

**CFTC Letter No. 98-17****March 12, 1998****Division of Trading & Markets**

Re: Rule 166.4 -- No-Action or Exemptive Relief from Listing a Branch Office

Dear :

This is in response to your letter dated January 22, 1998, 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, on behalf of registered commodity trading advisor ("CTA"), "X", relief from the branch office requirements of Rule 166.4.<sup>1</sup> Specifically, you request that the Division grant relief from the requirement that "X" list the home workplace of an associated person ("AP"), "A", as a branch office.

"X's" main office is located in Michigan. "A" is a principal of "X" who works full-time from his home in Nevada. "X" utilizes computerized trading systems to trade discretionary accounts. These systems use trading models developed, in large part, by "A". "A" monitors the performance of "X's" current computer trading models, refines those models and researches and develops new models.

You represent that "A" does not solicit customer accounts, open customer accounts, participate in the implementation of "X's" discretionary trading system or place orders for execution from his home. You further represent that "A" is registered as an AP solely for the following reasons: 1) to permit "A" to assume responsibility for trading "X's" discretionary accounts in the event that "X's" other principals, "B" and "C", become incapacitated; 2) to permit "A" to respond to requests for instructions on how to open discretionary trading accounts and for information on the performance of "X's" trading systems in the event such inquiries arise while "A" is conducting seminars, or being interviewed by the media; and 3) to permit "A" to respond to customer inquiries regarding the mechanics of "X's" computer trading systems or the trading models developed by "A".<sup>2</sup>

Commission Rule 166.4 provides that "[e]ach branch office of each Commission registrant must use the name of the firm of which it is a branch for all purposes, and must hold itself out to the public under such name . . . ." The Commission explicitly stated when enacting this provision that "an associated person must be situated in either the home office or designated branch office of the registrant and that each such office must have either a branch office manager or designated supervisor."<sup>3</sup>

You contend that the activities taking place at "A's" home do not warrant listing that location as a branch office. However, it is "A's" status as a registered AP that is the controlling factor in determining the applicability of the branch office requirement to his Nevada home, not the nature of the business activities he conducts there. As several Commission cases have held, if a person or entity is registered in a particular capacity, they are permitted to perform all functions permitted under registration. Even though a registrant may not be performing those functions at a particular point in time, the registrant could do so without further notice to the Commission, and the Commission therefore requires adherence to the statutory provisions, as well as the rules and orders thereunder, applicable to such a registrant.

In re Premex, Inc. dealt with the issue of whether a futures commission merchant ("FCM") was required to meet the FCM capital requirements despite its claim that it never traded futures contracts.<sup>4</sup> The Commission stated that it was the firm's status as a registered FCM that was controlling for purposes of determining whether the capital requirements applied, not the fact that it did not trade futures contracts. The Commission noted:

[T]he fact that Premex to date elected to refrain from trading in futures contracts has little, if any relevance to the purposes of section 4f(2) [of the Commodity Exchange Act] and regulation 1.17. Rather, we regard Premex's status as a registered FCM, not the present nature of its business activities, as the controlling factor in determining the applicability of the net capital requirements. Contrary to respondents' apparent view, it is not actual trading in futures that triggers an FCM's obligation[s] . . . .<sup>5</sup>

Similarly, in In re New York Currency Research Corporation,<sup>6</sup> the Commission held that "once an entity elects to register with the Commission, it is subject to both the rights and responsibilities that stem from its status as a registrant" and, therefore, an entity registered as a CTA and as a CPO, even if it was not proven to be operating in either capacity, was obligated to comply with the Commission's recordkeeping requirements.<sup>7</sup>

It is respondent's status as a registrant that governs the applicability of the bookkeeping requirements (citation omitted). It is irrelevant whether respondent is currently engaging in any CPO and CTA activities. When New York Currency elected to register with the Commission, it agreed to comply with the obligations that such registration imposed in exchange for the right to hold itself out as a CPO and CTA. Having received the benefits that registration provides, respondent cannot now avoid its responsibilities under the Act. When New York Currency registered as a CTA, the public had the right to expect that it was complying with the recordkeeping and inspection obligations that accompany the statute.<sup>8</sup>

As these decisions demonstrate, one cannot have the imprimatur of registration under the Act without fulfilling the duties attendant to such registration. Moreover, notwithstanding

your assertions that "A" need not actually be registered as an AP of "X", it is not clear his activities as you describe them do not necessitate registration.<sup>9</sup>

In summary, associated persons must be situated in either the main office or a designated branch office of the CTA with whom they are associated. "A" is registered as an AP and is engaged in activities in his Nevada home that are within the scope of his employment. "A's" status as a registered AP is the controlling factor in determining the applicability of the branch office requirement to his Nevada home, not the nature of the business activities he currently conducts there. Accordingly, the Division has determined that "A's" home must be registered as a branch office.

If you have any questions concerning this correspondence, please contact Jocelyn B. Barone, an attorney on my staff, at (202) 418-5450.

Very truly yours,

I. Michael Greenberger

Director

<sup>1</sup> Commission rules referred to in this letter are found at 17 C.F.R. Ch. I (1997).

<sup>2</sup> Section 4k(3) of the Commodity Exchange Act (the "Act") requires anyone associated with a CTA "as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation of a client's or prospective client's discretionary account or (ii) the supervision of any person or persons so engaged" to be registered with the Commission as an associated person of the CTA. 7 U.S.C. § 6k(3) (1994). Due to "A's" extensive role in the development of "X's" trading models, "X" refers inquiries regarding its trading models and systems directly to "A" at his home. The scope of these conversations and "A's" discussions during seminars and interviews may extend beyond the technical aspects of "X's" trading models to inquiries regarding discretionary accounts.

<sup>3</sup> 48 Fed. Reg. 35248 at 35252-53 (August 3, 1983) (footnote omitted) (emphasis in original).

See also Park v. Balfour Maclaine Futures, Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25, 045 (Initial Decision April 26, 1991) (a registrant did not list an AP's home as a branch office when he worked out of his home while recuperating from back surgery, and no one from the AP's employer ever went to the AP's home to inspect the procedures being utilized or to determine whether the AP was in compliance with federal and exchange rules; the CEO of the AP's employer was held to have failed properly to supervise the AP's actions and to be liable vicariously for the AP's acts), aff'd by Park v. Haynes, CFTC Docket No. 90-R149 (May 26, 1992) (Order of Affirmance).

<sup>4</sup> In re Premex, Inc., [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,992 (Feb. 1, 1984), aff'd, 785 F. 2d 1403 (9th Cir. 1986).

<sup>5</sup> Id. at (CCH) p. 28,355, 785 F.2d at 1406 n.7.

<sup>6</sup> In re New York Currency Research Corporation, CFTC Docket No. 98-3 (February 6, 1998) (Opinion and Order).

<sup>7</sup> Id. at 11.

<sup>8</sup> Id. at 10 (emphasis in original).

<sup>9</sup> In any event, "A" is registered and, given the reasoning outlined above, there is no need to address this issue to resolve your request.