



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and  
Intermediary Oversight

CFTC letter No. 05-17  
October 5, 2005  
Exemption  
Division of Clearing and Intermediary Oversight

Re: Rule 166.4 – Request By a Registered Commodity Pool Operator and Commodity Trading Advisor to Operate a Branch Office as a Separately Incorporated Entity

Dear :

This is in response to your letter dated August 26, 2005 to the Commodity Futures Trading Commission (the “Commission”), which has been forwarded to the Division of Clearing and Intermediary Oversight (the “Division”) for response.<sup>1</sup> You have requested that “X” be permitted to operate its New York branch, “Y”, as a separately incorporated branch office.

Based on the representations made in your letter, we understand the facts to be as follows. “X”, a registered commodity trading advisor and commodity pool operator, is an English general partnership that offers investment management services to institutional clients. In 1997, “X” established “Y” as a wholly-owned subsidiary. “Y” identifies potential United States investors for “X” and serves as an ongoing point of contact for those investors. “X” established “Y” as a separately incorporated entity in part to insulate the individual partners of “X” from personal liability resulting from claims against “Y”.<sup>2</sup> “Y”, like its parent, “X”, conducts business under the name “Z” and holds itself out to prospective investors as a branch office of “X”.

Although Rule 166.4 does not on its face address the question of whether a branch office of a Commission registrant may be a separate legal entity, the Division believes that allowing

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<sup>1</sup> Your letter was addressed to the Division of Trading and Markets. The Commission reorganized in 2002, and the functions formerly performed by the Division of Trading and Markets, which has been eliminated, are now performed by two new divisions, the Division of Clearing and Intermediary Oversight and the Division of Market Oversight.

<sup>2</sup> “X” formed “Y” as a separately incorporated entity also to facilitate compliance with various United States and New York laws, to facilitate the hiring of personnel who prefer to work for a United States entity, and to avoid potential negative tax consequences.

proprietary or separately incorporated branch offices would frustrate a core purpose of Rule 166.4 – *i.e.*, that Commission registrants be accountable for the acts and omissions of their branch offices. Rule 166.4 expressly provides that “[t]he act, omission or failure of any person acting for the branch office, within the scope of his employment or office, shall be deemed the act, omission or failure of the Commission registrant as well as of such person.”<sup>3</sup> As such, because “X’s” separate legal identity would potentially frustrate the ability of “Y’s” customers to seek redress against “X” for damages arising from “Y’s” conduct, the legal separation of the two entities runs counter to the policy underwriting Rule 166.4.

The Division notes that this position is consistent with prior positions taken both by the Commission and the Division of Trading Markets. Shortly after Rule 166.4 was adopted, the Division of Trading and Markets explained that each branch office of a futures commission merchant that previously maintained its own legal existence must elect to operate as an introducing broker or forsake its separate identity and become a proprietary branch of the futures commission merchant.<sup>4</sup> The Commission subsequently broadened the scope of that rule to apply to branch offices of *any* Commission registrant.<sup>5</sup>

Accordingly, the Division does not believe that it is appropriate to grant your request for relief, and your request is hereby denied. If you have any questions concerning this correspondence, please contact R. Stephen Painter Jr., an attorney on my staff, at (202) 418-5416.

Very truly yours,

Ananda Radhakrishnan  
Director

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<sup>3</sup> Emphasis added. Commission rules referred to herein are found at 17 C.F.R. Ch. I (2005).

<sup>4</sup> CFTC Staff Letter No. 84-10, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,252 (May 29, 1984).

<sup>5</sup> CFTC Letter No. 84-26, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,472 (Dec. 6, 1984) (“a non-proprietary branch office of a *registrant*, which is a separate person from the registrant, must itself be registered with the Commission in an appropriate capacity”) (emphasis added); *see also* CFTC Staff Letter No. 98-57, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,398 (June 12, 1998) (explaining that a separately incorporated branch office of an introducing broker generally must register with the Commission in an appropriate capacity).