

CFTC Letter No. 97-10**February 27, 1997****Division of Trading & Markets**

John G. Gaine, Esq.

General Counsel

Managed Futures Association

1150 Connecticut Avenue, N.W.

Washington, D.C. 20036

Re: Rule 4.26(b) -- Request on behalf of operators of certain publicly offered commodity pools for relief from the requirement to provide a prospective pool participant with a copy of the pool s most recent Annual Report at the time that the Disclosure Document is delivered

Dear Mr. Gaine:

This is in response to your letter dated February 20, 1997 to the Division of Trading and Markets (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by telephone conversations with Division staff. On behalf of the Managed Futures Association (MFA ¹), you request that exemptive relief be granted to the operators (CPOs) of certain publicly offered commodity pools (Public Pools ²) from the requirement of Commission Rule 4.26(b) to deliver a copy of a Public Pool s most recent Annual Report at the time a prospective pool participant is provided with the pool s Disclosure Document.

Based upon the representations made in your correspondence, we understand the relevant facts to be as follows. Under rules promulgated by the Securities and Exchange Commission (SEC) pursuant to the Securities Act, if the CPO of a Public Pool provides audited financial statements to prospective participants in addition to the financial statements that are required to be included in the registration statement, the accountant s statement must be filed with the SEC (necessitating the filing of a post-effective amendment to the registration statement).³ Filing a post-effective amendment may require a complete reprinting of the prospectus although, as you acknowledge,

the SEC has shown considerable flexibility in this regard.

The relief requested would exempt CPOs of eligible Public Pools from delivering the Annual Report at the time of delivery of the Disclosure Document. In lieu of delivering the Annual Report with the Disclosure Document, the CPOs would make the Annual Report available upon request prior to sale and such information would be readily accessible as an exhibit to the Form 10-K on the SEC's Internet website. Further, the CPO would deliver the Annual Report to all investors with the first communication sent to an investor after he or she has purchased an interest in the pool. Finally, the Public Pool CPOs would undertake to make the net asset value per unit available on a daily basis to prospective participants and would further undertake to furnish such information to the brokers who have sold units so that the brokers could, in turn, furnish such information to their clients who are participants in the Public Pools.

MFA argues, in effect, that the Disclosure Document, together with the most recent monthly Account Statement for the pool, which is required to be delivered with the Disclosure Document at the time of solicitation, will include all material information that would be included in the Annual Report. MFA stresses that all public pool Disclosure Documents contain detailed audited financial statements with full accounting notes.

In order to assure that current financial information is given to prospective pool participants, the Commission has required since 1981 that the most recent Account Statement and Annual Report accompany the Disclosure Document when it is delivered by the CPO. This requirement became effective on July 1, 1981. See 46 Fed. Reg. 26004 (May 8, 1981). Unlike the SEC's Form S-1 registration statement which requires inclusion of audited financial information in the prospectus, the Commission's regulations do not require that financial statements be included in the Disclosure Document.

In support of your request for relief from the requirement of delivery of the Annual Report with the prospectus/Disclosure Document, you argue that the importance of the disclosures provided in the Annual Report to prospective participants in publicly offered pools is significantly diminished by the following considerations. You contend that the monthly Account Statement that Commission Rule 4.26(b) requires the CPO to deliver with the Disclosure Document⁴ contains more current information than the Annual Report⁵ and should adequately supplement the audited financial information contained in the prospectus.⁶ In addition, the pool's net asset value per unit as of the end of the previous business day will be available upon request either from the brokers marketing pool units or directly from the CPO.⁷ Annual financial information is available in a Public Pool's Form 10-K report, which is filed with the SEC and available over the Internet through the SEC's EDGAR electronic dissemination system. Furthermore, the CPOs of Public Pools would undertake to provide a paper copy of the Annual Report to prospective pool participants upon written or oral request.

In any event, both the securities laws and the Commodity Exchange Act (the Act⁸) require that prospectuses/Disclosure Documents be updated prior to use to reflect any material change in disclosed information, and you assert that Public Pool CPOs would undertake to include in the monthly Account Statements delivered to prospective pool participants any material information contained in a Public Pool's Annual Report and not otherwise included in the prospectus/Disclosure Document.

Thus, you propose that Public Pool CPOs be permitted to deliver the most recent Annual Report following the sale of units, rather than at the point of solicitation. You assert that other applicable safeguards, including concurrent SEC regulation of the Public Pools and the other considerations set forth above, warrant granting the requested relief to reduce administrative burdens and expenses resulting from simultaneous application of federal securities and futures laws.

Based upon the representations made in your correspondence, the Division believes that the relief requested would not be contrary to the public interest. Accordingly, pursuant to Rule 140.93(a)(1) and subject to the following conditions, the Division hereby exempts any registered CPO of a pool in which units of investment participation are being offered and sold pursuant to an effective registration statement under the Securities Act and which is subject to the periodic reporting requirements of the Exchange Act, from the requirement of Rule 4.26(b) to provide a copy of such pool's most recent Annual Report to a prospective participant at the time a Disclosure Document is required to be delivered to such prospective participant. This relief is conditioned upon compliance by such CPO (or its agents) with the following requirements:

1. The monthly Account Statement provided to a prospective participant must include any material information contained in, or required to be contained in, the Annual Report (although the monthly Account Statement will not include audited financial statements, it will disclose any material change from the most recent audited financial statements);
2. The pool's net asset value per unit as of the close of the previous business day must be available from the CPO or from the broker marketing units of participation in the pool (and the availability of such information must be disclosed in the Disclosure Document and/or in the monthly Account Statement);
3. A paper copy of the most recent Annual Report must be provided to any prospective participant upon request;
4. Within twenty-one days following the purchase of a unit of participation in a Public Pool, the participant must be provided a copy of the Public Pool's most recent Annual Report, free of charge. The Form 10-K Annual Report will be updated and filed in accordance with the requirements of SEC rules;

and

5. The Public Pool's limited partnership agreement or other organizational document must provide for redemptions no less frequently than monthly

This letter is applicable to CPOs of Public Pools in connection with the operation of such Public Pools. Furthermore, this letter does not excuse any Public Pool CPO from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder, including all other provisions of Part 4. For example, such CPOs remain subject to the antifraud provisions of Section 40 of the Act⁹ and to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations.

This letter is based upon the representations provided to us and is subject to compliance with the conditions set forth above. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event the operations or activities of any Public Pool CPO change in any way from those represented to us. If you have any questions concerning this correspondence, please contact me or Susan C. Ervin, the Division's Chief Counsel, at (202) 418-5450.

Very truly yours,

Andrea M. Corcoran

Director

CWC/cc

cc: Daniel A. Driscoll, National Futures Association

¹ The Managed Futures Association is a not-for-profit trade organization representing managed futures industry professionals.

² You request relief only for the CPOs of publicly offered pools that: (1) are distributing units of investment participation pursuant to an effective registration statement under the Securities Act of 1933 (the Securities Act); (2) are subject to the periodic reporting requirements of the Securities Exchange Act of 1934 (the Exchange Act); and (3) satisfy the information delivery undertakings set forth in your letter.

³ Commodity pool securities offerings are generally ineligible for registration on SEC Form S-2 or Form S-3, each of which allows substantial incorporation by reference.

⁴ In lieu of the most recent Account Statement, Rule 4.26(b) permits delivery of performance information for the pool current as of a date not more than sixty days prior to the Disclosure Document delivery date and covering the period since the most recent performance information contained in the Disclosure Document.

⁵ The Annual Report need not be distributed to pool participants and filed with the Commission until ninety days after the end of the pool's fiscal year.

⁶ We understand that the monthly Account Statement is being filed with the SEC pursuant to Rule 424 under the Securities Act.

⁷ You state that those CPOs of Public Pools whose prospectuses/Disclosure Documents do not already advise participants of the availability of the net asset value per unit will undertake to revise their documents accordingly at the next scheduled reprinting, and in the interim, to include a statement in the monthly Account Statements to the effect that this information is available from the marketing brokers or from the CPOs.

⁸ 7 U.S.C. § 1 et seq. (1994).

⁹ 7 U.S.C. § 6o (1994).