

**CFTC Letter No. 97-63****July 15, 1997****Division of Trading & Markets**

Re: Applicability of the Commodity Exchange Act and Commission Regulations To Listing of Certain Financial Data for Publicly Offered Commodity Pools

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Dear :

This is in reply to your letter dated February 11, 1997 to the Secretary of the Commodity Futures Trading Commission ( Commission ) by which you request confirmation that X s proposal to list daily net asset values, daily returns and other financial data for publicly offered commodity pools, as described below, would not violate the Commodity Exchange Act ( Act )<sup>1</sup> or Commission rules promulgated thereunder.<sup>2</sup> Your letter was forwarded to the Division of Trading and Markets ( Division ) for response.

Based upon your letter, as supplemented by telephone conversations with Division staff, we understand the pertinent facts to be as follows. X is a division of Y . X wishes to publish a list of daily estimated returns for managed futures investment vehicles, specifically, publicly offered commodity pools, as part of its regular financial news reporting services.<sup>3</sup> The listing would contain the name of the commodity pool operator ( CPO ). Below the name of the CPO, X would print the names of the publicly offered commodity pools operated by that CPO. For each such listed pool, X would print the daily rate of return<sup>4</sup>, the current net asset value, the year-to-date rate of return, and the high and low net asset value for the current calendar year. CPOs will provide and X will also print in a separate column the daily rate of return for the five previous business days. Daily returns and other data may be estimated rather than actual because back offices of listed CPOs may have difficulty in generating rates of return and other figures that reflect end-of-day price changes, especially if foreign currencies are involved. You expect that differences between estimated and actual values will be slight.

Where a CPO changes previously published data for a pool, X will annotate the listing in some manner, such as by use of an asterisk, to indicate that the current published value differs from one previously published. Where the change from a previous value for a daily rate of return is one percentage point or more, X also will indicate that the new estimate is significantly different from the one previously provided by the CPO and will list the previous estimate.<sup>5</sup> Further, X will

compare daily returns provided by the listed CPOs against their actual monthly returns in an attempt to assure that there are not significant differences between these amounts and will advise the Commission and the reporting CPO of any discrepancies. No additional information about the CPO, such as the telephone number or address, is proposed to be published.

The listed CPO will calculate the relevant rates of return and net asset values for the funds and report the information to X for publication. X will instruct CPOs that all calculations will be required to be made in accordance with the requirements of Commission rules, notably Commission Rule 4.25, and GAAP, and all estimates will be required to be consistent with such requirements.<sup>6</sup>

X will not charge listed CPOs a fee for such listing. It will report the managed futures listings as part of its regular financial news reporting services, and the listing will be accessible free of charge to members of the public on the Internet. X will list only commodity pools operated by CPOs who are registered with the Commission. All registered CPOs will be eligible to have their funds listed provided that they are able to supply the data required by X.

X's listings will include a prominently displayed statement reading as follows:

THE INFORMATION CONTAINED IN THIS LISTING WAS SUPPLIED BY THE NAMED COMMODITY POOL OPERATOR AND WAS NOT INDEPENDENTLY VERIFIED. THE INFORMATION PROVIDED MAY BE ESTIMATED, AND ACTUAL RETURNS AND NET ASSET VALUES ONCE CALCULATED MAY VARY FROM THE FIGURES LISTED HERE. THE DISCLOSURE DOCUMENTS FOR THE LISTED COMMODITY POOL OPERATORS ALSO CONTAIN PERFORMANCE INFORMATION FOR THE FUNDS AS REQUIRED BY THE CFTC. DISCLOSURE DOCUMENTS CAN BE OBTAINED FROM THE INDIVIDUAL COMMODITY POOL OPERATORS AND ARE ALSO FILED WITH THE COMMODITY FUTURES TRADING COMMISSION AND THE NATIONAL FUTURES ASSOCIATION. A DISCLOSURE DOCUMENT MUST BE PROVIDED TO INVESTORS PRIOR TO INVESTMENT IN A POOL.

A second, equally prominently displayed statement would read:

PAST PERFORMANCE IS NOT NECESSARILY INDICATIVE OF FUTURE RESULTS.

Based upon the information provided to us, it does not appear that X's listing service would violate the Act or Commission rules. X will be reporting information concerning returns of commodity

pools as part of a general financial news reporting service. It will not endorse or otherwise comment upon particular funds or CPOs, nor will it receive compensation from the CPOs (or any other person) for providing the listings, apart from generally applicable subscription fees. The method of calculation for rates of return will be in accordance with Commission Rule 4.25 and GAAP. Further, it does not appear that X would be required to register as a CTA in order to offer this listing service. As a financial news service, X is a publisher of print or electronic data of general and regular distribution. You represent that the listing service would be provided in a manner that is solely incidental to X's general financial reporting. To that extent, X would be excluded from the definition of CTA by Section 1a(5) of the Act<sup>7</sup> and therefore would not be subject to the Commission registration requirements applicable to CTAs.

We note that CPOs who supply data to X remain subject to all applicable provisions of the Act and Commission rules in connection with this listing service, including the antifraud provisions of Section 40 of the Act.<sup>8</sup> As such, CPOs who supply false or misleading information to X would be subject to Commission enforcement action. Further, CPOs must retain copies of all data supplied to X pursuant to Commission Rule 4.23(a)(9).

This letter is based upon the representations provided to us. 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 if X's operation of the listing service varies in any way from that 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 concerning this correspondence, please contact me or Susan C. Ervin, Chief Counsel of the Division, at (202) 418-5430.

Very truly yours,

Andrea M. Corcoran

Director

<sup>1</sup> 7 U.S.C. § 1 et seq. (1994).

<sup>2</sup> Commission rules referred to herein are found at 17 C.F.R. Ch. I (1996).

<sup>3</sup> Your letter also included a request to publish estimated returns for trading programs used by commodity trading advisors ( CTAs ) to manage customer accounts. However, the Division has deferred consideration of the request with respect to CTA trading programs pending further review.

<sup>4</sup> Commission Rule 4.25 defines the rate of return for any period as the net performance for that period divided by the net asset value at the beginning of that period. Net performance is the change in net asset

value for the period, net of additions, withdrawals and redemptions. In effect, net performance shows the profit or loss from trading only and not any change in value based upon new subscriptions, redemptions, withdrawals or other types of charges or additions not related to changes in value of the underlying portfolio. Performance disclosure for pools provided in required Disclosure Documents is based upon rates of return rather than changes in net asset value.

Further, the daily rate of return should be based upon generally accepted accounting principles ("GAAP"), as required under Commission regulations for reporting to pool participants. Under generally accepted accounting principles, accruals will be required for fees, commissions and other expenses of the pool. If there are special allocations of partners' equity between ownership or participant classes in lieu of incentive fees or other compensation, such special allocations should also be accrued in computing the rates of return. If there are different classes of pool participants which receive different returns because of different expense, commission and profit-sharing arrangements, the rate of return published should be for the accounts of the pool's third-party participants, which may be different from the rate of return for other classes of participants or for the pool as a whole.

Unlike a rate of return calculation pursuant to Commission Rule 4.25, published performance information for mutual funds is generally based on changes in net asset values plus accumulated income for a period and assumes all distributions are reinvested in the fund. Thus, calculations of performance for mutual funds would generally be affected by the level of new subscriptions or redemptions which occur over a period, and more closely resemble a change in net asset value calculation than the rates of return for publicly offered pools to be published by X. See, e.g., How to Read These Tables, Wall St. J., May 30, 1997 at C19 (describing mutual fund listings published by the Wall Street Journal).

<sup>5</sup> X will inform subscribers that a CPO has changed a previous estimated daily rate of return by one percentage point or more even if the day for which the estimated change was made is not one of the five previous business days listed by X.

<sup>6</sup> In this regard, we note that the CPO's calculations of the daily net asset value should reflect the current redemption value for pool participations. Where redemption values are materially different from the recently published net asset values, and such discrepancies are not attributable to redemption fees that had been previously disclosed to pool participants or by the recent performance of the pool, the CPO which supplied the estimates may be subject to Commission enforcement action for violation of the antifraud provisions of Sections 4b and 4c of the Act, 7 U.S.C. § 6b and 6c (1994).

<sup>7</sup> 7 U.S.C. § 1a(5)(B) and (C) (1994).

<sup>8</sup> 7 U.S.C. § 6c (1994).