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COMMENT

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September 30, 1999

Jean A. Webb, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Performance Data and Disclosure for Commodity Trading Advisors

Dear Ms. Webb:

The Committee on Futures Regulation of this Association (the "Committee") respectfully submits this comment letter to the Commodity Futures Trading Commission (the "Commission") in response to a request for comments concerning its proposed rules on Performance Data and Disclosure for Commodity Trading Advisors (the "Proposal") which was published in the Federal Register on August 2, 1999 (64 F.R. 41843). The Association is an organization of approximately 21,000 lawyers. Most of its members practice in the New York City area. However, the Association also has members in 48 states and 51 countries. The Committee consists of attorneys knowledgeable in the field of futures regulation and has a history of publishing reports analyzing critical regulatory issues which affect the futures industry and related activities.

Overview

The Committee commends the Commission's resolution in the Proposal of the issues surrounding the presentation of performance for partially funded accounts. Adoption of the National Futures Association proposal on notional funding will provide closure for an issue that has caused uncertainty since 1987 for commodity trading advisors ("CTAs"), commodity pool operators ("CPOs") and their counsel. There have recently been accounts in the media criticizing the Proposal's resolution of the issues involving performance of partially funded accounts, and particularly alleging that it has potentially misleading consequences in masking volatility. The Committee notes that these arguments have been raised and considered by the Commission's staff and the NFA on various occasions over the last 12 years. The Committee believes that the Proposal reflects a balanced judgment of the best way in which to present performance for partially funded accounts. The Committee, however, believes that other portions of the Proposal

require further consideration before they are adopted.

As we stated in our September 14, 1998 comment letter on the Commission's Concept Release on Performance Data and Disclosure for Commodity Trading Advisors and Commodity Pools (63 F.R. 33297, June 18, 1998) (the "Concept Release"), "the Committee does not know of any negative experiences with this new [1995] disclosure regime and believes that it may be too soon to assess the adequacy of this regime. Consequently, the Committee does not believe that there is a need at this time to introduce possible discontinuities in performance presentation. In any event, if changes are deemed necessary, they should be introduced only on a prospective basis." The Committee reiterates this view. In addition, the Proposal contains a number of performance disclosure requirements that were not raised by the Concept Release. New performance disclosure requirements will continue the atmosphere of uncertainty in the performance disclosure area that has persisted since 1987 and threaten to render performance disclosures less comparable over time, and, hence, less meaningful to potential investors. The 1995 revisions were extensive in that they produced changes to the format of performance disclosures and introduced some new disclosure items, but those amendments did not alter the rate of return calculation. Consequently, prior year rates of return did not have to be recalculated in order to present consistent historical data. Elements of the Proposal would, if adopted, introduce material changes to the calculation or rate of return.

The Committee's concerns in this area are heightened by the statement in the Proposal (Section I – "Commodity Pool Disclosures" at page 41846) that the Commission is deferring consideration of changes to the CPO disclosure requirements. Future pool performance disclosure alterations could require changes to a CTA's performance presentation beyond those in the Proposal. The Committee believes that CTA performance presentation cannot and should not be uncoupled from CPO performance disclosures.

If the Proposal is adopted in whole or in part, certain technical points should be addressed, including the meaning of performance terminology. As the Proposal notes in Section II – "The Proposed Rules" at page 41844, a number of previous advisories have dealt with similar performance issues; they are cited in footnote 2 of the Proposal's narrative section. The narrative states that the proposed requirements are intended to codify definitions and other information in these advisories. Any final rules should state whether these advisories remain in effect, or are superseded by the proposed rules.

Section 4.10(l)(3)

The Committee's concerns about the disruptions in the continuity of performance presentations are raised by this portion of the Proposal, including the narrative in Section II-B – "Changes to Calculations." The 1981 formula for calculating and presenting CTA performance defined "net performance" as "the change in the net asset value net of additions, withdrawals and redemptions". This definition was essentially maintained when CTA performance disclosure requirements were extensively revised in 1994-1995. Thus, client trading account interest has

been included in a CTA's net performance for purposes of performance presentations, pursuant to Commission rules, since 1981. The question of whether interest should be included in calculating performance was not addressed in 1995 or by the 1998 Concept Release.

The Committee believes that altering the treatment of interest as a component of CTA performance would disrupt what has been to date a consistent method for the historical presentation of performance. If this part of the Proposal is adopted, CTAs and their CPO clients would be confronted with the need to restate their historical performance to maintain a consistent performance method for their entire history. Aside from the costs associated with such a requirement, performance disclosure would also be made more complex, a step back from simpler capsule performance and plain English disclosure. The Committee believes that the best approach to performance disclosure is through adequate narrative and footnote disclosure of the method by which net performance is determined. While this is a current requirement for CTA disclosure documents, the Committee believes that it would be appropriate if CTAs (and CPOs) were reminded of their obligation to make such disclosures in an intelligible manner.

Section 4.10(n)

In Section 4.10(n), the terms "committed funds" and "written evidence" of committed funds are used, but no definition of these terms is given in the Proposal. Because of the long history of interpretation associated with these terms since the adoption of Advisory 87-2, they should be defined in any final rules.

Section 4.33

This proposed rule should be clarified or otherwise modified to state that it applies only to those CTAs that accept notional funds. Many of the requirements are otherwise superfluous and at odds with simplifying and clarifying disclosure.

Section 4.35(a)(1)(iv)(A) and (B)

Establishing a separate rule dealing with situations where CTAs lack specific information about the funding of client accounts and are unable to determine the aggregate of actual funds in those accounts seems to preserve as a matter of regulatory significance the difference between actual and notional funds. The Committee questions the need to provide statements about actual funds given the resolution of the issues concerning notional funding by adoption of the NFA proposal. Nonetheless, if the Commission believes that a statement with respect to actual funding should be required, and CTAs are permitted to state that they are unaware of the level of actual funding, the Commission should clarify the situations in which such a statement could be acceptable. In addition, CTAs should be required to make such a representation formally to the Commission or NFA.

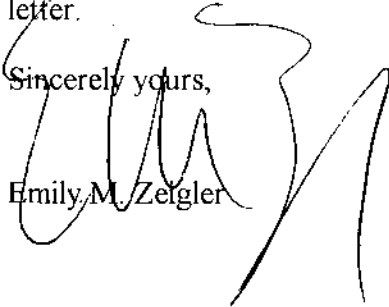
Section 4.35(a)(6)(ii)

After the reference to Section 4.35(a)(6)(i)(A-F), the phrase “ – and not the supporting documentation itself – ” should be added. This will conform the language of the rule to the intent expressed in the narrative portion of the Proposal (Section II-D, at page 41846).

The Association appreciates the opportunity to comment on the proposed rules concerning Performance Data and Disclosure for Commodity Trading Advisors, and stands ready to assist the Commission and its staff if further clarification is required on any of the points raised by this letter.

Sincerely yours,

Emily M. Zeigler

A handwritten signature in black ink, appearing to read 'Emily M. Zeigler', is written over the typed name. The signature is stylized and cursive.

**Association of the Bar the City of New York
Committee on Futures Regulations**

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Rita M. Molesworth, Secretary**

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* Chair of Subcommittee who drafted this letter of comments.