

CFTC Letter No. 02-01
December 11, 2001
Interpretation
Division of Trading and Markets

Re: Request for Interpretation that Registration Is Not Required for a Staff and Employee Leasing Company

Dear:

This is in response to your letter dated August 2, 2001, to the Division of Trading and Markets (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by your telefacsimile transmissions dated August 21 and 30, 2001 and by telephone conversations with Division staff. By your correspondence you request an interpretation by the Division that your client, "X" is not required to register in any capacity with the Commission under the Commodity Exchange Act (the "Act")^[1] if "X" performs for compensation certain human resources and personnel functions for persons who are subject to the registration requirements under the Act.

Based upon your representations, we understand the facts to be as follows. "X" is a Texas-based "professional employer organization" (a type of business that is also known as a staff leasing or employee leasing firm). "X" holds a Texas staff leasing license issued under the authority of Chapter 91 of the Texas Labor Code.

Services provided.

You represent that "X" provides a comprehensive range of human resources and administrative services to its customers, thereby taking on the roles of the human resources, payroll and benefits departments for those customers. "X" performs these services by establishing a shared or co-employment relationship with the covered employees. The employees continue to maintain an employment relationship with "X's" client companies, but "X" assumes responsibility for certain aspects of the employment relationship.

"X" provides its client companies with advice on personnel practices, assists with employment law compliance, offers employee benefit plans (such as group health insurance plans and retirement savings plans), provides workers' compensation insurance, manages workers' compensation and unemployment claims, and handles payroll tax filings. In some cases, "X" may assist in arranging pre-employment drug testing or background checks.

The employee benefit plans offered by "X" to its shared employees include life insurance, group health

insurance and 401k retirement savings plans. These benefit plans are offered only to the employees covered by "X's" agreements with its client companies, and are not products that are re-sold by the client companies. The insurance plans are fully underwritten by large commercial insurance carriers licensed under applicable state law. Employees have the option to invest their 401k plan balances in securities of various kinds. "X" is merely the sponsor of the 401k plan and is not involved in offering investment advice to the employees, executing trades, or other activities related to securities transactions that the employees may choose to enter into.

Fees and promotional activities.

"X" charges its client companies a fee based on a percentage of the gross wages paid to the employees. Certain services may be offered on a fee-for-service basis. For example, some client companies choose to have job applicants tested for illegal drug usage, and "X" arranges drug testing, for which service the client company is charged a separate fee. "X's" fees are not directly tied to commissions.^[2]

"X's" promotional activities, including advertising materials, relate solely to "X's" staff or employee leasing activities, and not to any commodity futures or securities activities. "X" does not hold itself out as offering services related to securities or commodities.

"X's" and its client companies' respective responsibilities

As noted above, "X" enters into a shared employment relationship with the employees of its client companies. As one of the employers in this shared workforce, "X" can manage unemployment claims, carry the workers' compensation insurance, and offer employee benefits. Under the terms of the contract between "X" and its client company, the client company retains the right to direct and control the work of the employees.

You represent that, under Texas law, the contract between the holder of a staff leasing license and its client company must provide that the license holder:

1. shares with the client company the right of direction and control over employees assigned to the client company's worksites;
2. assumes responsibility for the payment of wages to the assigned employees without regard to payments by the client company to the license holder;
3. assumes responsibility for the payment of payroll taxes and collection of taxes from payroll on assigned employees;
4. shares with the client company the right to hire, fire, discipline, and reassign the assigned employees; and
5. shares with the client company the right of direction and control over the adoption of employment and safety policies and the management of workers' compensation claims, claim filings, and related procedures.

Further, under Texas law, the client company retains responsibility for:

1. the direction and control of assigned employees as necessary to conduct the client company's business, discharge any applicable fiduciary duty, or comply with any licensure, regulatory, or statutory requirements;
2. goods and services produced by the client company; and
3. the acts, errors, and omissions of assigned employees committed within the scope of the client company's business.

You represent that "X's" customer service agreements comply with the requirements of Texas law described above, and you emphasize in particular the first of the three items immediately above, which would require that "X's" client company retain full control and direction over the commodity-related activities that are subject to regulation under the Act.

In addition to the requirements imposed by Texas law, you represent that "X" will contract with any client companies that are subject to the Act:

1. That all of "X's" books and records related to the employees shall be available for inspection by the Commission, the Securities and Exchange Commission, the National Futures Association, the United States Department of Justice, any exchange and any self-regulatory organization;
2. That the client company shall have the exclusive right to exercise supervisory control over the commodity related activities of the employees; and
3. The client company will be solely responsible for the proper registration, training and supervision of the employees.

Additional representations.

"X" does not engage in securities transactions, other than transactions related to its own corporate stock. "X" has no role in the transaction of commodity interest trades. "X" does not offer advice to anyone concerning commodities, the value of commodities or the advisability of trading in commodity interests.

"X" will not control or supervise the employees in the performance of their job duties. Supervision of day-to-day job duties will be expressly assigned to the client company. "X" will play no role in communications between Commission registrants and customers or clients of Commission registrants. "X" will neither solicit nor accept orders for commodity interest transactions, nor control accounts of customers of Commission registrants. "X" will have no managerial or supervisory authority over commodity interest trading accounts or commodity pools, and it will not be involved in record-keeping with respect to commodity interest transactions. "X's" client companies will have the right to obtain at any time complete copies of "X's" records related to the client company or to any of the employees.

Analysis.

Under the facts and representations set forth in your letters, "X" will be acting entirely as a contractor providing human resources and administrative services, and it will neither exercise control or supervision over, nor participate in, any commodity interest related activities of its client companies. "X's" compensation will not be directly related to any commodity interest trading activity on the part of its client companies, and it will not be holding itself out as being in any way involved in activities subject to regulation under the Act.

Conclusion.

Based on the representations in your correspondence, the Division does not believe that "X" is required to register with the Commission under the Act in connection with providing the services you have described.

This letter does not excuse "X" or any of its client companies or their employees from compliance with any other applicable requirements contained in the Act or the Commission's regulations thereunder, including without limitation, all antifraud and anti-manipulation provisions of the Act and the Commission's regulations, and the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations.

This letter is applicable to "X" solely in connection with providing the staff leasing services as described in your correspondence, and it represents the views of the Division, and not necessarily those of the Commission or any other division or office thereof. Moreover, this letter is based on the representations made to us and any different, changed or omitted facts or circumstances might render the interpretation herein void. You must notify us immediately in the event that the operations or activities of "X" change in any respect from those as represented to us.

If you have any questions concerning this correspondence, please contact me or Christopher W. Cummings, an attorney on my staff, at (202) 418-5445.

Very truly yours,
John C. Lawton
Acting Director

^[1] 7 U.S.C. § 1 *et seq.*, as amended.

^[2] Although "X's" fee is calculated as a percentage of the gross pay to the client company's employees, including employees receiving commission compensation, the client company (and not "X") controls commission rates paid to employees, assigns customer accounts, supervises trading, supervises promotional activities and controls compliance with regulatory requirements. The client company has

complete control to determine whether an employee is paid a commission on a particular transaction, what commission rate applies, and whether the employee is paid on a commission basis at all (or on an hourly rate or fixed salary).