

CFTC Letter No. 97-85**October 8, 1997****Division of Trading & Markets**

Re: Request for Relief from Registration as an Introducing Broker

Dear :

This is in response to your letter dated August 13, 1997, to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by telephone conversations with Division staff, in which you request that the Division take a no-action position with respect to the activities of T and certain affiliated companies, described below, if the affiliates of T do not register as introducing brokers ("IBs") or in any other capacity.¹

Based upon the representations made in your letter, as supplemented, we understand the relevant facts to be as follows. T is registered with the Commission as a futures commission merchant ("FCM") and maintains its headquarters in New York and branch offices in Chicago and London. U is a bank regulated by the New York State Superintendent of Banks and the Federal Reserve Board, which maintains its headquarters in New York and branch offices in London as well as other locations. V is a securities broker-dealer registered with the Securities and Exchange Commission ("SEC") and maintains its headquarters in New York and branch offices in London as well as other locations. W is a member of the London Metals Exchange, regulated by the U.K. and Futures Authority (SFA) and maintains its headquarters in London. T , U , and V are all wholly-owned subsidiaries of X , a bank holding company as defined under the Bank Holding Company Act of 1956, as amended. W is an indirect wholly-owned subsidiary of U . The New York offices of T , U and V are located on the same premises. Similarly, the London offices of T , U , V and W are located on the same premises. None of V or W (collectively, the "Affiliates") is registered with the Commission in any capacity.

You state that customers of the Affiliates may wish to enter into commodity interest transactions to complement or to manage exposures in connection with their "equity, derivative, cash market or other non-futures trading activities." In this regard, the Affiliates' personnel (collectively, the "Affiliated Salespersons") wish to refer such customers to T to handle any related commodity interest orders. Similarly, T wants to compensate the respective Affiliates for referrals from commission revenues derived from referred customers' commodity interest transactions. You represent that annual commission revenues generated by any Affiliate from customer referrals to T will in no event exceed two percent of such Affiliate's total annual revenue.

You further represent that none of the Affiliates will accept customer funds for purposes of effecting commodity interest transactions. Additionally, you represent that the Affiliates and the Affiliated Salespersons working together with T compliance personnel will take appropriate measures to prevent confusion regarding the identity of the entity with which a customer is dealing. For example, in all correspondence and communications with customers being solicited for commodity interest transactions, Affiliated Salespersons will clearly identify that they are acting on behalf of T .

In further support of your request for a no-action position, T makes the following undertakings:

1. All of the Affiliated Salespersons will be registered with the Commission as associated persons ("APs") of T ;
2. Each office of each Affiliate in which Commission-regulated activity will be conducted will be identified on a supplement to T's registration application as a branch office of T ;
3. Existing T supervisory personnel located in T's New York and London offices and who are listed as principals or registered as APs of T will supervise the commodity interest-related activities of the Affiliated Salespersons; and
4. Each Affiliate will provide the Commission with an undertaking whereby it agrees to be jointly and severally liable with T , both to the customers of the Affiliated Salespersons and to the Commission, for any violations of the Commodity Exchange Act, as amended (the "Act")³ and the regulations thereunder committed by any Affiliated Salesperson employed by such Affiliate.⁴ Appropriate documentation of the authority to enter into such undertaking and to bind the Affiliate will be furnished to the Commission upon request.

In light of the facts and representations discussed above, you state your belief that registration of the Affiliates as IBs or in any other capacity would not further the policy considerations underlying the Commission's registration requirements. You suggest that requiring registration of the Affiliates simply would add an additional layer of operational, minimum capital, recordkeeping and reporting requirements on the Affiliates, which are otherwise regulated by the Federal Reserve Board, the SEC, the SFA, or another recognized regulatory authority in the jurisdiction in which such Affiliate conducts its business.

As you are aware, the Division previously has taken the position that a separately incorporated branch office that refers business to an FCM either must register as an IB or forsake its separate corporate identity.⁵ When the Division published this interpretative letter concerning non-proprietary branch offices, it recognized that there may be circumstances in which a separately incorporated branch office may be permissible. For example, the Division indicated that it would grant appropriate relief if state law required a branch office located in a particular state to incorporate there. In a subsequent interpretative letter addressing facts similar to those presented in your letter, the Division determined that the facts presented were comparable to those which the Division had contemplated as appropriate for relief when it issued its interpretation concerning non-proprietary branch offices.⁶ The Division has determined that the situation presented herein also warrants relief.

Accordingly, based upon the representations contained in your letter, as supplemented, and consistent with the Division's prior precedent in this area, the Division will not recommend that the Commission take any enforcement action against T or its Affiliates under Section 4d of the Act⁷ based solely upon the Affiliates' referral of customers to T , as described above, and their failure to register with the Commission as IBs or in any other capacity. This no-action position is subject to the condition that T and its Affiliates continuously comply with the undertakings set forth in your letter.

The no-action position granted by this letter is based upon the representations provided to us and is subject to the condition stated above. Any different, changed or omitted facts or circumstances might require us to reach a different conclusion. In this connection, we request that you notify us immediately in the event that the

operations of T, the Affiliates or the Affiliated Salespersons change in any way from those represented to us. In addition, you must contact us by separate letter if you wish to have any other affiliates of T engage in activities similar to the Affiliates and the Division will consider any such request on a case-by-case basis. Further, this no-action position is the position of the Division of Trading and Markets only and is not necessarily the position of the Commission or of any other division or office of the Commission's staff. This letter does not excuse T, the Affiliates or the Affiliated Salespersons from compliance with any applicable requirements contained in the Act or in the Commission's rules issued thereunder. For example, they remain subject to the antifraud provisions of Section 4b of the Act, 7 U.S.C. § 6b (1994), and to the relevant reporting requirements set forth in Parts 15 through 21 of the Commission's rules, 17 C.F.R. Parts 15-21 (1997). Moreover, the Division does not take any position, and this no-action position has no effect, on any obligations that T, the Affiliates or the Affiliated Salespersons may have under the Bank Holding Company Act, federal securities laws or under the rules or laws of any other applicable regulatory authority.

If you have any questions concerning this correspondence, please contact me or Lawrence T. Eckert, an attorney on my staff, at (202) 418-5450.

Very
truly
yours,

Susan C. Ervin

Chief Counsel

¹ Your letter made reference to any affiliates of T. However, we are limiting our consideration of your request to those affiliates of T specified in your letter and discussed herein.

² You made this representation in a telephone conversation with Division staff on October 6, 1997. You were advised that since the Affiliates and T are located on the same premises in New York and London, branch office managers of T also could be listed as branch office managers with respect to the Affiliates.

³ 7 U.S.C. § 1 et seq. (1994).

⁴ T may agree to indemnify each Affiliate with respect to such liability.

⁵ See CFTC Interpretative Letter No. 84-10, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,252 (May 29, 1984). See also CFTC Interpretative Letter No. 84-26, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,472 (Dec. 6, 1984) (reaffirming the Division's position in Interpretative Letter No. 84-10).

⁶ See CFTC Interpretative Letter No. 84-18, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,388 (Sept. 26, 1984) (Division issued a no-action position to a wholly-owned subsidiary of a bank holding company, its affiliated companies and their respective employees for failure to comply with the Commission's prohibition against non-proprietary branch offices and with the provisions of Rule 166.4, 17 C.F.R. § 166.4 (1997)).

⁷ 7 U.S.C. § 6d (1994).