

**Commodity Futures Archive - Selected materials, CFTC Interpretative Letter No. 89-7. (Foreign Bank's Exemption from FCM Registration.), ¶24,479, Commodity Futures Trading Commission, (Jun. 22, 1989)**

¶24,479. Commodity Futures Trading Commission. Division of Trading and Markets. June 22, 1989. Correspondence in full text.

**Interpretations: Futures Commission Merchants: Registration: Exemption: Foreign Bank.**— The Division of Trading and Markets would not recommend that the Commission initiate enforcement action against a foreign bank for failure to register as a futures commission merchant provided the bank identify all of its U.S. branches, including addresses and contact persons at each such branch and consent to notify the Division and the NFA of any new U.S. branches the bank determines to open and provided the bank will otherwise comply with all of the provisions of the Commodity Exchange Act and Commission regulations applicable to foreign brokers. The no-action position was also based upon the bank's representations that none of the U.S. branches will engage in any activity subject to regulation by the Commission (except in connection with proprietary trading conducted by the U.S. branches); that it will provide, upon request of the CFTC or NFA, access to records of the U.S. branches for purposes of ensuring compliance with the foregoing undertaking, and will, in accordance with the requirements of Reg. §15.05, appoint as its agent for purposes of accepting delivery and service of any communication issued by or on behalf of the CFTC, either a clearing FCM pursuant to Reg. §15.05(b) or another person domiciled in the U.S. pursuant to Reg. §15.05(d). However, the no-action position will not take effect until an appropriate officer of the bank with authority to bind the bank and the U.S. branches files the required information and a notice on behalf of the bank and its U.S. branches affirming his consent to all of the conditions of relief specified.

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

This is in reference to your letter to the Division of Trading and Markets ("Division") dated June 14, 1989 on behalf of your client "DKB" in which you requested that the Division confirm that it will not recommend any enforcement action against DKB for failure to register as a futures commission merchant ("FCM") under the circumstances described below.

In your June 14, 1989 letter, you have stated the following:

DKB is a Japanese Bank organized as a corporation under the laws of Japan. DKB's principal office is located in Tokyo, Japan and DKB also maintains offices elsewhere in Japan and in other non-U.S. cities. In addition, DKB maintains several branch offices in the U.S. (the "U.S. Branches"). At the end of this month, DKB plans to begin conducting a brokerage business and carrying accounts in futures and options contracts traded on U.S. contract markets ("U.S. Contracts") from its Tokyo office (and, perhaps, from other non-U.S. offices) for Japanese and other non-U.S. Customers. DKB will obtain execution and clearing of the U.S. Contracts carried in such accounts through omnibus accounts ("Omnibus Accounts") maintained with one or more U.S. FCMs which are also clearing members of the appropriate contract markets ("Clearing FCMs").

All funds and property required for margin or premiums with respect to the U.S. Contracts carried in the Omnibus Accounts with the Clearing FCMs will be transferred directly by the Tokyo office of DKB to the clearing FCMs. Similarly, all withdrawals from Omnibus Accounts will be transmitted directly from the Clearing FCMs to DKB's Tokyo office. All orders and other instructions relating to the Omnibus Accounts will be transmitted directly to the Clearing FCMs from DKB's Tokyo office. Conversely, all reports and other communications relating to the Omnibus Accounts will be transmitted directly from the Clearing FCMs to DKB's Tokyo office. The U.S. Branches will not be involved in any way in DKB's activities as a foreign broker in U.S. Contracts or in the operation and administration of the Omnibus Accounts.

As you know, section 2(a)(1)(A) of the Commodity Exchange Act ("Act"), 7 U.S.C. §2 (1982), provides that the term "futures commission merchant" ("FCM"):

shall mean and include individuals, associations, partnerships, corporations, and trusts 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 and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trade or contracts that result or may result therefrom.

Pursuant to section 4d of the Act, 7 U.S.C. §6d (1982), any person who acts in the capacity of an FCM must register as such and otherwise comply with all obligations imposed upon such registrants under the Act and regulations thereunder.

However, the Commission has not required a person located outside the United States which engages in the conduct described in section 2(a)(1)(A) of the Act for or on behalf of foreign customers through a U.S. FCM to register as an FCM. Specifically, the Commission has not required a foreign broker as that term is defined in rule 15.00(a)(1) to register as an FCM.<sup>1</sup> But for the existence of the U.S. Branches, DKB could be characterized as located outside the U.S. and, under such circumstances, DKB would be eligible to be treated as a foreign broker in connection with the activities which it proposes to undertake on U.S. exchanges for or on behalf of foreign customers. In an analogous situation, in connection with the exemptive provision in rule 30.10, 17 C.F.R. §30.10 (1988), of the foreign futures and option rules for certain firms located outside the U.S.,<sup>2</sup> the Division determined that the existence of a branch in the U.S. could cause a firm to be considered to be located here.<sup>3</sup> Separately, however, the Division issued a no action letter allowing a firm with such a branch in the U.S. to claim exemptive relief subject to certain conditions.<sup>4</sup>

In your letter, you represent that in support of its request for this no action position, the appropriate authorized officer of DKB will undertake on behalf of DKB as follows:

- (a) None of the U.S. Branches will engage in any activities subject to regulation by the Commission (except in connection with proprietary trading conducted by the U.S. Branches);
- (b) DKB agrees to provide, upon request of the Commission or National Futures Association, access to records of the U.S. Branches for purposes of ensuring compliance with the foregoing undertaking; and
- (c) DKB will, in accordance with the requirements of Commission rule 15.05 (17 C.F.R. §15.05), appoint, as its agent for purposes of accepting delivery and service of any communication issued by or on behalf of the Commission, either (i) a Clearing FCM pursuant to Commission rule 15.05(b), or (ii) another person domiciled in the U.S. pursuant to Commission rule 15.05(d).

In connection with the foregoing, the Division further understands that each such U.S. Branch is subject to extensive regulation, including reporting and recordkeeping requirements and examinations, either under state banking laws or under federal law by the Office of the Comptroller of the Currency.

The Division has reviewed the undertakings proposed by DKB and believes that such undertakings, subject to the conditions noted below, will be sufficient to ensure that the regulatory purposes of limiting the foreign broker status to firms located outside the United States would be adequately addressed. Accordingly, the no action position adopted herein is subject to the following conditions. In addition to the undertakings contained in DKB's letter of June 14, 1989, the appropriate authorized officer of DKB must undertake on behalf of DKB as follows:

- (a) DKB must 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 National Futures Association of any new U.S. Branches which DKB determines to open; and
- (b) DKB must represent that it will otherwise comply with all of the provisions of the Act and the Commission's regulations applicable to foreign brokers, *see, e.g.* Parts 15 through 21 of the Commission's regulations.

The Division wishes to clarify that the no action position set forth herein will not take effect until an appropriate officer of DKB with authority to bind DKB and the U.S. Branches files the information required above and a notice on behalf of DKB and its U.S. Branches affirming his consent to all of the conditions of relief specified herein.

Based upon the foregoing, subject to compliance with the terms and conditions of this letter, the Division will not recommend that the Commission initiate enforcement action against DKB for failure to register as an FCM under the circumstances as 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 *See* rule 15.00(a)(1), 17 C.F.R. §15.00(a)(1) (1988). *See also* Interpretative Letter 86-4, Comm. Fut. L. Rep. ¶22,989 (March 5, 1986), in which the Division clarified that a non-domestic entity that accepts from U.S. customers orders and funds for the purchase or sale of futures or option contracts to be executed on a designated contract market must be registered as an FCM.
- 2 The Commission's rules clarify that the generalized exemption in rule 30.10 based on comparability of regulation

is available only to persons who are not located in the U.S. and who are subject to a comparable regulatory system. 52 Fed. Reg. 28989, 28981 (Aug. 5, 1987).

3 See Interpretative Letter No. 88-3, 2 Comm. Fut. L. Rep. (CCH) ¶24,085 (January 15, 1988).

4 See Interpretative Letter No. 89-5, 2 Comm. Fut. L. Rep. (CCH) ¶24,471 (December 8, 1988).