

**CFTC Letter No. 97-80****September 10, 1997****Division of Trading & Markets**Re: Section 1a(5) of the Act: Whether an FCM Must Register as a CTA

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Dear :

This is in response to your letter dated August 18, 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 inquire about whether X, a registered futures commission merchant ("FCM"), is required to register as a commodity trading advisor ("CTA") if it solicits and manages retail customer accounts.<sup>1</sup>

Section 1a(5) of the Commodity Exchange Act ("Act")<sup>2</sup> provides a statutory exclusion from the CTA definition for certain categories of persons, such as banks, publishers, teachers, and FCMs, who provide commodity interest advice in a manner "solely incidental" to the conduct of their business or profession.<sup>3</sup> As a general rule, the Commission has not required an FCM which manages a customer's commodity interest account to register as a CTA so long as the firm is acting as an FCM with respect to the account, *i.e.*, carrying the account on its books and accepting customer funds in connection with commodity interest transactions.<sup>4</sup> However, if a registered FCM were not acting as an FCM with respect to an account it was advising or managing, the statutory exclusion from the CTA definition based on "solely incidental" conduct may not apply.

We trust that the foregoing information will be helpful. If you have any further questions, please contact me or Monica S. Amparo, an attorney on my staff, at (202) 418-5450.

Very truly yours,

Susan C. Ervin

Acting Director

<sup>1</sup> You have advised Division staff that such retail customers will consist solely of natural persons.

<sup>2</sup> 7 U.S.C. § 1a(5) (1994).

<sup>3</sup> In construing the term "solely incidental," the Division has said that the term is not "meant to denote a numerical standard" but rather, "must be construed in the context of the business concerned and the factual situation in which the services are rendered." The Division noted, by way of example, that a planned or periodic expression of views as to the advisability of trading commodity futures by a futures commission merchant may be solely incidental to its business, while the same advice rendered by a publisher or bank may not. CFTC Interpretative Letter No. 76-1, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,135 at 20,907 (Feb. 26, 1976).

<sup>4</sup> *See, e.g.*, CFTC Interpretative Letter No. 77-13, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,476 (Sept. 1, 1977) wherein the Commission's Office of the General Counsel stated that it would not recommend any enforcement action to the Commission if a company, registered as both an FCM and CTA, instituted a managed account program and contemporaneously withdrew its CTA registration.