CFTC Letter No. 01-89
September 28, 2001
Interpretation
Division of Trading and Markets

Dear:

This is in response to your e-mail message to the Division of Trading and Markets (the "Division") of the Commodity Futures Trading Commission (the "Commission") dated September 3, 2001 regarding a proposed Internet web site to provide trading advice concerning foreign currency. You ask if such a web site, for which customers would pay a monthly fee in return for trading tips, information and signals, would be subject to Commission regulation and, if so, where you could find information regarding applicable requirements and obligations. We will review first the matter of jurisdiction over foreign currency trading in general, and next, regulation of the proposed web site activity.

The recently enacted Commodity Futures Modernization Act of 2000 ("CFMA") makes clear that the Commodity Exchange Act and the Commission's jurisdiction apply in the area of foreign currency trading, including off-exchange trading. (A copy of the CFMA is available on the Commission's website (http://www.cftc.gov) at (http://www.cftc.gov/files/ogc/ogchr5660.pdf). Generally, the Commission has jurisdiction over foreign currency futures and option contracts offered to retail customers, and the only counterparties that can lawfully enter into these contracts with retail customers are persons that are registered with the Commission as futures commission merchants ("FCMs"), or that are affiliates of an FCM, or that are otherwise regulated entities, e.g., a securities broker-dealer, a bank or an insurance company. You will find an advisory explaining the implications of the CFMA, as it relates to the trading of foreign currency, on the Commission's website at: www.cftc.gov/opa/press01/opaadv06-01.htm.

In your inquiry, you refer to trading tips and signals regarding "spot currencies." The Commission's staff has observed many firms that claim to be engaged in "spot" or forward transactions in an attempt to avoid Commission jurisdiction. The reference by a vendor 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. Of course, we cannot definitively determine the appropriate characterization of any particular instrument without reviewing documentation concerning the instrument and the manner in which it is being offered and sold. The Commission looks to the characteristics of a contract and the circumstances under which it is being traded to determine whether or not it is a futures contract. A forward contract contemplates physical delivery of the underlying commodity, in this case foreign currency, whereas a futures contract rarely results in actual delivery of the commodity. A person entering into a futures contract may satisfy his obligation under the contract by entering into an offsetting position. 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 and hedging purposes. Retail customers would not normally contemplate delivery of foreign currency or have a business purpose to do so. A transaction involving a futures or option contract on foreign currency that is not traded on a futures or securities exchange and is offered to a retail customer by a person that is not an appropriate counterparty would be unlawful.

Assuming for discussion that the subject matter of the proposed website is subject to Commission regulation, whether you, as its operator, would be subject to more requirements than the prohibition against fraudulent statements or activity and the restrictions upon advertising depends upon the manner in which advice is provided to customers. As a general rule, a person who, for compensation, provides trading advice that is subject to the Commission's regulatory jurisdiction must be registered as a commodity trading advisor ("CTA"). In March, 2000, the Commission adopted Rule 4.14(a)(9), providing an exemption from the requirement to register as a CTA for persons who provide standardized advice by means of newsletters, prerecorded telephone newslines, Internet web sites and non-customized computer software. The *Federal Register* release announcing adoption of the rule (including the text of the rule) is available at: http://www.cftc.gov/foia/fedreg00/foi000310a.htm. The release contains an extensive explanation including illustrative examples that should help you determine if the exemption provided by Rule 4.14(a)(9) is applicable to the activities in which you plan to engage by means of the proposed web site.

Please remember that whether or not your activities require you to register as a CTA, the Commission would almost certainly have antifraud jurisdiction over those activities. Because this area is highly regulated and because the factors that determine the applicability of various regulatory requirements are not always easily determined, you would be well advised to consult an attorney with experience in this area. Further information, including information CTA registration and the consequent regulatory requirements, about can be obtained from the Commission's web site and from the web site of the National Futures Association (http://www.nfa.futures.org/).

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Commodity Futures Trading Commission