

CFTC Letter No. 01-91
December 12, 2001
Interpretation
Division of Trading and Markets

Dear:

This is in response to your e-mail dated October 23, 2001, which has been forwarded to the Division of Trading and Markets (the "Division") for response, as supplemented by telephone conversations with Division Staff. Section 2(c)(2)(B) of the Commodity Exchange Act (the "Act"), makes clear that offering foreign currency futures and options contracts, other than those that are executed or traded on an organized exchange ("off-exchange"), to retail customers is unlawful unless the counterparty is a regulated entity enumerated in the Act. (A copy of the Act is available on the Commission's web site at: www.cftc.gov/files/ogc/comex060601.pdf). The counterparties enumerated include persons that are registered with the Commission as futures commission merchants ("FCMs") and certain affiliated persons of FCMs. 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 Section 2(c)(2)(B)(ii)). A "retail customer" is a person that does not fall within the definition of an "eligible contract participant" as defined in Section 1a(12) of the Act. If the off-exchange foreign currency transaction is being entered into with an "eligible contract participant," then the Act is not applicable to, and the Commission does not have jurisdiction over, the transaction.

In your e-mail, you indicated that your firm is a "fund management company." Generally, a firm that, 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") and must register as such. (See 7 U.S.C. 1a(6)). Advising others includes exercising discretionary trading authority over a customer's account. Generally, a person employed by a CTA to solicit discretionary accounts must register as an associated person ("AP") of the CTA. However, it is the opinion of the Division that, with respect to a firm that manages the funds of retail customers that are held by a registered FCM acting as a counterparty under Section 2(c)(2)(B)(ii) of the Act for the purposes of off-exchange foreign currency trading, the firm is not required to register with the Commission as a CTA, and its employees are not required to register as APs, but may voluntarily do so. This opinion is solely that of the Division and does not necessarily represent the opinion of the Commission or any other division or office of the Commission and is not binding on the Commission. (To the extent that your inquiry pertains to managing the funds of retail customers that are held by one of the enumerated counterparties other than an FCM, you will have to contact the appropriate regulatory body for a response, e.g., a broker-dealer is registered with the Securities and Exchange Commission).

Although your firm and the person soliciting discretionary accounts in the U.S. may not be required to register with the Commission, you both may remain subject to all relevant antifraud provisions of the Act, including Section 4b, and CFTC Rules 4.30 (prohibiting CTAs from handling client funds) and 4.41

(prohibiting deceptive advertising and requiring representations concerning hypothetical performance results). Additionally, if the counterparty to the retail customer is not one of those enumerated under the Act, then the transaction is unlawful and, in addition to the counterparty being liable for violating the Act, persons involved with the intermediation of the transaction, such as managing the funds of the customers or soliciting for such transactions, may be held liable for aiding and abetting a violation of the Act.

I hope you find this e-mail 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.

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Division of Trading and Markets,
U.S. Commodity Futures Trading Commission