# CFTC Letter No. 97-97

**November 18, 1997**

**Division of Trading & Markets**

Re: Sections 1a(4) and 1a(5) of the Commodity Exchange Act: Ability of an FCM to Register as a CPO or CTA

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Dear :

This is in response to your letter dated October 22, 1997 to Pete Shiner of the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"). Your letter has been forwarded to the Office of Chief Counsel for reply. By your correspondence, you inquire about the ability of futures commission merchants ("FCMs") registered under the Commodity Exchange Act[1] (the "Act") also to register as commodity pool operators ("CPOs") and commodity trading advisors ("CTAs").

Nothing in the Act or in the Commission's rules thereunder prohibits an FCM from also being registered as a CPO. Section 1a(4)of the Act defines a CPO as "any person[2] engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who in connection therewith, solicits, accepts or receives from others, funds, securities or property" for the purpose of trading commodity interests.[3] Although some firms are registered as both FCMs and CPOs, it is more common for an FCM to be affiliated with a CPO established as a subsidiary or as a sister corporation by the FCM's parent company.

Similarly, an FCM is not prohibited from being registered as a CTA. Section 1a(5) of the Act defines a CTA as "any person who, for compensation or profit," advises others about trading in commodity futures or commodity option contracts "either directly or through publications, writings or electronic media" or who as part of a regular business "issues or promulgates analyses or reports" concerning such transactions. Section 1a(5) provides a statutory exclusion from the CTA definition for certain categories of persons, which includes, among others, banks, teachers and FCMs, who provide commodity interest advice in a manner "solely incidental" to the conduct of their business or profession.[4] As a general matter, the staff 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.[5] 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. In any event, although they may not be required to do so, several firms are registered as both FCMs and CTAs.

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

Chief Counsel

[1] 7 U.S.C. § 1 *et seq.* (1994).

[2] The Act defines a "person" to include individuals, associations, partnerships, corporations and trusts.

[3] This provision further states "that the term [CPO] does not include such persons not within the intent of the definition of the term as the Commission may specify by rule, regulation or order." That authority has been used by the Commission in Rule 4.5 to exclude from the CPO definition certain otherwise regulated entities such as investment companies, insurance companies or banks meeting the criteria set forth in the rule, but FCMs are not eligible for that exclusion. In addition, Rule 4.13 provides certain exemptions from CPO registration to qualifying persons, although it does not specifically address FCMs. Rule 4.13(a)(2), which could be used by an FCM, provides an exemption from CPO registration where: (1) the aggregate gross capital contributions for all pools operated by the CPO do not exceed $200,000; and (2) none of the pools operated by the CPO contain more than fifteen participants at any time. Commission rules referred to herein are found at 17 C.F.R. Ch. I (1997).

[4] 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).

[5] *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.