



COMMODITY FUTURES TRADING COMMISSION

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93-113

DIVISION OF
TRADING AND MARKETS

October 29, 1993

[Address]

Dear Messrs. []:

This is in reference to your letter to the Division of Trading and Markets ("Division") dated August 25, 1993 on behalf of X in which you requested that the Division issue no-action relief to X in connection with the Commodity Futures Trading Commission's ("Commission") registration requirements under the circumstances detailed below.

In your August 25, 1993 letter, you have stated the following:

X is incorporated in Switzerland, where it has approximately ___ offices (in addition to its principal offices in Basel) and approximately ___ subsidiaries. X's foreign offices include ___ branches, agencies and representative offices; four of those offices are located in the United States (the "U.S. offices"). The U.S. offices, all of which are identified in the enclosed schedule, are subject to regulation by the Board of Governors of the Federal Reserve System, as provided in the Bank Holding Company Act and the International Banking Act, and also are subject to regulation by state banking authorities in the states where those offices are located. ^{1/}

Certain clients of X who are not located in the United States have expressed an interest in trading futures and options contracts on U.S. contract markets. As a service to those clients, X proposes to introduce the accounts of those foreign banking clients from its offices in London and Zurich (and, if appropriate, other locations outside the

^{1/} This letter addresses only those issues relevant to the Commodity Exchange Act ("Act"). Among other affiliates, X indirectly owns Y and Z, registered futures commission merchants.

- United States) on either a fully disclosed or omnibus basis to registered futures commission merchants in the United States. Y and Z, affiliates of X, are registered with the Commission as futures commission merchants ("FCMs") and are members in good standing of the National Futures Association ("NFA") in such capacity. Other affiliates of X may in the future become registered with the Commission as FCMs and members of NFA. X accordingly contemplates that it may, upon approval of the relief requested herein, introduce customer accounts to one or more such FCM affiliates.

The clients of X that are introduced to an FCM (which may or may not be an affiliate of X) will in all cases have a customer relationship with that FCM, although the precise nature of that relationship would vary depending on whether the customer's account is introduced by X on an omnibus or fully disclosed basis. ^{2/} At the same time, X will maintain its normal banking relationships with those clients, who also may have banking relationships with other banks. ^{3/}

To the extent that customers of X request that funds be transferred from their bank accounts to accounts at a U.S. FCM, all money, securities and property required for margin or option premiums with respect to futures or option contracts traded on a contract market will be transferred, with the authorization and at the direction of the customer, directly

^{2/} X represents that most of its clients would expect to have their accounts carried by a U.S. FCM on a fully disclosed basis, but it is prepared to act as a traditional "foreign broker" (see Commission Regulation 15.00(a)(1)) that introduces customer accounts to an FCM on an omnibus basis. In either case, X (and, to the extent relevant, its FCM affiliates) would comply with all applicable provisions of the Act and Commission regulations.

^{3/} X contemplates that few, if any, of the clients that wish to avail themselves of this facility will be individuals. X would not make this facility available to any client that is located in the United States.

from a non-U.S. office of X to the U.S. FCM in accordance with customary banking procedures. In like fashion, all withdrawals from a customer's segregated funds account at a U.S. FCM will be transmitted from that FCM to the appropriate non-U.S. office of X (or other [non-U.S.] bank account of the non-U.S. customer) in accordance with customary banking practices and procedures. These procedures would apply regardless of whether accounts are introduced on a fully disclosed or omnibus basis. In the former case, funds would be transferred directly between the client's overseas bank account and the U.S. FCM; in the latter, the transfers would be for the account of a foreign branch of X, which would then be responsible for further payment to or collection from clients of that branch.

All orders and other instructions relating to customer accounts will be transmitted directly to a U.S. FCM by the non-U.S. customer or a non-U.S. office of X, as applicable. All reports and other communications relating to those accounts will, in turn, be transmitted directly from the FCM to the appropriate non-U.S. office of X or directly to the customer. X additionally will require U.S. FCMs that carry the accounts of X's non-U.S. clients which are introduced by X's non-U.S. branches to obtain an acknowledgment from each such customer that the financial protections established by the Commodity Exchange Act and the Commission's Regulations thereunder do not extend to money, securities or property that is transmitted by a U.S. FCM to a third party (including the non-U.S. branches of X) which is not a Commission registrant. Where an account is introduced on an omnibus basis so that the only "customer" of the U.S. FCM is the non-U.S. branch of X, X will itself take steps to obtain this acknowledgment from each of its non-U.S. customers. ^{4/}

^{4/} In circumstances where the non-U.S. customer is the customer of X, which in turn has an omnibus account with a U.S. FCM, under the Act, the customer of the FCM would be X, not the customer's
(continued...)

Pursuant to section 4d of the Act and Commodity Futures Trading Commission ("Commission") regulations, any person who acts in the capacity of an FCM or introducing broker ("IB") ^{5/} 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, as that term is defined in Commission rule 15.00(a)(1), to register as an FCM in circumstances where the foreign firm introduces a customer omnibus account to a U.S. FCM or as an IB in cases where the foreign firm introduces the accounts of the non-U.S. customer to a U.S. FCM on a fully disclosed basis. ^{6/} But for the existence of its U.S. branches, X, based on its proposed activities described above, could be described as being located outside the U.S. and, under such circumstances, would be eligible to be treated as an offshore FCM or IB engaging in relevant activities with non-U.S. customers ^{1/} and, therefore, not

^{4/} (...continued)

underlying X's omnibus account. Accordingly, the Division has no opinion regarding X's representation that it will obtain the above-referenced acknowledgment from its non-U.S. customers whose accounts X carries on its own books.

^{5/} 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).

^{6/} See 48 Fed. Reg. 35248, 35261 (August 3, 1983).

^{1/} 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 non-resident U.S. customers should be directed to the Division. See also 57 Fed. Reg. 36369 (August 13, 1992).

required to register as either an FCM or IB.

In two analogous situations, the Division previously has determined that notwithstanding the presence of branches in the U.S. of a foreign bank, the Division would 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) recommend enforcement action against the foreign banks in the first case, for failure to register as an FCM^{8/} and in the second case for failure to register as an IB.^{2/}

In the request stated therein, X seeks to act as an FCM in introducing its non-U.S. customers' omnibus account to a U.S. FCM and as an IB in introducing the accounts of non-U.S. customers on a fully disclosed basis to a U.S. FCM. In that connection, X has provided the Division with the same assurances that caused the Division to adopt a no-action position in the circumstances noted above, and has represented through its duly authorized officers, among other things, that:

(a) None of the U.S. branches of X will engage in any activity that is subject to regulation by the Commission (except in connection with any proprietary trading that is conducted by the U.S. branches);

(b) In no circumstances will the U.S. branches of X be involved in any way in X's activities as a foreign broker or in the operation and administration of the accounts;

(c) X will provide, upon request of the Commission or the (NFA), access to records of its U.S. branches for purposes of ensuring compliance with the foregoing undertaking, to the extent permitted by law;

(d) X will otherwise comply with all of the provisions of the Act and the Commission's

^{8/} 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).

^{2/} See Interpretative Letter No. 92-19, Division of Trading and Markets [1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,516 (October 9, 1992).

regulations applicable to conduct subject to regulation under the Act; and

(e) X will require that the U.S. FCMs carrying the accounts of X's non-U.S. customers introduced by X's non-U.S. branches obtain an acknowledgement from such customers that the financial protections established by the Act and the Commission's regulations thereunder do not extend to money, securities or property transmitted by the U.S. FCMs to a third party (including the non-U.S. branches of X) which is not a Commission registrant. ^{10/}

In addition, X in its letter dated August 25, 1993 has:

(a) identified all of its U.S. branches, (including addresses and contact persons at each such U.S. branch) and consented to notify the Division and NFA of any new U.S. branches which X determines to open; and

(b) stated that it has entered into a valid and binding agency agreement with Y 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 and in the event the Agency Agreement is terminated for any reason, X will promptly take steps to execute and make effective a successor agreement and will file that latter agreement with the Division and NFA;

^{10/} 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 (e) addresses the Division's concerns in this regard.

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 August 25, 1993 letter and referred to herein, the Division will not recommend that the Commission take enforcement action against X for failure to register as an FCM in circumstances where X introduces its non-U.S. customer omnibus account to a U.S. FCM(s) or as an IB in circumstances where X introduces the accounts of its other non-U.S. customers to a U.S. FCM(s) on a fully disclosed basis.

This no-action position is conditioned on X's compliance with all applicable provisions of the Act and Commission rules thereunder, including, but not limited to, the antifraud provisions in section 4b of the Act and Commission rules 21.02 and 21.03 (special calls for information). In this connection, you should be aware that Commission rule 1.37 requires the FCM to know the true owners of the accounts it carries. This no-action position does not excuse X's compliance with any other applicable provision of United States or foreign laws.

The position adopted herein is based on the information and representations 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.

Very truly yours,

Andrea M. Corcoran
Director