

CFTC Letter No. 01-67

June 21, 2001

No Action

Division of Trading and Markets

Re: Section 4d(a)(1) – No-Action Relief in Connection with Registration as an Introducing Broker

Dear :

This is in response to your letter, received by the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), on April 26, 2001. By your correspondence, you request that "A" not be required to register as an introducing broker ("IB") under the Commodity Exchange Act ("Act").^[1]

Based upon your representations, we understand the relevant facts to be as follows. "X" is a registered IB. As part of its IB business, "X" has a website that is maintained by "A". "A" also writes a "trade recommendation newsletter" for persons who pay an annual subscription. This newsletter, called "Y", is advertised on the "X" website. "A" provides "X" "with the names of anyone who signs up for his free sample trial." You represented that "X" does not compensate "A" for providing this list and does not initiate contact with any person on the provided list.

"A's" Newsletter Activity

The Act defines a commodity trading advisor ("CTA") as a person who, for compensation or profit, (1) advises others as to the value of, or the advisability of trading in, futures or commodity options, or (2) as part of a regular business, issues analyses or reports concerning the foregoing. These activities may be conducted either directly or indirectly, through publications, writings, or electronic media.^[2] Accordingly, based upon your description, it appears that "A's" activities would bring him within the definition of a CTA. Generally, a person conducting business as a CTA must register with the Commission. However, Commission Rule 4.14(a)(9) exempts from mandatory registration under the Act CTAs whose business is limited to distributing standardized commodity trading advice.^[3] 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 appears that Rule 4.14(a)(9) might be applicable to "A's" activities in regard to his newsletter and, accordingly, he might be exempt from registering as a CTA.

Please be aware that, in order to qualify for the exemption under Rule 4.14(a)(9), "A" may not tailor any opinion he gives, as to what commodities to buy or sell, to a subscriber's particular circumstances.

Additionally, he may not direct client accounts, meaning that he may not be authorized to cause transactions to be effected for any subscriber's commodity interest account. Additionally, although he might be exempt from registering as a CTA, "A" is still subject to the antifraud provisions of Section 40 of the Act^[4] and Commission Rules 4.30 (prohibiting CTAs from handling client funds) and 4.41 (prohibiting deceptive advertising and requiring representations concerning hypothetical performance results).

You and "A" should also be aware that the Commission recently adopted a new Part 160 of its rules, which sets forth notice requirements and restrictions on the ability of financial institutions to disclose nonpublic personal information about consumers to nonaffiliated third parties.^[5] New Part 160 becomes effective June 21, 2001, and financial institutions must be in full compliance by March 31, 2002. These rules are applicable to both registered and unregistered CTAs, and, accordingly, "A" must be in full compliance with the rules by March 31, 2002.

The Subscriber List

Section 1a(23) of the Act^[6] defines an IB as:

[A]ny person (except an individual . . . registered as an associated person of a futures commission merchant) engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

Rule 1.3(mm) similarly defines an IB, in relevant part, as:

Any person who, for compensation or profit, whether direct or indirect, is engaged in soliciting or in accepting orders (other than in a clerical capacity) for the purchase or sale of any commodity for future delivery on or subject to the rules of a contract market who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

Section 4d(a)(1) of the Act^[7] requires any person soliciting or accepting orders for futures contracts as an IB to be registered as such.

The registration requirements of the Act are an important part of customer protection. The registration requirements, as they pertain to persons involved in customer solicitation, "have been construed flexibly to require the registration of persons who participate even indirectly in such solicitations."^[8] In establishing the rules for registration as an IB, the Commission specifically noted its "opinion that the phrase 'soliciting or accepting orders,' . . . must be construed to encompass not just the literal solicitation

or acceptance of customers' orders, but also the solicitation of customers."^[9]

Accordingly, in response to interpretive and no-action letter requests, the Division has consistently stated that persons who refer customers to Commission registrants for compensation must register.^[10] Those who have been required to register as IBs include persons who: (1) generated a list of potential customers and sold the list to Commission registrants;^[11] (2) were hired by a Commission registrant to conduct a telephone survey in order to develop a database of potential customers for the registrant;^[12] and (3) sold a service that provided potential futures customers with the names of APs who may be able to provide specific futures-related services.^[13] The Division has also stated that a provider of futures-related information services that included advertisements for an FCM in its mailings to customers in return for the FCM providing customers with a per-trade commission "rebate" that could be used to pay for the information services must register as an IB. In the Division's view, this arrangement was a form of indirect compensation because it allowed the corporation providing futures-related information services to offer a discount without losing revenue and helped it to maintain its customer base.^[14]

It could be argued that "A" is indirectly compensated for providing you with the list of subscribers because "X" permits "A" to advertise and sell his newsletter on its website. However, based upon your representations, and in particular upon your representations that: (1) "A" does not have contact with commodity customers, other than through his newsletter; (2) "A" is not directly compensated for providing you with his subscriber list; and (3) "X" does not initiate contact with any person on the list provided by "A", the Division will not recommend that the Commission commence any enforcement action against "Y" or "A" for failing to register as an IB under Section 4d(a)(1) of the Act.

This letter does not excuse you, "X", "A", or "Y" from compliance with any other applicable requirements contained in the Act or in the Commission's rules issued thereunder. For example, each of those persons remains subject to all of the relevant antifraud provisions of the Act and the Commission's regulations issued thereunder.

The positions taken herein are based upon the representations that have been made to us. Any different, changed, or omitted facts or conditions might require us to reach a different conclusion. You must notify us immediately in the event the operations or activities of you, "X", "Y", or "A" change in any material way from those represented to us. Further, this letter represents the position of this Division only and does not necessarily represent the views of the Commission or any other division or office of the Commission.

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,

[1] 7 U.S.C. § 1 *et seq.* (1994), *as amended* by the Commodity Futures Modernization Act of 2000, Pub. L. 106-554, 114 Stat. 2763 (2000) (to be codified as amended in scattered sections of 7 U.S.C.).

[2] 7 U.S.C. § 1a(6).

[3] Commission rules referred to herein are found at 17 C.F.R. Ch. 1 (2001).

[4] 7 U.S.C. § 6o.

[5] 66 Fed. Reg. 21235 (April 27, 2001). A copy of the *Federal Register* release for this part is available on the CFTC web site at: www.cftc.gov/foia/fedreg01/foi010427a.htm.

[6] 7 U.S.C. § 1a(23).

[7] 7 U.S.C. § 6d(a)(1).

[8] CFTC Interpretative Letter No. 99-28, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,718 (July 9, 1999).

[9] 48 Fed. Reg. 35248, 35250 (August 3, 1983), *citing* 48 Fed. Reg. 14933, 14935 (April 6, 1983).

[10] A natural person who receives compensation from a Commission registrant for customer referrals may register as an associated person of that registrant. A corporate or business entity that receives such compensation is required to register as an IB.

[11] CFTC Interpretative Letter No. 96-45, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,715 (May 18, 1996); *but see Commodity Futures Trading Commission v. Mass Media Marketing, Inc.*, No. 97-1492-CIV (S.D. Fla. March 20, 2001) (holding that a firm that produced advertising that encouraged commodity investing, and sold leads generated by the advertising to IBs, was not an IB and not required to register under the Act).

[12] CFTC Interpretative Letter No. 90-8, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,831 (May 7, 1990).

[\[13\]](#) CFTC Interpretative Letter No. 98-76, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,477 (November 18, 1998) (the service intended to charge customers a one time flat fee and to charge APs an annual fee to be listed in the service database).

[\[14\]](#) CFTC Interpretative Letter No. 95-51, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,420 (May 1, 1995); *see also* Interpretative Letter No. 75-6, [1975-1977 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 20,093 (August 13, 1975) (conduct contributing to maintenance of customer base is "compensation or profit" as used in definition of commodity trading advisor).