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U.S. COMMODITY FUTURES TRADING COMMISSION
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DIVISION OF
TRADING & MARKETS

June 12, 1996

Re: Request for Interpretation of Application of Sections 2, 5 and 6 of the Act

Dear :

This is in response to your letter dated March 28, 1996. In your letter, you requested that the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission") determine that the Division would not recommend enforcement action pursuant to Sections 2 or 5[1/] of the Commodity Exchange Act ("Act"), or Section 6[2/] of the Act, to the Commission if your client, "X", a corporation registered under the laws of the state of "A" and currently registered as an introducing broker ("IB") and commodity trading advisor ("CTA")(the "Firm"), also engages in the business of executing transactions in foreign currencies on behalf of its customers according to the facts as set forth below.

You indicate that the Firm desires to establish a currency trading facility as follows. You state that the Firm's foreign currency or exchange (both terms hereinafter referred to as "FX")

1/ 7 U.S.C. §§ 2, 7 (1994). Section 2 of the Act sets forth the Commission's jurisdiction. Section 5 of the Act describes the Commission's designation of a "contract market."

The Act is found at 7 U.S.C. §§ 1 et seq. (1994). Commission rules referred to are found at 17 C.F.R. Ch. I (1994).

2/ 7 U.S.C. §§ 8, 9, 15, 13b, 9a (1994). Section 6 deals with application for designation as a "contract market," made to the Commission, and several other topics, including appellate review of an order denying such application, the Commission's authority to proceed administratively against various parties subject to its regulations, and various sanctions that the Commission may order.

trading business will be limited to those contracts which you characterize as occurring in the "spot and forward currency markets" and "carried out on an off-exchange basis". The Firm proposes to accept funds from customers for the purpose of establishing FX trading accounts on behalf of such customers. The FX customer funds initially will be deposited in an omnibus account established by the Firm.[3/]

In 1985, the Commission addressed the differences between futures contracts, which are generally subject to the Act, and various other contracts used in buying and selling commodities, including spot, option and forward contracts. Characteristics Distinguishing Cash and Forward Contracts and "Trade" Options, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,718 (Sept. 30, 1985) ("1985 Cash and Forward Contracts Statutory Interpretation"). In the same year, the Commission addressed in detail the status of foreign currency transactions under the Act. Trading in Foreign Currencies For Future Delivery, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,750 (Oct. 23, 1985) ("1985 Foreign Currencies Interpretation"). In the 1985 Foreign Currencies Interpretation, the Commission stated that "the Treasury Amendment cannot be read so as to place outside the Commission's jurisdiction the marketing to the general public of such off-exchange foreign currency transaction [sic]; instead, the Amendment was meant to encompass only transactions among and between banks and other sophisticated, informed institutions." 1985 Foreign Currencies Interpretation, ¶ 22,750 at 31,122. The Commission continues to adhere to such interpretative position.

You should refer to the Commission's 1985 Foreign Currencies Interpretation as well as recent judicial precedent under the Treasury Amendment in determining the proper characterization of the specific contracts in which trading is contemplated by your client and the permissibility of the trading facility proposed. CFTC v. Am. Board of Trade, 803 F.2d 1242 (2d Cir. 1986) as cited in CFTC v. William C. Dunn, et al., 58 F.3d 50 (1995), cert. granted, 64 U.S.L.W. 3787 (U.S. May 28, 1996) (No. 95-1181); CFTC v. Standard Forex, Inc., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,063 (E.D.N.Y. 1993). See also Salomon Forex, Inc. v. Tauber, 8 F.3d 966 (4th Cir. 1993), cert. denied, 114 S.Ct. 1540

3/ The Firm desires to establish clearing agreements with various futures commission merchants ("FCMs") that would allow for the creation of segregated customer accounts under $100,000, but has not been able to do so at this time.

(1994); CFTC v. Frankwell Bullion Ltd., 904 F.Supp. 1072 (N.D. Cal. 1995); appeal docketed, Nos. 95-16977 and 95-17298 (9th Cir.). We are unable to provide the assurances you have requested on the facts presented to us.

If you have any questions regarding this letter, please contact me at 202-418-5450.

Very truly yours,

Susan C. Ervin
Chief Counsel