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Division of Clearing and
Intermediary Oversight

James L. Carley
Director

CFTC letter No. 05-02
December 10, 2004
No-Action
Division of Clearing and Intermediary Oversight

Re: Request for No-Action Relief from Part 30 Registration Requirements

Dear :

This letter is in response to your September 21, 2004 letter requesting that the Division of Clearing and Intermediary Oversight ("Division") confirm that it will not recommend enforcement action against "X" were it to execute and clear foreign futures and foreign options transactions for the foreign futures and options customer omnibus accounts of its affiliate, "Y", without being registered with the Commission as a futures commission merchant ("FCM"), in reliance upon Rule 30.4(a).[1]

The relevant facts are as follows. "X", incorporated under the laws of the State of "A" in 1976, has acted as a securities and futures brokerage firm in "B" since 1996 and maintains offices in "C". "X" is a clearing member of the "D" and "E", and is licensed to conduct brokerage and regulated by these exchanges. As a "A" corporation, "X" pays an annual registration fee to the "A" Secretary of State, is required to update its filings with that office, and appoints an agent for service of process in "A". Although "X" maintains its principal place of business in the U.S. and employs certain administrative support personnel here, it does not conduct any brokerage or other trading activities in the U.S. In particular, "X" does not execute or clear foreign futures or foreign options transactions for any foreign futures or foreign options customers,[2] and "X" employees do not market to or otherwise solicit foreign futures or foreign options customers. "X", however, seeks to execute and clear foreign futures and foreign options

[1] Commission rules referred to herein may be found at 17 C.F.R. CH I (2004).

[2] Rule 30.1(c) defines "foreign futures or foreign options customer," in part, as "any person located in the United States, its territories or possessions who trades in foreign futures or foreign options."

transactions for the foreign futures and options customer omnibus accounts[3] of "Y", in reliance on Rule 30.4(a). "Y" is, among other things, registered with the Commission as an FCM, a clearing member of all major futures exchanges in the U.S., and a member of the National Futures Association.

The Commission recently amended Rule 30.4(a) to clarify the circumstances under which a "foreign futures and options broker" ("FFOB") must register with the Commission or obtain an exemption from registration.[4] Specifically, an FFOB, as defined in Rule 30.1(e), is not required to register with the Commission as an FCM if, among other things, the FFOB solely accepts orders from or carries a U.S. FCM's foreign futures and options customer omnibus account(s). The latter requirement is satisfied because "X's" activities would be limited to executing and clearing foreign futures and foreign options transactions for the foreign futures and options customer omnibus accounts of "Y".

Rule 30.1(e) defines an FFOB as

> a non-U.S. person that is a member of a foreign board of trade, as defined in § 1.3(ss) of this chapter, licensed, authorized or otherwise subject to regulation in the jurisdiction in which the foreign board of trade is located; or a foreign affiliate of a U.S. futures commission merchant, licensed, authorized or otherwise subject to regulation in the jurisdiction in which the affiliate is located.

Although "X" is a member of a foreign board of trade subject to regulation in the jurisdiction in which the foreign board of trade is located, it is not a "non-U.S. person" by virtue of its incorporation and presence in the U.S.[5] Therefore, absent relief, "X" would be precluded from operating pursuant to Rule 30.4 without obtaining registration as an FCM.

In adopting amendments to Part 30, the Commission determined to provide clarity to its registration requirements under Rule 30.4 by specifically addressing when registration by an

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[3] Rule 30.1(d) defines "foreign futures and options customer omnibus account" to mean an account in which the transactions of one or more foreign futures and foreign options customers are combined and carried in the name of the originating FCM rather than in the name of each individual foreign futures or foreign options customer.

[4] 69 Fed. Reg. 49800 (August 12, 2004). These rule amendments were promulgated in conjunction with rule amendments to Rule 30.10.

[5] Although the Commodity Exchange Act ("Act") does not define "U.S. person," the Commission and the Division have addressed the definition in the context of domestic transactions. Rule 4.7 defines "non-U.S. person" to include a "corporation . . . . organized under the laws of a foreign jurisdiction and which has its principal place of business in a foreign jurisdiction." See also CFTC Letter 92-3, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,221 (January 29, 1992)(defining "United States person" to include a corporation organized under the laws of the U.S. or which has its principal place of business in the U.S.).

FFOB is not required.[6] In particular, the Commission codified the position taken by the Division previously in CFTC Letter 87-7. In CFTC Letter 87-7, the Division issued an interpretation indicating that an FFOB whose only contact with foreign futures and options customers was limited to carrying customer omnibus accounts of a U.S. FCM would not be required to register as an FCM.[7] The Division determined that such relief was appropriate because foreign futures and options customers would continue to have a relationship with and be clients of the U.S. FCM, and would not have direct contact with the FFOB. In support of your request for relief, you represented that "X" employees would not market to or otherwise solicit foreign futures and foreign options customers, and that "X's" sole contact with any foreign futures or foreign options customer would be limited to carrying the customer omnibus accounts of "Y".[8]

Based upon these representations, the Division believes that granting the requested relief would not be contrary to the public interest. While "X's" presence in the U.S. precludes its consideration as an FFOB under Rule 30.4(a), the Division believes that registration is not necessary under these circumstances. Accordingly, the Division will not recommend that the Commission commence any enforcement action against "X" or "Y" based solely upon the failure of "X" to register with the Commission as an FCM for the purpose of executing and clearing foreign futures and foreign options transactions for the foreign futures and options customer omnibus accounts of "Y". This relief is conditioned upon "Y's" acknowledgment that it will be jointly and severally liable for any violations of the Act or the Commission's rules committed by "X" in connection with the latter's execution and clearing of foreign futures and options orders in "Y's" customer omnibus accounts. "Y" must submit such an acknowledgment in writing manually signed by a representative duly authorized to bind "Y" within two weeks of the date of this letter.

This position taken in this letter is based upon the representations that have been made to the Division. Any different, changed, or omitted facts or conditions might render this position void. You must notify the Division immediately in the event that the operations or activities of "X" or "Y" change in any material way represented to us. Further, this letter represents the position of the Division only and does not necessarily reflect the views of the Commission or any other division or office of the Commission. This letter does not excuse "X" or "Y" from compliance with any other applicable requirements contained in the Act or in the Commission's

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[6] In the final rulemaking, the Commission stated that rule amendments to Rule 30.4 supercede prior staff positions, but also that rule amendments "contain no substantive changes to prior staff interpretative statements and no-action letters. . . ." 69 Fed. Reg. at 49802.

[7] CFTC Letter 87-7, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,972 (November 17, 1987).

[8] In your letter, you also indicated that "X" will execute and clear KOSPI 200 index futures contract transactions for "Y's" foreign futures and options customer omnibus accounts in accordance with applicable Korean regulations, as soon as the CFTC's Office of General Counsel issues a no-action letter permitting the offer and sale of such contracts in the U.S. The Office of General Counsel has not issued a letter at this time, so the offer and sale of KOSPI 200 index futures contracts to U.S. customers remains prohibited.

regulations issued thereunder. For example, each remains subject to all applicable antifraud provisions of the Act and the secured amount requirement set forth in Rule 30.7 and Appendix B to Part 30. Moreover, the position taken in this letter is applicable to "X" and "Y" solely in connection with "X's" execution and clearing of foreign futures and foreign options transactions for the foreign futures and options customer omnibus accounts of "Y".

If you have any questions concerning this correspondence, please contact Peter Sanchez, an attorney on my staff, at (202) 418-5237.

Very truly yours,

James L. Carley
Director