

CFTC Letter No. 00-29**May 20, 1999****Interpretation****Division of Trading & Markets**

Re: Interpretative Letter Regarding Section 4k(1) "Clerical Capacity" Exception to Registration Requirement

Dear :

This is in response to your letter dated March 3, 1999, 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 request an interpretation on behalf of "X", a registered introducing broker ("IB"), regarding the clerical capacity exception to the associated person ("AP") registration requirement of Section 4k(1) of the Commodity Exchange Act ("Act")¹ as it applies to an employee of "X", whom you describe in your letter as a "series 11 registered order taker" ("Order Taker").

Based upon your representations, we understand the facts to be as follows. The National Association of Securities Dealers, Inc. ("NASD") officially terms an order taker that must pass the series 11 examination as an "Assistant Representative - Order Processing," and defines that function as "persons associated with a member who accept unsolicited customer orders for submission for execution by the member."² In addition to the securities-related activities permitted under NASD regulations, "X" foresees that its Order Taker will give price quotes and accept customer orders for commodity interest contracts. In accepting a customer order, the Order Taker will only be concerned with the customer's name, the account number, and the specific order information such as buy or sell, the particular contract, and the price. Subsequently, the Order Taker will phone the order in to "X's" central trading desk for execution. The Order Taker will not have any sales responsibilities. Instead, "X's" separate sales staff is responsible for sales activities. The Order Taker will not recommend trades or give any trading advice to "X's" customers. Furthermore, the Order Taker will not have any discretion over any customer accounts. Finally, "X" will pay the Order Taker on an hourly basis and one of "X's" registered APs will supervise the Order Taker.

Section 4k(1) requires the registration of any person associated with an IB as a partner, officer, employee, or agent in any capacity that involves the solicitation or acceptance of customers' orders (other than in a clerical capacity).³ Commission Rule 1.3(aa)(2) defines an AP as, among other things, any natural person who is associated with an IB as an employee in any capacity that involves the

solicitation or acceptance of customers' futures or options orders (other than in a clerical capacity) or the supervision of any person or persons so engaged.⁴ Whether a particular person is an AP who must register depends on all the facts and circumstances of the case. The Division has held that "order specialists" were within the "clerical capacity" exception where they met the following criteria: (1) The order specialists did not solicit customer orders; (2) a separate sales staff of registered APs was maintained to solicit customers, the majority of whom initiated their relationship with the company; (3) the order specialists did not dispense trading advice, but merely accepted orders from the public and relayed them to the appropriate exchange floor; (4) wages were paid to the order specialist on an hourly basis and the order specialists did not participate in commissions; and (5) persons registered with the Commission as APs supervised the order specialists.⁵

If the Order Taker's activities are confined to the parameters described by the above-mentioned criteria, the Division believes that the Order Taker will not have to register as an AP. This view is consistent with previous Division staff advice as noted herein. Typically, clerical conduct is found where an employee's compensation is fixed and not dependent on incentives and the employee does not initiate customer contact for the purpose of establishing a customer relationship. Instead, to avoid having to register, the employee must act as a passive conduit between a customer and the firm's AP, for example by answering telephones, transferring calls or relaying instructions to the appropriate AP, or accepting requests for literature.⁶

The Division cautions that an employee's conduct may easily fall outside of the clerical capacity exception. Congress intended that registration requirements and fitness checks should apply to all persons who are "involved either directly or indirectly in influencing or advising the investment of customers' funds."⁷ Such activity would include telephone solicitations, whether directly or indirectly intended to culminate in a customer relationship, and the giving of advice.⁸

This letter, and the interpretations provided herein, are based upon the representations you have made to us. Any different, changed or omitted material facts or circumstances might render these views void. Additionally, the positions taken in this letter do not excuse "X" and the Order Taker from compliance with any otherwise applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, "X" and the Order Taker will be subject to all antifraud provisions of the Act and the Commission's regulations and "X" is responsible for supervising all of its employees under Commission Rule 166.3.

The interpretations provided herein are those of the Division only and do not necessarily represent the views of the Commission or of any other office or division of the Commission. If you have any questions concerning this correspondence, please contact Matthew W. Lisle, an attorney on my staff, at (202) 418-5450.

Very truly yours,

I. Michael Greenberger

Director

1 The Act may be found at 7 U.S.C. § 1 *et seq.* (1994).

2 NASD Rule 1041.

3 7 U.S.C. § 6k(1) (1998).

4 Commission rules referred to in this letter are found at 17 C.F.R. Ch. 1 (1998).

5 CFTC Staff Letter No. 82-2 [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,784. *See also* CFTC Staff Letter No. 76-18 [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,210. The Commission's Office of General Counsel determined that an employee's activities in connection with the solicitation and acceptance of customer orders were solely in a clerical capacity because the employee did not have a title, was salaried and did not earn commissions, and her duties included answering the telephone for and in the presence of those persons to whom she reported, giving futures market quotations, and recording and time stamping customer orders upon their acceptance by an associated person.

6 CFTC Staff Letter No. 90-11 [1990-1992 Transfer Binder] Comm. Fut. L. Rep.(CCH) ¶24,872.

7 Subcommittee on Special Business Problems of the House Permanent Select Committee on Small Business, H.R. Rep. No. 963, 93d Cong., 2d Sess. at 36-37 (1974).

8 *See supra* footnote 6.