

CFTC Letter No. 01-82

November 2, 2001

Interpretation

Division of Trading and Markets

Re: "X"

Dear:

This is in response to your letter dated February 20, 2001, to "A", an attorney in the Commission's Division of Enforcement, on behalf of "X". "A" has asked that the Division of Trading and Markets (the "Division") respond to your inquiry.

As you are aware, Section 102 of the Commodity Futures Modernization Act of 2000 ("CFMA")^[1] amended the Commodity Exchange Act (the "Act")^[2] to make clear the application of the Act and the Commission's jurisdiction in the area of foreign currency trading. Generally, it is unlawful to offer off-exchange foreign currency futures or option contracts to retail customers^[3] unless the counterparty is a regulated entity enumerated in the Act. The counterparties enumerated include registered futures commission merchants ("FCMs") and certain affiliated persons of registered FCMs.^[4]

In your letter, you state that "X" is "purely an educational company" offering "affordable training courses that teach students to trade in the spot market." You claim that "X" does not advise as to trading foreign currency futures or option contracts. Please be aware that the reference to a contract as being a "spot" or "forward" contract does not necessarily mean that the contract being offered is not, in fact, a futures or option contract, which would make it subject to the jurisdiction of the Commission. The Commission views the transaction as a whole, including the characteristics of the contract and the circumstances under which it is being traded, to determine whether or not it is a futures or options contract. A spot or forward contract contemplates physical delivery, either immediately or on a deferred basis, respectively, of the underlying commodity, in this case foreign currency, whereas a futures contract rarely results in actual delivery of the commodity. While futures contracts may provide for the parties to make or take delivery, delivery can be avoided by offset, cancellation, cash payment, or similar mechanisms. Additionally, those entering into forward contracts do so because they have some business purpose for obtaining foreign currency, while futures contracts are usually entered into for speculation or hedging purposes.

Generally, a person who, for compensation or profit, advises others as to the value of or advisability of trading in futures or options contracts, or issues analyses or reports concerning the foregoing, is a commodity trading advisor ("CTA").^[5] Absent an exemption, a CTA is required to register with the Commission.^[6] In March 2000, the Commission adopted Rule 4.14(a)(9), exempting from mandatory registration under the Act CTAs whose business is limited to distributing standardized commodity

trading advice.^[7] Rule 4.14(a)(9) is meant to exempt from registration CTAs who do not provide trading advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients.

Based upon the limited facts presented in your letter, it would appear that your activities might bring you within the definition of a CTA. Additionally, it would appear from your brief description of "X's" activities that Rule 4.14(a)(9) might be applicable to your situation, and, accordingly, you would be exempt from registering as a CTA. However, please be aware that, in order to qualify for the exemption under Rule 4.14(a)(9), you may not tailor to a client's particular circumstances any opinion you give as to what commodity interests to buy or sell. Additionally, you may not direct client accounts, meaning that you may not be authorized to cause transactions to be effected for any client's commodity interest account. Additionally, CTAs that meet the requirements for exemption under Rule 4.14(a)(9) remain subject to all the relevant antifraud provisions of the Act and the Commission's regulations thereunder (including Section 4o of the Act),^[8] as well as Commission Rules 4.30 (prohibiting CTAs from handling client funds) and 4.41 (prohibiting deceptive advertising and requiring representations concerning hypothetical performance results).

I hope you find this letter responsive to your inquiry. If you have any questions concerning this correspondence, please contact Michael A. Piracci, an attorney on my staff, at (202) 418-5430.

Very truly yours,

Lawrence B. Patent
Associate Chief Counsel

^[1] The Commodity Futures Modernization Act of 2000, Pub. L. 106-554, 114 Stat. 2763 (to be codified as amended in scattered sections of 7 U.S.C.).

^[2] 7 U.S.C. § 1, *et seq.* (1994), as amended by Pub. L. 106-554, 114 Stat. 2763.

^[3] As used in this letter, the term "retail customer" refers to any person other than a person that comes within the definition of an "eligible contract participant" pursuant to Section 1a(12) of the Act.

^[4] The other enumerated counterparties are: (1) financial institutions; (2) registered broker-dealers; (3) associated persons of registered broker-dealers; (4) insurance companies or affiliates thereof; (5) financial holding companies; and (6) investment bank holding companies. *See* 7 U.S.C. § 2(c)(2)(B)(ii), as amended by Section 102 of the CFMA.

[5] See 7 U.S.C. § 1a(6).

[6] See Section 4m(1) of the Act, *see also* Commission Rule 4.14. Commission rules referred to herein are found at 17 C.F.R. Ch. 1 (2001).

[7] A copy of the *Federal Register* release for this rule is available on the CFTC web site at: www.cftc.gov/foia/fedreg00/foi000310a.htm.

[8] 7 U.S.C. § 6o.