

CFTC Letter No. 98-12**December 30, 1997**Re: Application for Confirmation of Relief Under Rule 30.10

Dear :

This concerns the letter of "S" to the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission") dated November 20, 1996, which was forwarded to the Division by the "T" under separate cover dated December 3, 1996. Pursuant to "S's" letter, "S", a member of "T", applied to the Commission for confirmation of relief under the May 19, 1989 orders granted by the Commission to "A", "B" "C" and "D" under Commission Rule 30.10<sup>1</sup> (the "Orders").<sup>2</sup> For the reason set forth below, we cannot provide the relief "S" has requested.<sup>3</sup>

By the Orders, the Commission exempted United Kingdom ("U.K.") firms that make a written application to the Commission pursuant to the Orders from certain of the Commission's rules that apply to persons that engage in activities with U.S. customers related to foreign futures or foreign options.<sup>4</sup> The Orders were based upon the Commission's determination, after reviewing, among other things, the regulatory scheme governing the persons in the U.K. who would be exempted under the Orders, that it is appropriate to allow eligible members who apply for relief to "substitute compliance" with the Commission's regulations with compliance "with the applicable statutes and regulations in effect in the United Kingdom."<sup>5</sup> Further, the eligibility of any firm seeking relief under the Orders is subject to, among other things, the condition that the regulatory or self-regulatory organization responsible for monitoring the regulatory compliance of such firm as described in the Rule 30.10 petition represents in writing to the Commission that "[i]t will monitor firms to which relief is granted for compliance with the regulatory requirements for which substituted compliance is accepted . . . ."<sup>6</sup> Thus, in issuing the Orders, the Commission clearly contemplated that any firm seeking relief under the Orders would be subject to the full statutory and regulatory scheme of the U.K. and full monitoring by the U.K. regulatory and self-regulatory authorities.

"S" applied for relief under the Orders based upon plans to transfer to "S" the foreign futures and foreign options business subject to regulation under Part 30 of the Commission's rules currently carried out by "W", a wholly-owned, U.K.-incorporated indirect subsidiary of "X" that operates under confirmed Rule 30.10 relief. Under this reorganization plan, "S" would become the contracting party with U.S.-based clients in place of "W". Unlike "W", which is domiciled in the United Kingdom and is subject fully

to U.K. regulation, "S" is domiciled in Germany and is operating in the U.K. pursuant to the "passport" provisions of relevant directives issued by "Y". Under these directives, if "S" were to transact "W's" business within the bank instead of a separate U.K. subsidiary, "S" would be subject to regulation partly by its "home" country, Germany.<sup>7</sup> Therefore, "S" would be regulated partly by a country other than the U.K. with respect to foreign futures and options business involving U.S. customers. This situation, as discussed above, is not contemplated by the Orders. Accordingly, the Commission finds no basis for granting "S's" application for confirmation of relief under the Orders, and such application is, hereby, denied.<sup>8</sup>

Notwithstanding the Commission's denial of "S's" current request, if the relevant German authorities as well as the "T" were to apply to the Commission for appropriate relief under Rule 30.10 and were to be granted such relief, the Commission would consider whether and under what conditions "S" itself would be entitled to relief.

If you have any questions concerning this correspondence, please contact I. Michael Greenberger, Director of the Division of Trading and Markets.

Very truly yours,

Catherine D. Dixon

Assistant Secretary of the Commission

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

<sup>2</sup> 54 Fed. Reg. 21599, 21604, 21609, 21614 (May 19, 1989). "D" and the "B" merged on April 1, 1991 to form the "T". The Commission issued an Order substituting the "T" as being subject to the Orders. 56 Fed. Reg. 14017 (Apr. 5, 1991).

<sup>3</sup> As you know, there has been previous communication about this matter among the Commission's staff, the "T" and "S". Commission staff informed you by telephone in January 1997 that "S's" request could not be granted because it was a "passport" firm (as described more fully below) and that the "T" should not forward applications from any other "passport" firms. A letter from "S" to the Commission dated July 7, 1997, stated that it understood from "T" that its application had been rejected on that basis and that the Commission would confirm that in writing to "S" in due course.

<sup>4</sup> Specifically, the Orders exempt eligible firms from: (1) registration with the Commission for the firms

and their representatives; (2) the separate account requirement contained in Commission Rule 30.7; (3) those sections of Part 1 of the Commission's financial regulations that apply to foreign futures and options sold in the U.S. as set forth in Part 30 of the Commission's rules; and (4) those sections of Part 1 of the Commission's rules relating to books and records which apply to transactions subject to Part 30, based upon substituted compliance with U.K. statutes and regulations and the terms of the Orders. Written representations are required both from the regulatory or self-regulatory organization and from the firm requesting the relief. The terms "foreign futures" and "foreign options" are defined in Rule 30.1.

<sup>5</sup> Id. at 21600, 21605, 21610, 21615 (emphasis added). The Orders were issued based on the comparability representations made and the supporting material provided to the Commission and the recommendation of the staff. Those representations contemplated regulation and supervision by U.K. authorities.

<sup>6</sup> Id. at 21601, 21606, 21611, 21616.

<sup>7</sup> For example, under the "Z", which enables firms to engage in investment services anywhere in the European Economic Area without authorization by the host country, the home state authority (in this case, Germany) remains responsible for prudential requirements, which include fitness, client money and capital requirements, while the host country would be responsible for conduct of business rules. We recognize that Germany has not yet implemented that portion of the "Z" concerning client money but is anticipated to do so shortly. See "S's" July 7, 1997 letter to the Commission. In any event, the client money requirements are not our sole concern so, even if "S" were to remain subject to those of the U.K. for a brief period, that would not change our conclusion given the fact that other prudential requirements of the U.K. do not apply to "S".

<sup>8</sup> By separate letter received concurrently with the request discussed herein, "S" requested that the Division issue "S" "no-action" relief such that it would not be required to register as a futures commission merchant ("FCM"). Due to "S's" presence in the United States through its U.S.-based banking branches, FCM registration would be necessary, absent relief, if "S" were to take over the foreign futures and foreign options business of "W". However, based upon our disposition of "S's" application for relief under the Orders, it is unnecessary for the Division to consider this request.