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CITY BAR**

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September 20, 2006

Ms. Eileen Donovan
Acting Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N. W.
Washington, D. C. 20581

Re: Advertising by Commodity Pool Operators, Commodity Trading Advisors, and
the Principals Thereof

Dear Ms. Donovan:

The Committee on Futures Regulation (the "Committee") of the New York City Bar Association (the "Association") is pleased to support the Commission's proposal, which was published in the Federal Register at 71 *F.R.* 49387 (August 23, 2006), to amend the Commission's rules governing advertising by commodity pool operators, commodity trading advisors, and their principals (the "Proposal").

The Association is an organization of over 22,000 lawyers. Most of its members practice in the New York City area. However, the Association also has members in nearly every state and over 50 countries. The Committee consists of attorneys knowledgeable in the regulation of futures contracts and other derivative instruments and it has a history of publishing reports analyzing regulatory issues critical to the futures industry and related activities, including those affecting commodity pool operators and commodity trading advisors. The Committee appreciates the opportunity to comment on the Proposal.

The Committee believes that the Proposal is helpful in clarifying the Commission's advertising rules. We note that the proposed change to rule 4.41(c)(1) to make explicit that the Commission's advertising rules are equally applicable to electronic media presentations as to traditional media is consistent with other initiatives to modernize Commission rules as a result of technological changes that affect the futures industry. For example, the Commission has amended its rules to provide for electronic signatures on various agreements in rule 1.4, and for distribution of brokerage statements through electronic media in rule 1.33(g).

The Committee supports the Proposal and encourages its adoption, but believes that certain clarifications would make these rules more effective.

1. Section 4.41(a) would govern the use of testimonials for commodity pool operators and commodity trading advisors. It is not clear why testimonials are proposed to be regulated along the lines of National Association of Securities Dealers Rule 2210(d)(2), rather than being prohibited as Securities and Exchange Commission Rule 206(4)-1(a) does for investment advisers. The Committee recommends that the Commission explain in the adopting release the rationale for this approach to the testimonial rule. Has the Commission, for example, observed problems with the use of testimonials by CPOs or CTAs or have CPOs and/or CTAs requested clarification of the use of testimonials?
2. Rule 4.41(b)(1)(i) contains the proposed revised statement that must accompany hypothetical or simulated performance presentations. There are a number of differences in the wording of this proposed disclaimer and that contained in NFA Compliance Rule 2-29, which also addresses the use of hypothetical performance. It is not clear why, if the Commission rule is to be revised at this time, two alternative cautionary statements should continue to be prescribed by the agencies responsible for regulating these types of communications. The Committee urges the Commission to consider adopting the language of the NFA disclaimer.
3. Proposed rule 4.41(b) (2) would require that the prescribed statement concerning hypothetical or simulated performance be presented "in immediate proximity to the simulated or hypothetical performance being published." The term "prominently disclosed" is defined in Commission rule 4.1(b), and we recommend that a definition be provided for "in immediate proximity" as well. Alternately, examples of how "immediate proximity" will be assessed in practice might be given in the adopting release. Does the "immediate proximity" requirement mean that the disclaimer must be included on the same page as the presentation of hypothetical or simulated performance, or on the cover page of such a presentation? If there are multiple pages of performance, must the statement appear on every page that contains hypothetical performance?
4. The Committee recommends that the Commission revise rule 4.41(c)(2) to state that advertisements directed at qualified eligible persons (as defined in Rule 4.7) are not subject to the specific requirements of rules 4.41(b) and (c). The Committee notes that NFA Rule 2-29 provides that certain restrictions in that rule do not apply to advertisements directed at qualified eligible persons. The Committee believes that lack of such a provision may result in inadvertent violation of the rule even if the performance and other information presented is adequately explained and otherwise not misleading.
5. We note one typographical correction in proposed rule 4.41(a)(3)(iii): delete the comma after "If" (the first word).

Please contact us if you have questions or if there is any assistance we can provide in connection with the Proposal.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Michael Sackheim".

Michael Sackheim,
Chairman

New York City Bar Association
Committee on Futures Regulation
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* Members of Subcommittee that drafted this comment letter.

** Chair of Subcommittee that drafted this comment letter.

¶ These Adjunct Members did not participant in this comment letter.