, organized under the laws of specified foreign countries and subject to comparable regulation in those countries, and having assets of $250 million or more. The relief was further conditioned upon the Commission-required disclosures remaining unchanged and separately furnished to the customer where required.

Essentially, the no-action relief you request would provide to all FCMs a broader range of relief than that provided by the Division on a case-by-case basis to individual requestors under specific circumstances. In particular, the requested relief would include, in addition to Rule 4.5 entities and the comparably regulated foreign entities as to which relief was previously granted, all customers falling within the definition of QEP set forth in proposed Rule 4.7 (and comparable foreign customers).

Based upon the foregoing, the Division believes that the relief requested with respect to FCM account opening procedures for the specified categories of institutional and highly accredited investors would not be contrary to the public interest. Accordingly, subject to the condition stated below, the Division will not recommend that the Commission take enforcement action against an FCM based solely upon such FCM's use of the Form of Acknowledgment of Receipt of Required Disclosures proposed by you and attached to this letter, or a comparable format, with respect to accounts of the following categories of customers: (1) qualifying entities under Rule 4.5; (2) persons who would qualify as QEPs under proposed Rule 4.7, subject to such modifications as the Commission may subsequently make in the proposed rule;[7] (3) foreign entities that are analogous to qualifying entities under Rule 4.5 and subject to regulatory frameworks comparable to those applicable to Rule 4.5 qualifying entities; and (4) foreign persons substantially equivalent to those constituting QEPS under proposed Rule 4.7, subject to such modifications as the Commission may subsequently make in the proposed rule, and otherwise authorized to engage in futures related transactions. Thus, the Division would not recommend enforcement action where FCMs obtain a single acknowledgment from an eligible customer at the end of the customer agreement or on a separate page; if such acknowledgment immediately precedes the signature line of the FCM's customer agreement, the customer would be required to sign the agreement only once and a separate signature acknowledging the receipt of the disclosures would not be required.

This relief is applicable solely to the acknowledgment requirements and the customer election requirements noted above and is conditioned upon the FCM's compliance with the duty to make all required disclosures and elections in their prescribed form, separately furnished to the customer where required by Commission rules. This no-action position is subject to the condition that the terms of such relief shall continue under the requirements of proposed Rule 4.7 until the adoption by the Commission of Rule 4.7 as a final rule. Upon the adoption of the final rule, the terms of

---

7/ The LCD recognizes that the Commission may amend the QEP definition when proposed Rule 4.7 is adopted as a final rule and proposes that in that event the no-action relief proposed to be granted would be similarly amended.

the no-action relief provided herein shall be amended to conform to the terms of Rule 4.7 as adopted by the Commission. Our position does not affect the obligation of an FCM to comply with contract market rules which require the FCM to obtain, by instrument separate and apart from the customer agreement, a customer's consent that the FCM may knowingly take the other side of a customer's order.[8/]

The position taken herein is based upon the representations you have made to us and is subject to compliance with the conditions set forth herein. The position taken herein does not excuse an FCM from compliance with any otherwise applicable requirements contained in the Commodity Exchange Act or the Commission's rules thereunder. Any different, changed or omitted facts or circumstances might cause us to reach a different conclusion. Further, this is the opinion of the Division only and does not necessarily represent the opinion of the Commission or any other division or office of the Commission.

Finally, we note that the Law and Compliance Division has suggested that relief of the nature addressed herein be made applicable with respect to all customer accounts. The Commission is reviewing disclosure simplification on a more generalized basis and may in that context consider the latter issue.

If you have any questions about this correspondence, please feel free to contact me or Susan C. Ervin, the Division's Chief Counsel, at (202) 254-8955.

Very truly yours,

Andrea M. Corcoran
Director

Attachment

8/ See Commission Rule 155.3(b)(2) and the Division of Trading and Markets Interpretative Letter No. 83-7, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,907 (October 25, 1983).

Similarly, we note that relief from any requirements of the National Futures Association or from any requirements of a contract market should be addressed directly to NFA or the contract market concerned.

Proposed Form of Acknowledgment
of Receipt of Required Disclosures

Customer Acknowledgments.

(a) Customer hereby acknowledges that it has received and understands the following disclosure statements prescribed by the CFTC (check where applicable):

[ ] Risk Disclosure Statement
(CFTC Rule 1.55)

[ ] Options Disclosure Statement
(CFTC Rule 33.7)

[ ] Non-Cash Margin Disclosure Statement
(CFTC Rule 190.10)

(b) (If applicable) All transactions effected for this account will be bona fide hedging transactions as described in Section 4a of the Act, as amended, and Rule 1.3(z) promulgated thereunder. As such, in accordance with CFTC Rule 190.06, Customer may specify whether, in the event of Broker's bankruptcy, Customer prefers that the trustee liquidate open commodity contracts in the accounts without seeking Customer's instructions. Accordingly, in the event of Broker's bankruptcy, the trustee should:

[ ] Attempt to contact Customer for instructions regarding the disposition of open contracts in the account.

[ ] Liquidate open commodity contracts without seeking Customer's instructions.

(c) (If applicable) Customer has read the pre-dispute arbitration provisions set forth in paragraph __ of this Agreement and understands that it is not required to agree to such arbitration in order to open an account with Broker.

[ ] Customer agrees to arbitration.

[ ] Customer does not agree to arbitration.

_____
Customer's Name (Printed) Date

By: _____
Signature

Title: _____