

CFTC Letter No. 01-02**December 1, 2000****No-Action****Division of Trading & Markets**

Re: Section 4d(2) of the Act -- Request for No-Action Position to Permit a Registered IB to Effect Transfers of Funds from Customers' Securities Accounts to Customers' Commodity Interest Accounts Without Registering as an FCM

Dear :

This is in response to your letter dated December 31, 1999 to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission") as supplemented by your letters dated January 18, 2000, August 11, 2000, September 21, 2000, October 25, 2000 and November 17, 2000, as well as telephone conversations with Division staff. By your correspondence, you request, on behalf of "P", a registered introducing broker ("IB"), the continuation of the no-action position¹ provided to "Q", which was formerly a registered IB. The Division's previous no-action position permitted "Q", upon written authorization from its customers, to transfer funds via check between its customers' securities and commodity interest accounts without becoming registered as a futures commission merchant ("FCM") pursuant to Section 4d(2) of the Commodity Exchange Act ("Act").² In your correspondence, you stated that "P" acquired "Q" and its commodity interest trading business on June 1, 1998 and that "Q" subsequently withdrew its registration as an IB.

Based upon your representations, we understand the facts to be as follows. "P" has been registered as a broker-dealer since 1979 and a member of the New York Stock Exchange since 1982. Although "P" maintains securities accounts for its customers, it does not itself carry or clear such accounts. Instead, "R", a registered broker-dealer that is affiliated with "P",³ carries and clears all of "P's" customer securities accounts.

Some of "P's" securities accounts also trade commodity interests. The commodity interest accounts of such customers are carried on a disclosed basis by "S", a registered FCM. Less than one percent of "P's" total revenue is derived from commodity interest-related activity. "P" does not advertise its commodity interest-related services, and instead offers such services to its existing securities customers merely as a courtesy.

When customers open a commodity interest account, they complete, among other documents,

authorization forms permitting the transfer of funds both ways between their commodity interest and securities accounts. After the customer signs these authorization forms, funds may be transferred via customer's oral request between the customer's securities and commodity interest accounts carried, respectively, by "R" and by "S".

Transfers of funds from customers' securities accounts at "R" and customers' commodity interest accounts at "S" are made only by check. Requests for such transfers are processed upon approval by the "P" Cash Management Department. When a request is approved, "P" personnel will draw a check on the "P" account at "T". The check will be made payable to "S" for the benefit of the customer and will be printed at the San Diego office of "P". The check will then be retrieved by armored courier and delivered to "U", which maintains an account for "S". The courier makes daily pick-ups at the San Diego office of "P" at approximately 12:30 p.m Pacific Standard Time ("PST").

When transferring funds from a customer's commodity interest account at "S" to the customer's securities account carried by "R", "P" personnel will contact "S", which will then cause a wire transfer to be made by its bank, "V", to "R" for the benefit of the customer. Wire transfer requests that are received before 9:00 a.m., PST, are processed that same business day. Requests that are received after 9:00 a.m. PST are processed on the following business day.

As we stated in our letter to you dated August 3, 2000, the no-action position provided to "Q" did not concern the use of wire transmissions to affect the transfers of funds. The use of wire transfers, however, was addressed in CFTC Letter No. 99-47 [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,789 (Oct. 7, 1999), which was a no-action position provided to a registered IB that was using both checks and wire transfers to effect the transfer of funds between client securities and commodity interest trading accounts.

Additionally, the Division's prior grant of no-action to "Q" concerned the hand delivery of checks to the FCM's bank, which was located in the same building as "Q". You have presented somewhat different facts. You assert that checks are retrieved on a daily basis and delivered by armored courier to "U", which carries an account for "S", the FCM. Provided you comply with the following conditions, we believe it is appropriate to extend to you the prior grant of relief to "Q":

1. "P" must designate specific individuals within "P" who are authorized to draw checks on the "T" account for transmittal to "S" and to request wire transfers from "V" to "R";
2. "P" must maintain any cancelled checks drawn on the "T" account concerning any transfers to "S";
3. "P" must maintain all wire transfer instructions concerning transfers to "R" from "V";
4. All checks that are forwarded to "S" must be sent the same day that an oral request is received, provided that the request is received and processed before 12:30 p.m., PST. If a

customer's oral request is received after 12:30 p.m., PST, "P" must promptly process the request on the next business day;

5. All wire transfers from "V" to "R" must be initiated on the same day that an oral request is received, provided the request is received before 9:00 a.m. PST. If the request is received after 9:00 a.m., PST, "P" must promptly process the request on the next business day;

6. "P" must maintain: (a) evidence that it is not able to withdraw funds from "S's" segregated account; (b) a record in chronological order of all checks drawn on the "T" account that are made payable to "S" for the benefit of customers who are trading commodity interests, including the name and account numbers of the customers and the amounts transferred for each customer; (c) a record in chronological order of all wire transfers from "V" to "R" for the benefit of "P" customers who are trading commodity interests, including the name and account numbers of these customers and the amounts transferred for each customer; (d) a record reflecting the name of the person receiving the authorization to transfer funds and the individual who contacted "P" to initiate the transfer, if the account is carried in the name of a person other than a natural person; and (e) a record reflecting the name of the person contacted at "S" to effect transfers of funds between the securities and commodity interest accounts of customers; and

7. "P" must provide to the Commission and the National Futures Association ("NFA") evidence that the "S" accounts held with "V" and "U" are qualifying accounts within the meaning of Rule 1.57(c)(4).

Based upon your representations and "P's" ability to adopt and to comply with the procedures set forth in items one through seven above, the Division will not recommend that the Commission commence any enforcement action against "P" under Section 4d(2) of the Act, based solely upon "P's" failure to register as an FCM in connection with the activities described herein.

The position taken in this letter is applicable to "P" solely in connection with its transfer of customer funds between "R" and "V", on the one hand, and "T" and "S", on the other hand, without "P" being registered as an FCM. It does not excuse "P" or "S" from compliance with any other applicable requirements contained in the Act or the Commission's rules promulgated thereunder, and in particular, all applicable antifraud provisions of the Act and the Commission's regulations, such as Rule 1.31. Thus, any and all records that must be maintained herein must be kept and produced for inspection upon the request of any representative of the Commission, NFA or the Department of Justice. Further, this letter, and the no-action position taken herein, are based upon the representations that have been 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 this letter void. You must notify us immediately in the event that the activities of "P" or "S" change in any material way from those as represented to us.

If you have any questions concerning this correspondence, please contact Helene D. Schroeder, an attorney on my staff, at (202) 418-5450.

Very truly yours,

John C. Lawton
Acting Director

1 See CFTC Letter No. 97-13 [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26, 986 (Dec. 24, 1996) ("CFTC Letter No. 97-13").

2 7 U.S.C. § 6d(2) (1994).

3 Both "R" and "P" are wholly-owned subsidiaries of "W".