

CFTC Letter No. 97-44**June 9, 1997****Division of Trading & Markets**

Re: Relief from Registration Requirement for a Company Selling a Database of Leads to Commission Registrants

Dear :

This is in response to your letters dated March 14, 1997, and March 28, 1997, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by telephone conversations with Division staff. By your letters, as supplemented, you request that the Division confirm that (Company"), which sells a database of leads to Commission registrants, is not required to register with the Commission as an introducing broker ("IB").¹

Based upon the representations made in your letters, as supplemented, we understand the pertinent facts to be as follows. Since 1982, the Company has been selling to Commission registrants a database of investors in commodity pools and hedge funds. The database contains an individual's name, address and telephone number, the commodity pool or hedge fund in which he has invested, and the amount of such investment. You represent that the names, addresses and investment information in the database were obtained from publicly available partnership filings in various county government recorder offices throughout the country. Further, you represent that the Company does not independently investigate or verify the accuracy of the investment information culled from the county records. Rather, the Company adds telephone numbers to the information from the county records through the use of a computerized telephone directory. You state, however, that due to changes in partnership registration and recording requirements, no new names have been added to the database since 1992. In addition, the Company does not have any contact with members of the general public nor does it advertise for new leads or purchase any additional leads from other sources. Thus, other than updating telephone numbers and addresses, the Company's database has remained static since 1992.

The Company markets the database to Commission registrants through direct mail and advertisements in futures publications. Your current direct mail brochure describes the database as a list of 5,000 individuals who have invested \$20,000 or more in publicly organized commodity funds and privately placed hedge funds. The Company sells the database in various computerized formats for a fixed fee of (A). The Company does not receive any additional compensation based

upon commissions or investment activity generated from successful leads. Additionally, the Company does not participate or assist in developing the message or method used by registrants in soliciting potential customers. Finally, you represent that the Company does not sell or otherwise provide the database to any affiliated or related entities that may use it for the solicitation of customers.

Generally, persons who refer potential customers to Commission registrants for compensation are required to register under the Act.² The registration requirements serve to screen unfit persons from dealings with customers and thus represent an important customer safeguard. To assure that these requirements reach all persons involved in customer solicitations, the registration requirements have been construed flexibly to require the registration of persons who participate even indirectly in such solicitations. In Congressional deliberations leading up to the creation of the Commission as an independent regulatory body in 1974, it was noted that:

in order to adequately protect the investing public, registration requirements and fitness checks should be imposed on commodity solicitors, advisors, and all other individuals who are involved either directly or indirectly in influencing or advising the investment of customers' funds.³

In creating the IB registration category in 1983, the Commission stated that it will require:

registration as an introducing broker by any person who is compensated for the referral of customers to an FCM. Specifically, the Commission is of the opinion that the phrase soliciting or accepting orders . . . must be construed to encompass not just the literal solicitation of customers' orders, but also the solicitation of customers . . . for referral to an FCM for the institution of a trading relationship and the execution of those orders. Similarly, the Commission believes that persons who are currently compensated on a per-trade basis or by a referral fee . . . would be deemed to be the agent of a futures commission merchant for the purposes of the acceptance of those customer orders. As such, any person who continues to engage in those activities would be within the definition of, and generally required to register as, an introducing broker.⁴

Commission staff have required that persons who for compensation refer customers to Commission registrants be registered as IBs in accordance with the Act and the legislative history. The touchstone of the Commission staff interpretative letters requiring registration of persons providing referrals has been the contact with the potential customer or the relationship between the person providing the referral and the person communicating with the potential customers.⁵ For example, Commission staff have required registration of: (1) account executives of a registered broker-dealer who for compensation refer inquiries from customers to a futures

commission merchant;⁶ (2) a telecommunications company that developed technology to permit a caller to reach thousands of people and utilizes such technology in conjunction with a Commission registrant to develop a survey, which in turn is used to create a database of prospective customers;⁷ and (3) employees of an FCM who telephoned prospective customers to determine their interest in communicating with associated persons of the FCM and receiving promotional literature.⁸

Based upon the foregoing representations, the Division will not recommend that the Commission take any enforcement action under Section 4d(1) of the Act, 7 U.S.C. § 6d(1), against the Company based solely upon its failure to register as an IB in connection with its lead activities as described herein. This letter is based upon the representations made in your letters, as supplemented. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this regard, we request that you notify us immediately in the event that the operations or activities of the Company change in any way from those represented to us. This letter represents the views of this Division only and does not necessarily represent the views of the Commission or any other office or division of the Commission.

If you have any questions regarding this letter, please contact me or Lawrence B. Patent, Associate Chief Counsel, at (202) 418-5450.

Sincerely,

Susan C. Ervin

Chief Counsel

¹ An introducing broker is defined as "any person (except an individual who elects to be and is registered as an associated person of a futures commission merchant) engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom." Section 1a(14) of the Commodity Exchange Act ("Act"), 7 U.S.C. § 1a(14) (1994).

² See, e.g., Division of Trading and Markets Interpretative Letter No. 96-45, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,715 (May 8, 1996).

³ Subcommittee on Special Small Business Problems of the House Permanent Select Committee on Small Business, H.R. Rep. No. 963, 93rd Cong., 2d Sess. at 36-37 (1974).

⁴ 48 Fed. Reg. 35248, 35250 (August 3, 1983), citing 48 Fed. Reg. 14933, 14935 (April 6, 1983).

⁵ See, e.g., Division of Trading and Markets Interpretative Letter No. 82-4, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,786 (August 10, 1982) (noting Congress "intended that those persons who engage in direct contacts with customers expressing an interest in commodities and thus are in a position to influence customers' decision-making, whether or not they in fact do so, be subject to appropriate fitness standards").

⁶ Id.

⁷ Division of Trading and Markets Interpretative Letter No. 90-8, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,831 (May 7, 1990).

⁸ CFTC Interpretative Letter No. 77-8, [1977-1980 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 20,430 (May 16, 1977) (Office of the General Counsel).