

## **Commodity Futures Archive - Selected materials, CFTC-OETF Interpretative Letter No. 90-2. (Certain Hybrid Instruments Marketed and Sold by Branches or Agencies of Foreign Banks Subject to the Regulatory Supervision of the Banking Department of the State of New York.), ¶24,625, Commodity Futures Trading Commission, (Mar. 2, 1990)**

¶24,625. Commodity Futures Trading Commission. Off-Exchange Task Force. March 2, 1990. Correspondence in full text.

**Interpretations: Hybrid Instruments: Foreign Banks: N.Y. Regulation.**— Since the regulatory supervision provided by the Banking Department to branches and agencies of foreign banks it licenses to conduct the business of banking in the state of New York is comparable to the regulatory supervision provided by U.S. federal banking authorities to the U.S. branches or agencies of foreign banks as contemplated by Reg. §34.2(a)(1)(vii), enforcement action would not be recommended to the Commission under Section 4c of the Commodity Exchange Act or Reg. §34.2 should any branch or agency of a foreign bank located within the state of N.Y. which is licensed, regulated, supervised and examined by the Banking Department market and sell hybrid instruments in compliance with the requirements of Part 34 except for the requirements of Reg. §34.2(a)(1)(vii) concerning the regulation, supervision or examination of such branches or agencies by U.S. federal banking authorities.

See ¶12,825, “Liabilities—Prohibitions” division, Volume 1.

This is in response to your letters of October 6, 1989 and January 11, 1990 concerning the application of the regulations of the Commodity Futures Trading Commission concerning certain hybrid instruments, 17 CFR Part 34 (54 F.R. 30684; July 21, 1989) to the issuance of such instruments by domestic, state-licensed branches or agencies of foreign banks. Specifically in this regard, you have requested that the applicability of the exemption from Commission regulation for certain hybrid instruments issued by a United States branch or agency of a foreign bank subject to federal bank regulator supervision as set forth in Commission Rule 34.2(a)(1)(vii) be extended to such branches or agencies when subject to regulatory supervision by the Banking Department of the State of New York (“Banking Department”).

In your letters you have represented that Article V of the New York banking law provides that a specific application and licensing procedure be followed before a foreign bank may commence the business of banking in the state of New York. Among the factors considered in making a decision to grant a license are the financial condition of the bank, the integrity of ownership, the quality of management and the business plan for the New York operation. The procedure also entails a check of the applicant's correspondent banks and business references and contact with the applicant's home country supervisory authorities. A copy of the application is made available to the Federal Reserve Board, the Comptroller of the Currency and the United States Department of State. Comments provided by these agencies are also taken into consideration in the decision-making process. Ultimately the New York State Banking Board considers the application and must grant its formal approval before a branch or agency may open for business.

You have indicated that once licensed by the state of New York, all branches and agencies of foreign banks are examined on a regular basis, supplemented by semi-annual visitations. Examinations are conducted by staff members of the Banking Department who frequently work with examiners from the Federal Reserve and the Federal Deposit Insurance Corporation during joint examinations of supervised institutions. The examination process entails review procedures and techniques similar to those that apply to Federal Reserve member banks and to FDIC insured banks. It includes an assessment of asset quality, reviews of internal controls and audit and the capability of management, and compliance with laws and regulations. Banking Department examiners also evaluate the adequacy of liquidity and the risk inherent in off-balance sheet activities. The examination includes an analysis of the depth, adequacy and diversity of funding sources and the quality and adequacy of earnings. In conducting these examinations, the Banking Department follows the uniform approach to the examination of branches and agencies of foreign banks developed through the Federal Financial Institutions Examinations Council. Thus, examination procedures and the overall report format are identical with those utilized by Federal Reserve bank regulators. All completed examination reports, along with a record of supervisory action, are forwarded to the Federal Reserve Bank of New York.

In addition, you have represented that the Foreign Commercial Banks Division of the Banking Department is responsible for all licensed branches and agencies and banks and trust companies with foreign ownership. While reports of examination are the primary basis for supervision, the condition of each institution is continuously monitored through the regular review of quarterly financial reports and various other reports filed with Banking Department and the Federal regulatory authorities at frequent intervals.

Finally, you have noted that state-licensed branches and agencies are subject to the federal regulatory structure created by the International Banking Act, including the authorization of the Federal Reserve to act as the residual examining agency. You have also noted that the Department of the Treasury has authorized the Banking Department to enforce the Bank Secrecy Act in state-licensed, uninsured branches and agencies of foreign banks.

Based upon these representations, the staff is of the view that the regulatory supervision provided by the Banking Department to branches and agencies of foreign banks it licenses to conduct the business of banking in the state of New York is comparable to the regulatory supervision provided by U.S. federal banking authorities to the United States branches or agencies of foreign banks as contemplated by Commission Rule 34.2(a)(1)(ii). As a result, the staff will not recommend enforcement action to the Commission under Section 4c of the Commodity Exchange Act, 7 USC §6c, or Commission Rule 34.2 (54 F.R. 30684, 30692-3; July 21, 1989) should any branch or agency of a foreign bank located within the state of New York which is licensed, regulated, supervised and examined by the Banking Department as described above market and sell hybrid instruments in compliance with the requirements of 17 CFR Part 34 except for the requirements of Commission Rule 34.2(a)(1)(vii) concerning the regulation, supervision or examination of such branches or agencies by U.S. federal banking authorities.

This position does not excuse any such New York branch or agency of a foreign bank from complying with any otherwise applicable provisions of the Commodity Exchange Act. You should know that this position is based upon the facts and representations set forth in your October 6, 1989 and January 11, 1990 letters, and that any different, omitted or changed facts or conditions might require a different conclusion. It should also be noted that this position is that of the staff and is not binding upon the Commission.