

CFTC Letter No. 00-44

March 31, 2000

No-Action

Division of Trading and Markets

Re: Section 4d(1): "R" -- Request for IB Registration No-Action Position

Dear :

This is in response to your letter to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission") dated February 9, 2000. By your correspondence, you request on behalf of your client, "R", relief from the introducing broker ("IB") registration requirements of Section 4d(1) of the Commodity Exchange Act ("Act").¹ You request this relief to allow "R" branch offices located outside of the United States ("Foreign Branches") to introduce futures and options customers located outside of the United States to "S", an affiliate of "R", without "R" registering as an IB.²

Based upon the representations made in your correspondence, we understand the facts to be as follows. "R" is a national banking association regulated by the Office of the Comptroller of the Currency ("OCC"). "S" is a registered futures commission merchant ("FCM"). Both "S" and "R" are subsidiaries of "T", a bank holding company regulated by the Board of Governors of the Federal Reserve System.

You represent that the United States offices of "R" do not engage in conduct requiring registration with the Commission. However, the Foreign Branches, which are located in _____, _____, the _____, _____, and _____, have customers who are located outside of the United States ("Foreign Customers") that wish to enter into futures transactions on both United States and non-United States markets. The Foreign Branches wish to refer the Foreign Customers who want to enter into futures transactions on United States markets to "S", which then will be responsible for the transactions. "S" would like to compensate the Foreign Branches for these referrals. Thus, "R", through the Foreign Branches, wishes to act as an IB.³

Section 4d of the Act requires all persons who act as IBs to register as such. However, the Commission generally has not required persons to register where those persons were: (1) located outside of the United States; and (2) transacting business only with Foreign Customers.⁴ The Foreign Branches are located outside of the United States, and they will transact business only with Foreign Customers. Thus, you essentially are requesting that, for registration purposes, the Division treat the Foreign Branches as

legal entities separate from "R's" United States offices. By treating the Foreign Branches as legal entities separate from "R's" United States offices, neither "R" nor the Foreign Branches would have to register as an IB because: (1) "R's" United States offices do not engage in conduct requiring registration with the Commission; and (2) the Foreign Branches are located outside of the United States, and they will transact business only with Foreign Customers.

The Division three times previously has treated a bank in one country as a separate legal entity from the bank's branches in another country. In all three cases, the Division determined that, notwithstanding the presence of bank branches in the United States, the Division would not recommend enforcement action against a non-United States bank for failure to register as either an FCM or IB.⁵ Additionally, even if "R" or the Foreign Branches were required to register as IBs, the Foreign Branch personnel who would introduce customers to "S" would not be required to register as associated persons of "R".⁶

In support of your request, you represent that: (1) "R" will identify to the Commission the Foreign Branches that will engage in the above-described conduct; and (2) "S" will be jointly and severally liable with "R", both to the clients referred to "S" and to the Commission, for any violations of the Act or regulations issued thereunder arising from or relating to the Foreign Branches' referral activities; and (3) the Foreign Branches are subject to regulation by the relevant regulatory authorities in the countries in which they are located.

Based upon the representations made in your correspondence the Division will not recommend that the Commission commence enforcement action against "R" under Section 4d(1) of the Act based solely upon its failure to register as an IB in connection with the activities of its Foreign Branches.

The Division's position is based upon your representations, among others, that: (1) "R" is a national banking association regulated by the OCC; (2) "R's" offices in the United States will not engage in any activities subject to regulation by the Commission; (3) "R" will identify to the Commission the Foreign Branches that will engage in the above-described conduct; (4) "S" will be jointly and severally liable with "R", both to the clients referred to "S" and to the Commission, for any violations of the Act or regulations issued thereunder arising from or relating to the Foreign Branches' referral activities; (5) the Foreign Branches will do no more than refer Foreign Customers who want to enter into futures transactions on United States markets to "S", and "S" will then be responsible for the transactions; and (6) the Foreign Branches are subject to regulation by the relevant regulatory authorities in the countries in which they are located.

This letter does not excuse "R", its Foreign Branches or "S" from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, "R", its Foreign Branches, and "S" remain subject to all of the antifraud provisions of the Act and the Commission's regulations issued thereunder and Commission Rules 21.02 and 21.03 (special calls for information). Additionally, you should be aware that Commission Rule 1.37 requires an FCM to know the true owner of every account it carries.

This letter, and the no-action position issued herein, are based upon the representations that you have made to us, and are subject to compliance with the conditions set forth above. Any different, changed, or omitted material facts or circumstances might render these positions void. You must notify us immediately in the event that the operations or activities of "R", its Foreign Branches, or "S" change in any material way from those represented to us. Further, this letter represents the position of the Division only. It does not necessarily reflect the views of the Commission or any other division or office of the Commission.

If you have any questions concerning this correspondence, please contact Lawrence B. Patent, Associate Chief Counsel, or Gregory S. Collett, an attorney on my staff, at (202) 418-5450.

Very truly yours,

John C. Lawton
Acting Director

1 7 U.S.C. § 6d(1) (1994).

2 As you note in your correspondence, "R" is not required to register as an IB under Rule 30.4 because Rule 30.4 applies to commodity interest transactions on non-United States markets by customers located in the United States. Your no-action request concerns transactions on United States markets by customers located outside the United States. Commission rules referred to herein can be found at 17 C.F.R. Ch. I (1999).

3 Rule 1.3(mm) defines an introducing broker, in relevant part, as "Any person who, for compensation or profit . . . is 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 . . . to margin, guarantee, or secure any trades or contracts that result or may result therefrom." The Division specifically has noted that "any person who is compensated for referral of customers to an FCM" must register as an IB. *See* 48 Fed. Reg. 35248, at 35250 (August 3, 1983).

The Division has drawn a distinction in the past between an entity with multiple branches or divisions, both of which indicate that the entity in question is one entity, and an entity with affiliates or subsidiaries, both of which the Division has treated as separate legal entities from the main entity. *See, e.g.*, CFTC Staff Letter No. 88-3, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. ¶24,085 (January 15, 1988).

4 *See* 48 Fed. Reg. 35248, at 35261.

5 CFTC Staff Letter No. 93-113, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,930 (October 29, 1993); CFTC Staff Letter No. 92-19, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,516 (October 9, 1992); CFTC Staff Letter No. 89-5, [1987-1990 Transfer Binder] Comm.

Fut. L. Rep. (CCH) ¶24,471 (December 8, 1988).

6 48 Fed. Reg. 35248, at 35261.