CFTC Letter No. 99-08

December 22, 1998

Division of Trading & Markets

Re: X's Request for a No-Action Position

Dear :

This is in response to your letter to the Division of Trading and Markets ("Division") dated July 23, 1998 and your supplemental correspondence dated August 20, 1998, on behalf of your client, X, in which you request that the Division confirm that it will not recommend any enforcement action to the Commission if X acts as a clearing agent for Eurex Deutschland ("Eurex") members who enter trades on Eurex computer terminals in the United States.[1] Specifically, X wishes to clear trades entered on Eurex computer terminals by U.S. Eurex members, including registered futures commission merchants ("FCMs"), who place trades for their own accounts, and FCMs trading on behalf of U.S. foreign futures and foreign options customers.[2]

As you are aware, the Division's 1996 no-action letter allowed Eurex to place computer terminals in the United States in order to permit U.S. Eurex members to execute transactions involving certain Eurex futures and option products, subject to specified conditions, without requiring Eurex to be designated as a contract market under the Act. The no-action letter, however, did not provide relief from Part 30 registration requirements for those foreign firms who wish to clear the trades executed on the Eurex terminals. Absent no-action relief or an exemption from registration, Rule 30.4 requires FCM registration for any firm which, "with respect to a foreign futures or foreign options customer. . . solicit[s] or accept[s] orders for or involving any foreign futures contract or foreign options transaction and, in connection therewith, . . . accept[s] any money, securities or property (or extend[s] credit in lieu thereof) to margin, guarantee or secure any trades or contracts that result or may result therefrom. . . "

Non-FCM Eurex Member Proprietary Accounts[3]

Commission rules do not allow X to provide execution or clearing services for the proprietary accounts of non-FCM U.S. based Eurex members who are "foreign futures or foreign options customers" within the meaning of Rule 30.1 without registering as an FCM with the Commission or seeking relief from registration pursuant to Rule 30.10.[4]

Nor has the Division ever issued a no-action position that would permit X to clear the proprietary accounts of non-FCM U.S. based Eurex members.

On July 17, 1998, the Commission issued a concept release requesting public comment on issues concerning the placement of foreign board of trade computer terminals in the United States, and it intends to propose rules and ultimately to adopt rules in this area.[5] The concept release requested comment on a number of issues, including what procedures should be in place for customer transmission of orders to be placed on foreign boards of trade, what safeguards and controls should be included in order routing systems, and how the Commission should treat firms operating under Part 30 of the Commission's rules who wish to use these systems.

Although the concept release did not specifically solicit comments on the discrete function of clearing trades made on foreign computer terminals, several commenters raised clearing and registration issues in their comments to the concept release.[6] Because the Commission may address these issues in any action it may take on the concept release, the Division does not believe that it would be appropriate to alter existing policies concerning the clearing of Eurex trades by foreign futures or foreign options customers. Rather, the Commission likely will address the issues you raise in conjunction with the Commission's ongoing rulemaking process regarding electronic access to foreign boards of trade. We encourage you to review the concept release and the forthcoming rule proposal and to file comments on any further rulemaking thereon that can assist the Commission's development of rules in this area.

FCM Customer Omnibus Accounts

In CFTC Interpretative Letter No. 87-7, the Division clarified its interpretation of Rule 30.4 and stated that an offshore firm that is either a member of a foreign exchange or is an offshore affiliate of a U.S. FCM licensed or authorized by the offshore jurisdiction where it is located, and whose activity is limited to carrying the customer *omnibus* account of a U.S. FCM for execution on the foreign exchange, does not fall within the scope of the foreign futures and options rules.[7] This view is based upon the fact that in the scenario described in Interpretative Letter No. 87-7, the foreign firm does not have direct contact with foreign futures and options customers and the intervening U.S. registrant, *i.e.*, a U.S. FCM, will be responsible for complying with all relevant regulations with respect to such customers. But for the existence of U.S. bank branches, which render X legally present in the United States, X might otherwise be eligible for treatment similar to that provided by Interpretative Letter No. 87-7 for the purpose of clearing on an omnibus basis trades executed on Eurex terminals by a registered U.S. FCM.[8]

As noted above, the Division issued CFTC Letter No. 89-11,[9] confirming a no-action

position to a foreign bank with U.S. bank branches that, but for the presence of U.S. branches, would not be required to register as an FCM based on the interpretative statement in CFTC Interpretative Letter No. 87-7. In light of the fact that you made representations consistent with those in CFTC Letter No. 89-11,[10] the Division will not recommend that the Commission initiate enforcement action against X under Section 4(b) of the Act and Rule 30.4 thereunder based solely upon its failure to register as an FCM for the purpose of clearing customer omnibus accounts of U.S. FCMs trading on Eurex Terminals located in the United States. Please note, this no-action position is conditioned on compliance with the terms of CFTC Letter Nos. 87-7 and 89-11 and with all applicable provisions of the Act and Commission rules thereunder, including but not limited to, the antifraud provision in Section 4b of the Act.

The positions adopted herein are based on the information provided to us. Any different, changed or omitted facts or conditions might require us to reach a different conclusion. These positions are solely those of the Division of Trading and Markets and do not necessarily represent the views of the Commission or those of any unit of its staff.

If you have any questions concerning this matter, please contact me or Laurie Plessala Duperier, Special Counsel.

Very truly yours,

I. Michael Greenberger

Director

[1] The Division issued a "no-action" position to Deutsche Terminborse ("DTB"), which permitted DTB members to install DTB computer terminals in the United States without requiring DTB to be designated as a contract market under the Commodity Exchange Act ("Act"). CFTC Letter No. 96-28, Comm. Fut. L. Rep. (CCH) ¶26,669 (February 29, 1996). On June 18, 1998, DTB changed its name to Eurex Deutschland as a step toward a merger with the Swiss Options and Financial Futures Exchange. Thus, we will refer to Eurex Deutschland in this letter.

[2] Section 30.1 defines a "foreign futures or foreign options customer" as "any person located in the United States, its territories or possessions who trades in foreign futures or foreign options: *Provided*, That an owner or holder of proprietary account as defined in paragraph (y) of §1.3 of this chapter shall not be deemed to be a foreign futures or foreign options customer within the meaning of §§30.6 and 30.7 of this part."

[3] The Division declines to address at this time Dresdner's request for a no-action position regarding clearing of proprietary trades of registered FCMs without X registering as an FCM or obtaining confirmation of Rule 30.10 relief.

[4] X's London branch previously applied for confirmation of Rule 30.10 relief pursuant to the Rule 30.10 Order granted to the Securities and Futures Authority ("SFA") in the United Kingdom. Such relief was denied because X's London branch is only partially regulated by the SFA. CFTC Letter No. 98-12, Comm. Fut. L. Rep. (CCH) ¶27,263 (December 30, 1997).

[5] 63 Fed. Reg. 39779 (July 24, 1998).

[6] *See e.g.*, comment letters from Deutsche Bank Futures, October 6, 1998, at pg. 11, and the Futures Industry Association, September 30, 1998, at pgs. 4 and 9, found at www.cftc.gov.

[7] CFTC Interpretative Letter No. 87-7, Comm. Fut. L. Rep. (CCH) ¶23,972 (November 17, 1987).

[8] *See, e.g.*, CFTC Letter No. 89-11, Comm. Fut. L. Rep. (CCH) ¶24,516 (August 15, 1989).

[9] *Id.*

[10] The Division notes that you also represented that the U.S. branches of X "may respond to unsolicited inquiries from existing U.S. DTB Members or FCMs that are prospective U.S. DTB Members by referring them to X." This representation goes beyond the representations that were accepted by the Division in CFTC Letter No. 89-11 and the no-action position taken therein. The Division declines to expand the terms of CFTC Letter No. 89-11.