

**CFTC Letter No. 97-49****June 20, 1997****Division of Trading & Markets**

Re: Rule 4.14(a)(6): Availability of Commodity Trading Advisor  
Registration Exemption To an Introducing Broker Which Provides  
Agricultural Market Commentaries Through Various Media

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Dear :

This is in response to your letter dated April 17, 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 correspondence, you request the Division's opinion as to whether the Rule 4.14(a)(6) <sup>1</sup> exemption from registration as a CTA would be available to X , a registered IB and CTA, so that X may withdraw its CTA registration but continue to provide commentary on cash and futures agricultural markets through various media.

Based upon your letter, as supplemented, we understand the pertinent facts to be as follows. X is a registered IB currently guaranteed by W , a registered futures commission merchant ("FCM"), and has been so registered since 1987. In 1996, X also registered as a CTA since it believed such registration was necessary in order for it to provide commentary on agricultural markets through various media, as more fully described below. You are listed as the sole principal and are a registered associated person ("AP") of X . During a recent audit of X by the National Futures Association ("NFA"), NFA auditors informed you that X may be able to provide its commentary without being registered as a CTA based upon the registration exemption provided by Rule 4.14(a) (6), and the auditors instructed you to seek the Division's opinion as to whether this exemption would be available to X .

X provides a commentary service on agricultural markets, called "V", twice daily over Y and Z , two media transmission services that provide subscribers access to other information services via a satellite link. The commentary may involve discussions on price movements in the cash and futures markets for agricultural products, demand and supply factors in the agricultural markets, and other factors relevant to the cash and futures agricultural markets as well as specific recommendations on marketing grain in the cash market and on positions to be taken in the futures markets for hedging purposes. "V" also runs a "tally sheet" which provides the results of entering into the hedge positions recommended by it. Persons who receive "V" are charged a subscription

fee of \$90 per quarter. This fee is split evenly between X and Y or Z, as applicable. Persons may contact X, Y or Z to subscribe to "V." "V" indicates that the commentary is provided by X with you listed as editor.

X also provides commentaries for radio broadcasts. The radio commentary generally does not include any cash marketing recommendations but is otherwise similar in its content to "V." Only one radio station that carries your commentaries regularly announces X's telephone number for its listeners to call for additional information. In other cases, however, listeners would usually be able to obtain X's telephone number by contacting the radio station, through telephone directory information or other similar means. X also writes a column that appears in a local newspaper. It provides information similar to that found in V and the radio broadcasts. The newspaper column carries the following byline: A, X ". Neither X nor you receive any direct compensation for the radio or newspaper commentaries.<sup>2</sup>

X currently holds discretionary trading authority over only four customer accounts, which represents less than one percent of the total number of its customer accounts. X has not exercised its discretionary authority to trade these accounts and, in fact, has requested that these customers withdraw the powers-of-attorney they had previously executed in favor of X.<sup>3</sup>

Section 1a(5) of the Commodity Exchange Act<sup>4</sup> ("Act") defines a CTA as:

any person who for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market; any commodity option authorized [under the Act] or . . . for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning of the activities referred to [above].

By providing its commentaries, which include discussions of the underlying demand and supply trends that affect futures markets prices, opinions concerning price trends in futures markets and specific recommendations for positions to be taken in the futures markets for hedging purposes, X is engaging in activities which implicate the statutory definition of CTA. Thus, X must register as a CTA pursuant to Section 4m(1) of the Act<sup>5</sup> unless an exemption from registration is available to it.

Rule 4.14(a)(6)<sup>6</sup> exempts a registered IB from registration as a CTA if the IB's advisory services are "solely in connection" with its business as an IB. In this regard, the Division has stated that a determination as to whether an IB's advisory services are "solely in connection" with its business

as an IB involves an examination of the context of the business concerned and the factual situation in which the services are rendered. This may include, among other things, an examination of: (1) whether the IB markets its advisory services generally to the public or limits their availability to established customers; (2) the manner in which the IB is compensated for its advisory services; (3) whether the advisory services originate with the IB or are supplied by a third party; and (4) the proportion of the IB's customer accounts to which it is providing advisory services.<sup>7</sup>

After reviewing the information provided to us concerning X's activities, the Division is unable to conclude that X qualifies for exemption from registration as a CTA under Rule 4.14(a)(6), inasmuch as it receives a fee distinct from any fees charged its IB customers for some of its advisory services and provides its commentaries generally to the public and does not limit their availability to its established IB customers.<sup>8</sup> However, based upon the facts provided to us, we do not believe that it would be contrary to the public interest or the purposes of the registration requirements to provide X with relief from the CTA registration requirements of Section 4m(1) of the Act. In this regard, we note that X is registered with the Commission as an IB and is a member of NFA. Thus, you as X's sole principal along with X's APs have undergone fitness checks and complied with relevant proficiency requirements. Given that X does not exercise discretionary trading authority over any customer accounts, it is not subject to the Disclosure Document requirement of Rule 4.31. Further, as a member of NFA, X is subject to NFA rules, including NFA's Compliance Rule 2-29, which requires, among other things, that NFA members be able to demonstrate that any past performance information used in promotional materials was calculated in a manner consistent with Commission rules and that required disclosures are made in the presentation of hypothetical performance results.

Accordingly, based upon the foregoing, the Division will not recommend that the Commission commence enforcement action against X under Section 4m(1) of the Act if X withdraws its CTA registration and continues to offer commentary on agricultural markets as described above. This position is subject to the condition that X continues to maintain any applicable records that would be required by Rule 4.33 of a registered CTA.

This letter applies to X solely with respect to the requirement that it remain registered as a CTA in connection with its providing commentary on the agricultural markets through various media, as described above. This letter does not excuse X from compliance with any other applicable requirements contained in the Act or Commission rules. For example, X remains subject to the antifraud provisions of Section 4o of the Act,<sup>9</sup> the advertising restrictions of Rule 4.41 and to all other applicable requirements of Part 4 of the Commission rules.

This letter is based upon the representations that you have made to us, and is subject to the condition stated above. Any different, changed or omitted conditions might require us to reach a different conclusion. In this regard, we request that you inform us immediately if the activities or operations of X change in any way from those represented to us. This letter represents the views

of this Division only. It does not necessarily reflect the views of the Commission or any other division or office of the Commission. If you have any questions, please contact me or Thomas E. Joseph, an attorney on my staff, at (202) 418-5430.

Very truly yours,

Susan C. Ervin

Chief Counsel

<sup>1</sup> Rule 4.14(a)(6) exempts a registered introducing broker ("IB") from also having to register as a commodity trading advisor ("CTA") where the IB's "trading advice is solely in connection with its business as an introducing broker." Commission rules referred to herein are found at 17 C.F.R. Ch. I (1996).

<sup>2</sup> We note, however, that the Division has stated that activities which help maintain or develop a firm's client base may provide such a firm with indirect compensation. See, e.g., CFTC Interpretative Letter No. 95-51, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,420 at p. 42,854 (May 1, 1995) (arrangement by which an firm's customers received a discount on firm's information services if they traded through a specific FCM constituted indirect compensation).

<sup>3</sup> X had originally requested powers-of-attorney over its customers' accounts to allow it to exercise time and price discretion. Once X learned that it did not require a power-of-attorney to exercise price and time discretion over its customers' trades, it requested all of its customers to cancel any powers-of-attorney that they had provided X. All of X's customers but for the previously mentioned four customers have canceled such discretionary trading authority.

<sup>4</sup> 7 U.S.C. §1a(5)(1994).

<sup>5</sup> 7 U.S.C. §6m(1)(1994).

<sup>6</sup> Other exclusions from the definition of CTA or exemptions from registration as a CTA are available to qualified persons under the Act and Commission rules. However, based upon the information provided to us, it does not appear that any of these other provisions would be applicable to X. See Section 1a(5) (B) and (C) of the Act, 7 U.S.C. §1a(5)(B) and (C); Section 4m(1) of the Act; and Rule 4.14(a)(1)-(a)(5) and (a)(7)-(a)(8).

<sup>7</sup> See CFTC Interpretative Letter No. 95-68, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,488 at p. 43,233 (October 12, 1995).

<sup>8</sup> Cf. CFTC Interpretative Letter No. 93-6, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶

25,571 (January 27, 1993) (registered IB which wished to offer a hotline service to members of the general public on a fee-per-call basis should register as a CTA).

<sup>9</sup> 7 U.S.C. 60 (1994).