

Commodity Futures Archive - Selected materials, CFTC Interpretative Letter No. 92-19. (No-Action Relief Request for Failure to Register as an Introducing Broker.), ¶25,516, Commodity Futures Trading Commission, (Oct. 9, 1992)

¶25,516. Commodity Futures Trading Commission. Division of Trading and Markets. October 9, 1992. Correspondence in full text.

Interpretations: Registration: Introducing Brokers: Foreign Bank.— The presence of branches in the U.S. of a foreign bank did not, subject to certain conditions intended to ensure a separation between the foreign bank's brokerage activities from offshore locations and its U.S. banking activities and CFTC access to books and records, disqualify that foreign bank from characterization as a foreign broker.

See ¶7025, "Registration" division, Volume 1.

This is in reference to your letter to the Division of Trading and Markets ("Division") dated September 22, 1992 on behalf of your client, X, in which you requested that the Division issue no-action relief to X for failure to register as an introducing broker ("IB") under the circumstances described below.

In your September 22, 1992 letter, you have stated the following:

X is a Swiss bank organized as a corporation under the laws of Switzerland. The principal office of X is in Zurich, but X also maintains offices elsewhere in Switzerland and in other non-U.S. cities. In addition, X maintains branches and offices in several U.S. cities ("U.S. branches"). The U.S. branches are regulated by the Federal Reserve Board and state banking authorities in the states where branches are located.¹

As a service to its Swiss customers and its other non-U.S. customers, X plans to begin conducting a brokerage business for such customers, introducing accounts of Swiss and other non-U.S. customers for futures and option contracts traded on U.S. contract markets ("U.S. contracts") from its Zurich office and possibly from other non-U.S. offices on a fully-disclosed basis to registered futures commission merchants ("FCMs") in the United States.

After introduction to the U.S. FCM, the customer will have a direct relationship with the U.S. FCM, and X will maintain its normal banking relationship with the customer. The customer may also have banking relationships with other banks.

All funds and property required for margin or premiums with respect to the U.S. contracts will be transferred directly from the Zurich office of X (or other non-U.S. offices of X or other banks, as the case may be) to the U.S. FCM in accordance with normal banking practices and procedures at the direction and authorization of the customer. Similarly, all withdrawals from the accounts will be transmitted from the U.S. FCM to the appropriate non-U.S. office of X or other bank in accordance with normal banking practices and procedures at the direction and authorization of the customer. All orders and other instructions relating to the accounts will be transmitted directly to the U.S. FCMs from the Zurich office of X or other non-U.S. X offices, or directly by the non-U.S. customer, as the case may be. Conversely, all reports and other communication relating to the accounts will be transmitted directly from the U.S. FCMs to the appropriate non-U.S. office of X or directly to the non-U.S. customers at the customer's election. The U.S. branches of X will not be involved in any way in X's activities as a foreign broker in U.S. contracts or in the operation and administration of the accounts.

We initially note that the proposed conduct of X constitutes the solicitation and acceptance of orders for the purchase or sale of commodity contracts, and that such conduct, when unaccompanied by the acceptance of money to margin the trades, ordinarily would require such person to be registered as an IB.² Although X, as a Swiss bank, is permitted to engage both in banking and brokerage activities, and in this independent banking context holds funds that ultimately may be transmitted to an FCM, we do not believe that the holding of such funds takes X out of the IB definition.

Pursuant to section 4d of the Act and Commodity Futures Trading Commission ("Commission") rule 3.15, any person who acts in the capacity of an IB must register as such and otherwise comply with all the obligations imposed upon such registrants under the Act and regulations thereunder. However, the Commission has generally not required the registration of persons located outside the United States which engage in conduct which otherwise would require registration if conducted in the United States or conducted with customers located in the United States. Specifically, the Commission has not required a foreign broker which does not deal with U.S. customers to register as an IB.³ But for the existence of its U.S. branches, X could be described as being located outside the U.S. and, under such circumstances, would be eligible to be treated as an offshore IB engaging in relevant activities with non-U.S. customers

⁴ and, therefore, not required to register as an IB.

In an analogous situation, the Division previously has determined that the presence of branches in the U.S. of a foreign bank did not (subject to certain conditions intended to ensure a separation between the foreign bank's brokerage activities from offshore locations and its U.S. banking activities and Commission access to books and records) disqualify that foreign bank from characterization as a foreign broker.⁵ X seeks to give the Commission the same assurances that caused the Division to adopt a no-action position in that analogous circumstance, and has represented, among other things, that:

- (a) None of the U.S. branches will engage in any activities subject to regulation by the Commission (except in connection with the proprietary trading conducted by U.S. branches);
- (b) X will provide, upon request of the Commission or the National Futures Association ("NFA"), access to records of its U.S. branches for purposes of ensuring compliance with the foregoing undertaking;
- (c) X will identify all of its U.S. branches, including addresses and contact persons at each such U.S. branch, and consent to notify the Division and NFA of any new U.S. branches which X determines to open;
- (d) X will file a valid and binding agency agreement for purposes of accepting delivery and service of any communication issued by or on behalf of the Commission with respect to its activities subject to regulation under the Act;
- (e) X will otherwise comply with all of the provisions of the Act and the Commission's regulations applicable to conduct subject to regulation under the Act; and
- (f) X will require that the U.S. FCM carrying the accounts of non-U.S. customers introduced by X obtain an acknowledgement from such customers that the financial protections of U.S. regulation do not extend to funds, securities or property transmitted by the U.S. FCM to a third party who is not a Commission registrant.⁶

The Division believes that compliance with the foregoing conditions will be sufficient to ensure that the proposed course of conduct will not compromise customer protection. Based upon the foregoing and subject to compliance with the terms and conditions set forth in your September 22, 1992 letter and referred to herein, the Division will not recommend that the Commission take enforcement action against X for failure to register as an IB under the circumstances described above.

The position adopted herein is based on the information provided to us. Any different, changed or omitted facts or conditions might require us to reach a different conclusion. This position is solely that of the Division of Trading and Markets and does not necessarily represent the views of the Commission or that of any other unit of its staff.

Footnotes

- 1 This letter addresses only those issues relevant to the Commodity Exchange Act ("Act"). Among other affiliates, X indirectly owns Y registered futures commission merchant.
- 2 Section 2(a)(1)(A) of the Act, 7 U.S.C. ¶2, defines the term "introducing broker" as:
Any person, except an individual who elects to be and is 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 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.
See also Commission rule 1.3(mm), 17 C.F.R. §1.3(mm).
- 3 *See* 48 *Fed. Reg.* 35248, 35261 (August 3, 1983); *see also* fn.4, *infra*.
- 4 The term "customer located outside the U.S." most clearly applies to non-resident, non-U.S. customers. It may encompass non-resident U.S. nationals in many circumstances as well. Questions regarding the application of this letter to nonresident U.S. customers should be directed to the Division. *See also* 57 *Fed. Reg.* 36369 (August 13, 1992).
- 5 *See* Interpretative Letter No. 89-7, Division of Trading and Markets, [1987-1990 Transfer Binder] Comm. Fut. L Rep. (CCH) ¶24,479 (June 22, 1989).
- 6 As you know, section 4d of the Act provides for the segregation of customer funds by an FCM. The Division is concerned that the persons introduced by X to U.S. FCMs fully understand that they will be treated as

"customers" of the FCM as defined in Commission rule 1.3(k), 17 C.F.R. §1.3(k), for all purposes under the Act and regulations thereunder, and that their funds will receive segregation protection only while the funds remain at the FCM or any other depository that is permissible under the Act and Commission rules for purposes of activities regulated by the Act. Customers also should understand that their funds will not be subject to segregation requirements once those funds are transmitted by the FCM to the customer or a third-party depository of the customer. We believe that proposed condition (f) addresses the Division's concerns in this regard.