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U.S. COMMODITY FUTURES TRADING COMMISSION

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September 20, 1995

This is in response to your letter to the Division of Trading and Markets ("Division") dated August 7, 1995 on behalf of X, a registered futures commission merchant ("FCM"), in which you requested that the Division confirm that under the situation described below, it will not recommend that the Commodity Futures Trading Commission ("Commission") take enforcement action against X and its Japanese and Hong Kong affiliates for failure of such affiliates to provide the Commission access to original books and records as required under Interpretative Letter No. 95-8, Comm. Fut. L. Rep. (CCH) ¶ 26,300 (January 25, 1995) ("1995 Advisory").

The 1995 Advisory was preceded by Interpretative Letter No. 93-115, [1993-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,932 (December 23, 1993) ("1993 Advisory"). In the 1995 Advisory, the Division permitted certain institutional customers of a FCM to transmit their orders directly to a qualified foreign firm affiliated with the FCM and which carried such FCM's customer omnibus account. The 1993 Advisory was limited to foreign firms which had confirmed rule 30.10 relief under Part 30 of the Commission's rules.^{1/}

Specifically, the order transmittal procedures of the 1993 Advisory were extended in the 1995 Advisory to circumstances where the customer omnibus account is carried at a foreign affiliate that does not have rule 30.10 relief if certain conditions are met.^{2/} Among those conditions, the 1995 Advisory requires that the FCM and its foreign affiliate jointly and severally undertake to assure the Commission prompt access, consistent with Commission rule 1.31, 17 C.F.R. § 1.31, to original books and records, wherever located, that relate to the solicitation, acceptance or entry of U.S. institutional customer orders on behalf of the FCM at

^{1/} The Division limited the 1993 Advisory to situations where the FCM and foreign affiliate have a parent/subsidiary relationship or are affiliated through common ownership.

^{2/} Such firms could be: a) eligible for rule 30.10 relief but have elected not to operate pursuant to the terms of the applicable rule 30.10 order, or b) located in a jurisdiction for which the relevant regulatory or self-regulatory organization has not sought such relief on behalf of firms subject to its jurisdiction.

the foreign affiliate. The FCM and its foreign affiliate must also represent that they are not aware of any provision of law in the relevant foreign jurisdiction that would prohibit either entity from complying with this condition.

In connection with the foregoing condition imposed pursuant to the 1995 Advisory, you state that X has been advised by local counsel that laws in both Japan and Hong Kong require that the original books and records of the FCM's foreign affiliate be maintained at a location in the local jurisdiction previously identified to the applicable regulatory authorities and preclude their removal without prior notice to and consent from the appropriate regulatory authorities. Therefore, you have requested that the Division confirm that the requirement set forth in the 1995 Advisory that an FCM and its foreign affiliate assure the Commission access to the foreign affiliate's books and records will be satisfied with respect to X's Japanese and Hong Kong affiliates by complying with the following undertakings:

- 1) X and its Japanese and Hong Kong affiliates will, jointly and severally, undertake to provide at such entity's expense, copies of the foreign affiliate's original books and records to a Commission representative upon the representative's request, all such copies being authenticated by an employee of the foreign affiliate by such employee attesting that the copies are true and complete before a notary public;
- 2) X and its Japanese and Hong Kong affiliates will represent that they are unaware of any legal impediment preventing access to original books and records of the foreign affiliate in the foreign jurisdiction, and will jointly and severally, undertake to provide, at such entity's expense, access to original books and records at a designated location in the foreign jurisdiction to a Commission representative or a third party involved in any proceeding relating to X or its Japanese or Hong Kong affiliate to which the Commission is a party;
- 3) X and its Japanese and Hong Kong affiliates will each agree to waive any objections to the admissibility of the copies described in paragraph (1) above as evidence in any action brought by the Commission against the FCM or such affiliates; and
- 4) X and its Japanese and Hong Kong affiliates will each agree, in the event of a proceeding involving the FCM or such affiliates to provide a witness, such as an employee of the foreign affiliate, to authenticate such copies of the books and records produced to the Commission.

The Division has considered your request and has determined

that the regulatory purposes of the Commodity Exchange Act, the 1993 and 1995 Advisories and Commission rule 1.31 would not be adversely affected in the event that X and its Japanese and Hong Kong affiliates consent to the foregoing undertakings as substituted compliance with the undertaking set forth in the 1995 Advisory regarding access to original books and records. In this regard, the undertakings as described above should provide the Commission with the ability to exercise the same compliance and enforcement functions that access to original books and records would otherwise have allowed.

The views expressed in this letter are based on the representations that you have made in your August 7, 1995 letter and are strictly limited to those representations. Any different, changed or omitted factors or conditions might require the Division to reach a different conclusion and we therefore request that you notify us immediately if the facts change in any way from those as represented in your letter. In all other respects, the terms and conditions of the 1993 and 1995 Advisories continue in effect. X must continue to comply with all applicable Commission rules, regulations and orders. In addition, X and its Japanese and Hong Kong affiliates must comply with the applicable laws, rules and orders of relevant foreign jurisdictions.

The positions adopted herein are solely those of the Division and do not necessarily represent those of the Commission or any other unit of the Commission's staff.