CFTC letter No. 02-106
September 30, 2002
Interpretation
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 July 31, 2002 letter requesting that the Division of Clearing and Intermediary Oversight ("Division")[1] confirm that it will not recommend enforcement action against the "Bank", a bank organized under the laws of France, for its failure to register as a futures commission merchant ("FCM") or an introducing broker ("IB") with respect to certain foreign futures brokerage related activities undertaken by employees located in the U.S.

In your letter, you stated that "X" has among its subsidiaries a company formed under the laws of England, the "Foreign Broker", which is a London-based commodities broker and London Metal Exchange ("LME") member regulated by the U.K. Financial Services Authority ("FSA"). The Foreign Broker intermediates LME trades for certain customers in the U.S. pursuant to a Commission Rule 30.10 exemption from registration as an FCM.[2] In addition, the Bank has a New York branch (the "Branch") that engages in, through one or more of its New York-based employees, certain over-the-counter ("OTC") metals derivative transactions with sophisticated customers located in the U.S. (each an "OTC Customer"), each of whom qualify as an "eligible contract participant" under section 1a(12) of the Commodity Exchange Act ("CEA"). The Branch is licensed by the State of New York and subject to oversight by the New York State Department of Banking as well as the Federal Reserve Board. Furthermore, as the Branch is a part of the Bank itself, the Bank exercises oversight and control over, and takes legal responsibility for, the activities of the Branch.

You further represent that Branch employees do not market or otherwise solicit LME futures trading. From time to time, however, the employees may be asked by their OTC Customers for information or assistance with respect to such futures trading. For efficiency's sake, the Bank would like the Branch employees to refer any such OTC Customer to the Foreign Broker. The proposed futures related activity of the Branch employees would be limited to placing an OTC Customer who makes an unsolicited inquiry about LME futures in contact with the Foreign Broker. Specifically, no Branch employee would: (1) solicit any OTC Customer to engage in, or to inquire about, LME futures; (2) discuss LME futures with any OTC Customer on an unsolicited basis, except as needed to put the OTC customer in touch with the Foreign Broker; (3) take any LME futures order from any OTC Customer; or (4) receive any futures trade-based compensation with respect to any OTC Customer. You also represent that an unsolicited referral of this nature from a U.K. person to a U.S.-based FCM would not subject the referring U.K. person or the FCM to any FSA licensing or approval requirement. Furthermore, you represent that the above described activity will be limited such that revenues to the Foreign Broker from

any OTC Customer futures transactions resulting from such referrals by the Branch employees would constitute no more than five percent of the Foreign Broker's overall revenues.

Based upon these facts and circumstances, the Division will not recommend that the Commission institute enforcement action against the Bank or the Branch based solely on their failure to register as an FCM or as an IB pursuant to Rule 30.4(a) or (b), respectively. In Interpretative Letter 89-11, the Division previously stated that the employees of a U.S. branch of a foreign bank may, on an unsolicited basis, refer bank customers located in the U.S. to a registered FCM, including an FCM that carries a customer omnibus account with the foreign bank trading foreign futures and options, without the bank having to register as an FCM.[3] As a condition to such relief, the foreign bank was required to represent that none of the U.S. branches would solicit or accept from U.S. customers orders for foreign futures or options contracts. In reaching its conclusion, the Division recognized that the U.S. branches were subject to extensive regulation, including reporting and recordkeeping requirements and examinations, either under state banking laws or under federal laws administered by the Office of the Comptroller of the Currency, and that the Commission, NFA or other self-regulatory organizations would monitor the activities of any FCM that would benefit from the referrals.

Analogous to the situation set forth in Interpretative Letter 89-11, you represent on behalf of the Bank that Branch employees will not engage in any futures related activity subject to regulation by the Commission, except to refer unsolicited inquiries from OTC Customers interested in trading LME futures to the Foreign Broker. Although the Foreign Broker is exempt from registration as an FCM pursuant to Rule 30.10, its sales activities remain subject to scrutiny by the FSA, the recipient of a Rule 30.10 order issued by the Commission. As with the U.S. bank branches in Interpretative Letter 89-11, the Division also recognizes that the Branch and its employees remain subject to extensive state and federal banking regulation.

This no-action position is taken by the Division only and does not necessarily reflect the views of the Commission or any other unit or member of the Commission's staff. It is based upon the information and representations contained in your July 31, 2002 letter or otherwise communicated to the Division by you. In addition, this no-action position applies only to the customers and contracts described herein, and does not excuse the Bank, the Branch or the Foreign Broker from complying with any other applicable provision of the Act or of the Commission's regulations. Any materially different, changed, or omitted facts or circumstances may render this letter void.

If you have any questions concerning this correspondence, please contact Andrew Chapin, an attorney on my staff, at 202-418-5430.

Very truly yours,

Jane Kang Thorpe
Director

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[1] As of July 1, 2002, a reorganization of Commission staff became effective. For purposes of this letter, the term "Division" includes the Division of Clearing and Intermediary Oversight and its predecessor, the Division of Trading and Markets, as the context requires.

[2] Appendix A to the Part 30 rules provides an interpretative statement that clarifies that a foreign regulator or self-regulatory organization ("SRO") can petition the Commission under Rule 30.10 for an order to permit firms that are members of the SRO and subject to regulation by the foreign regulator to conduct business from locations outside of the U.S. for U.S. persons on non-U.S. boards of trade without registering under the Commodity Exchange Act, based upon the person's substituted compliance with a foreign regulatory structure found comparable to that administered by the Commission under the Act.

Among the issues considered by the Commission in determining whether to grant Rule 30.10 relief to a foreign regulatory or self-regulatory authority are the authority's: (i) requirements relating to the registration, authorization, or other form of licensing, fitness review, or qualification of persons through whom customer orders are solicited and accepted; (ii) minimum financial requirements for those persons that accept customer funds; (iii) minimum sales practice standards, including disclosures about the risk of transactions undertaken outside of the U.S.; (iv) procedures for auditing compliance with the requirements of the regulatory program, including recordkeeping and reporting requirements; (v) standards for the protection of customer funds from misapplication; and (vi) arrangements for the sharing of information with the United States. *Interpretative Statement with Respect to the Commission's Exemptive Authority Under § 30.10 of its Rules,* 17 C.F.R. Part. 30, Appendix A (2002).

[3] *See* Interpretative Letter 89-11, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,516 (August 15, 1989).