CFTC letter No. 04-01
December 30, 2003
No-Action
Division of Clearing and Intermediary Oversight

Re: "Y"and "X"

Dear :

This is in response to your letter dated December 24, 2003, to the Division of Clearing and Intermediary Oversight (the "Division") of the Commodity Futures Trading Commission (the "Commission"), as supplemented by telephone conversations with Division staff. By your correspondence, you request, on behalf of "X" and "Y", confirmation that "Y" is not required to register under Section 4d(a)(1) of the Commodity Exchange Act (the "CEAct") as a futures commission merchant ("FCM") notwithstanding that, for corporate organizational efficiencies, "Y" will be handling the payment of commissions and other compensation to certain registered associated persons ("APs") of "X", which is a registered FCM sister company of "Y".

You have described in your correspondence how, as part of the overall restructuring of the business of "Y's" ultimate parent, "Z", "Y" and "X" have been organized as separate, commonly-owned financial services entities because of regulatory capital efficiencies afforded by this arrangement.[1] "Y" is registered as a securities broker-dealer under Section 15(a)(1) of the Securities Exchange Act of 1934 (the "Exchange Act") and "X" is registered as an FCM under Section 4d(a)(1) of the CEAct.[2] Both companies share senior management, office space and support staff. The registered representatives of "Y" are also APs of "X" (although not all of "X's" APs will also be registered representatives of "Y"). "Z" has determined that it would be more administratively efficient for all of the APs/registered representatives to be employed by a single entity, "Y", and for "Y" to provide all employer-related administrative functions relative to them, including human resources functions. As such, "Y" would be in the position of paying futures-related commissions to APs of "X".

Although "X" will assign its commission income to "Y" so that "Y" may make payment of commissions to "X" APs, "Y" will essentially be serving as a conduit for these commission payments that were originally intended to be made by "X".[3] "Y" will not be soliciting or accepting customer orders for futures or commodity option contracts nor will it be handling customer funds related thereto. "Y" will have a limited role in handling commission income payments to "X" APs to achieve the administrative efficiencies referred to above. Accordingly, the Division believes that "Y's" activities do not come within the definition of an FCM[4] and "Y" is not required to register as an FCM. "X", of course, would remain obligated to reflect on its books and records all transactions and the full amount of commissions accrued and due to its APs as though actually being paid by "X" to its APs, as well as the inter-company transfer to "Y".

This letter does not excuse "Y" or "X" from compliance with any other applicable requirements contained in the CEAct or in the Commission's regulations issued thereunder. For example, they remain subject to relevant antifraud provisions of the CEAct[5] and the Commission's regulations thereunder and the relevant reporting requirements under Parts 15, 17, 18, 19 and 21 of the Commission's regulations.

This letter is based upon the representations made to us. Any different, changed or omitted material facts or circumstances might render this interpretation void. Further, this letter represents the position of this Division only. It does not necessarily represent the position of the Commission or of any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact me, Deputy Director Lawrence B. Patent at (202) 418-5439 or Christopher W. Cummings, Special Counsel, at (202) 418-5445.

Very truly yours,

James Carley
Director

---

[1] "Y" and "X" are successors in interest to "W". Both are wholly-owned by "V", which is ultimately owned by "Z".

[2] "X" is also notice-registered as a securities broker-dealer under Section 15(a)(11) of the Exchange Act for the limited purpose of dealing in security futures products.

[3] You provided us with a copy of a letter dated August 4, 2003, to staff of the Securities and Exchange Commission ("SEC") wherein counsel for "X" outlined the reverse arrangement, i.e., "X" would make a single payment to APs and registered representatives of both "X" and "Y". Because the new organizational structure takes effect on January 1, 2004 and the SEC staff has yet to respond definitively to the request for no-action relief if "X" failed to register as a full securities broker-dealer under the scenario outlined in the August 4 letter, you decided to pursue a structure whereby "Y" would pay all APs and registered representatives.

[4] Section 1a(20) of the CEAct, 7 U.S.C. §1a(20) (2000).

[5] *See*, Section 4b of the CEAct, 7 U.S.C. §6b (2000).