

COMMODITY FUTURES TRADING COMMISSION

Performance of Certain Functions by National Futures Association With Respect to Those Foreign Firms Acting in the Capacity of a Futures Commission Merchant

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice and Order.

SUMMARY: The Commodity Futures Trading Commission ("Commission") is authorizing the National Futures Association ("NFA") to confirm exemptive relief to certain firms acting in the capacity of a futures commission merchant ("FCM") that are subject to regulation by a foreign futures authority or that are members of a foreign self-regulatory organization ("SRO") in a particular jurisdiction to which an order under Commission Rule 30.10 has been issued, notwithstanding that such firms may be subject, in part, to joint regulation by a second regulator or SRO in another jurisdiction. The Commission previously authorized NFA to confirm exemptive relief solely to firms subject to regulation by a single foreign futures authority or that are members of a foreign SRO. This Order extends the scope of that authority. The Commission also is authorizing NFA to maintain records pertaining to the functions described in this Order and to serve as the official custodian of those Commission records.

EFFECTIVE DATES: February 14, 2005.

FOR FURTHER INFORMATION CONTACT:

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United States of America, Before the Commodity Futures Trading Commission, Order Authorizing the Performance of Certain Functions by National Futures Association With Respect to Firms Seeking Confirmation of Rule 30.10 Relief.

I. Authority

Section 8a(10) of the Commodity Exchange Act ¹ ("Act") provides that the Commission may authorize any person to perform any portion of the registration functions under the Act, notwithstanding any other provision of law, in accordance with rules adopted by such person and submitted to the Commission for approval or, if

applicable, for review pursuant to section 17(j) of the Act² and subject to the provisions of the Act applicable to registrations granted by the Commission. NFA has confirmed its willingness to perform certain functions now performed by the Commission.³

On September 11, 1997, the Commission authorized NFA to receive requests for confirmation of Rule 30.10 relief (described in greater detail in Part II below) on behalf of particular firms, to verify such firms' fitness and compliance with the conditions of the appropriate Rule 30.10 Order, and to grant exemptive relief from registration to qualifying firms pursuant to Rule 30.10.⁴ The Commission stated that, after it had examined the foreign jurisdiction's regulatory structure and issued an Order under Rule 30.10, granting general relief based upon the comparability of that structure to the regulatory framework under the Act, the steps needed to determine if relief is appropriate for particular firms are similar to those undertaken in the course of fitness checks performed by NFA with respect to applicants under the Act.⁵ The Commission subsequently authorized NFA to revoke the confirmation of Rule 30.10 relief for any firm that fails to comply with the terms and conditions on which relief was confirmed, and to withdraw the confirmation of Rule 30.10 relief from any firm that notifies NFA of its decision to forfeit such relief.⁶

Upon consideration, the Commission has determined to authorize NFA to confirm exemptive relief from FCM registration to certain firms organized in one foreign jurisdiction and engaging in cross-border activities from a branch location in another jurisdiction, and that, as a consequence, may be subject, in part, to regulation by a foreign regulator or SRO that has not been issued an order under Rule 30.10. As discussed below, this function involves the registration or exemption from registration of non-U.S. persons and is related to trading by persons located in the U.S. on non-U.S. markets.

II. Background

In 1987, the Commission adopted a new Part 30 to its regulations to govern

² 7 U.S.C. 21(j) (2004).

³ Letter from Robert K. Wilmouth, President, NFA, to Brooksley Born, Chairperson, dated August 27, 1997; Letter from Daniel J. Roth, President, NFA, to Sharon Brown-Hruska, Acting Chairperson, dated December 22, 2004.

⁴ 62 FR 47792-47793 (September 11, 1997). The Commission also authorized NFA to serve as the official custodian for records produced pursuant to this undertaking. *Id.*

⁵ *Id.* at 47793.

⁶ 64 FR 30489 (June 8, 1999).

the offer and sale to U.S. persons of futures and option contracts entered into on or subject to the rules of a foreign board of trade.⁷ These rules were promulgated pursuant to sections 2(a)(1)(A), 4(b) and 4c of the Act, which vest the Commission with exclusive jurisdiction over the offer and sale, in the U.S., of futures and options contracts traded on or subject to the rules of a board of trade, exchange or market located outside of the U.S.⁸ Part 30 of the Commission's rules sets forth regulations governing foreign futures⁹ and foreign option¹⁰ transactions executed on behalf of foreign futures or foreign options customers.¹¹ Specifically, Part 30 imposes requirements in the following areas: registration, disclosure, protection of customer funds, recordkeeping, reporting, sales practices and compliance procedures.¹²

Rule 30.10 allows the Commission, among other things, to exempt a foreign firm acting in the capacity of an FCM from compliance with certain rules based upon the firm's compliance with comparable regulatory requirements imposed by the firm's home-country regulator. The Commission has established a process whereby a foreign regulator or SRO can petition on behalf of its regulatees or members, respectively, for such an exemption based upon the comparability of the regulatory structure in the foreign jurisdiction to that under the Act. The specific elements examined in evaluating whether the particular foreign regulatory program provides a basis for permitting substituted compliance for purposes of exemptive relief pursuant to Rule 30.10 are set forth in Appendix A to Part 30

⁷ 52 FR 28980 (August 5, 1987).

⁸ Commission rules referred to herein can be found at 17 CFR Ch. I (2004).

⁹ "Foreign futures" as defined in Part 30 means "any contract for the purchase or sale of any commodity for future delivery made, or to be made, on or subject to the rules of any foreign board of trade." Commission Rule 30.1(a).

¹⁰ "Foreign option" as defined in Part 30 means "any transaction or agreement which is or is held out to be of the character of, or is commonly known to the trade as, an 'option', 'privilege', 'indemnity', 'bid', 'offer', 'put', 'call', 'advance guaranty', or 'decline guaranty', made or to be made on or subject to the rules of any foreign board of trade." Commission Rule 30.1(b).

¹¹ Pursuant to Rule 30.1(c), "Foreign futures or foreign options customer" means "any person located in the U.S., its territories or possessions who trades in foreign futures or foreign options: *Provided*, That an owner or holder of a proprietary account as defined in paragraph (y) of § 1.3 of [the Commission's rules] 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."

¹² See generally Commission Rules 30.1 through 30.9.

(“Appendix A”).¹³ If the Commission determines that the foreign jurisdiction’s regulatory structure offers comparable regulatory oversight, it may issue an order, referred to as a “Rule 30.10 Order,” granting general relief subject to certain conditions.¹⁴ Firms seeking confirmation of relief must make certain representations set forth in the Rule 30.10 Order issued to the regulator or SRO from the firm’s home country.¹⁵ A foreign firm that has obtained confirmation of relief pursuant to a Rule 30.10 Order generally is exempt from compliance with the Act and Commission rules regarding registration (including the registration of its representatives), minimum capital, recordkeeping, and, in some circumstances, the treatment of customer funds and disclosure, based upon the substituted compliance with the applicable local statutes and regulations. The Commission issued its first Rule 30.10 Order in 1988 and has issued a total of eighteen Orders to

¹³ See 52 FR 28990, 29001 (August 5, 1987).

¹⁴ These conditions require the regulator or SRO responsible for monitoring the compliance of its regulatees or member firms with the regulatory requirements described in the Rule 30.10 petition to make certain representations regarding the fitness of each firm seeking to receive confirmation of Rule 30.10 relief, the protections to be afforded to U.S. customers, and the exchange of information with the Commission. See 62 FR 47792, 47793, n.7 (September 11, 1997).

¹⁵ A firm seeking confirmation of Rule 30.10 relief is generally required to:

(1) Consent to jurisdiction in the U.S. and designate an agent for service of process in the U.S. in accordance with the requirements set forth in Rule 30.5;

(2) Agree to make its books and records available upon the request of any representative of the Commission or the U.S. Department of Justice;

(3) Agree that all futures or regulated option transactions with respect to U.S. customers will be made on or subject to the rules of the applicable exchanges and will be undertaken consistent with rule and codes under which such firm operates;

(4) Represent that no principal of the firm would be disqualified under Section 8a(2) of the Act from registering to do business in the U.S. and notify the Commission promptly of any change in that representation;

(5) Disclose the identity of each U.S. affiliate or subsidiary;

(6) Agree to be subject to NFA arbitration;

(7) Consent to the release of certain financial information;

(8) Segregate customer funds from the firm’s proprietary funds, even if the ability to opt out is generally available under local law; and

(9) Undertake to comply with the provisions of law and rules which form the basis for granting the exemption.

62 FR 47792, 47793, n.8. The terms and conditions vary from order to order depending upon the regulatory structure of the firm’s home country. See e.g., 68 FR 58583, 58587 (October 10, 2003) (permitting eligible contract participants, as defined in section 1a(12) of the Act, to opt out of the segregation provisions set forth under the U.K. Financial Services Act, as implemented by the Financial Services Authority (“FSA”)).

foreign regulators and SROs in ten countries.¹⁶

At the time the Commission adopted Appendix A, firms conducting business in a particular jurisdiction were fully supervised by the regulatory authority in that jurisdiction. Accordingly, the Commission contemplated that, when it issued a Rule 30.10 Order, firms applying for confirmation of relief would substitute compliance with the applicable statutes and regulations in effect in the recipient’s jurisdiction in lieu of compliance with the applicable Commission rules. Further, each Rule 30.10 Order provided that the eligibility of any firm applying for confirmation of the relief provided by the order would be subject to, among other things, the condition that the recipient regulator or SRO represent in writing to the Commission that it will monitor such substituted compliance by the firm.

As a result of general trends towards increased global trading, the business model for brokerage firms has progressed from the operation of a firm within the borders of a single country to having a firm organized in one country, but operating one or more other countries through a branch or branches. The firms are referred to herein as cross-border futures brokers (“CBFBs”). CBFBs, by their nature, are subject to regulation in multiple jurisdictions. The multi-jurisdictional regulation of such activity is facilitated by memoranda of understanding entered into by governing regulatory authorities, and changes to the law promoting cross-border activities. In particular, the European Union (“E.U.”)¹⁷ has created a unitary market whereby a firm organized and recognized in one country need not obtain separate recognition before conducting brokerage activities in another country. This arrangement, commonly referred to as the “European Passport,” is the product of various Directives issued by the Council for the European Union.¹⁸ The

¹⁶ The first Rule 30.10 Order was issued to the Sydney Futures Exchange in Australia. 53 FR 44856 (November 7, 1988). The most recent Rule 30.10 Order was issued to ASX Futures Proprietary Limited, also located in Australia. 68 FR 39006 (July 1, 2003). For a list of all Rule 30.10 Orders issued by the Commission, please refer to the Commission’s Web site: <http://www.cftc.gov>.

¹⁷ The E.U. is composed of 25 member states that have agreed to delegate some sovereignty on specific matters of joint interest to European regulatory bodies. For example, the Council for the European Union represents the governments for each member state and enacts legislation in the form of Directives. Each member is obligated to enact local legislation consistent with these Directives.

¹⁸ The Commission relied on the operation of the European Passport when it issued a Rule 30.10 Order to Eurex Deutschland. 67 FR 30785 (May 8, 2002).

primary Directive underlying the European Passport is the Investment Services Directive (“IDS”). The ISD creates an authorization within the European Economic Area (“EEA”), i.e., the European Passport, which enables firms to engage in investment services anywhere in the EEA without separate authorization by the host country. Under the ISD, the home country regulator (the regulator or SRO in the country in which the firm maintains its head office) supervises the CBFB with regard to the prudential aspects of the broker’s business, such as minimum capital requirements and the segregation of customer funds, while the host country regulator (the regulator or SRO in the country where the branch is located) is responsible for the remaining aspects of the broker’s business, including fitness, sales practices and recordkeeping.¹⁹ Relief pursuant to the European Passport is only available to branches, and not subsidiaries, of E.U. firms. Minimum capital requirements for firms covered by the ISD are set by the Capital Adequacy Directive and are consistent with the Basel Capital Accord.

With respect to Rule 30.10 relief, the Commission may have issued a Rule 30.10 Order to both the host and home country regulator. However, the original Orders and representations made by the CBFB and each regulator did not contemplate a firm receiving confirmation of Rule 30.10 relief under either Order when it was not fully regulated by a single regulator.

In recent years, Commission policy has evolved toward acceptance of Rule 30.10 entities subject to multi-jurisdictional regulation. For example, the Commission has confirmed Rule 30.10 relief to non-U.K. entities operating a branch in the U.K. pursuant to the Rule 30.10 Order issued to FSA. Where each of the two regulators were recipients of Rule 30.10 Orders, the Commission confirmed relief to the firm in question based upon additional representations from the home country

¹⁹ On April 21, 2004, the Council for the European Union adopted the Directive on Markets in Financial Instruments (“MIFID”) as part of its Financial Services Action Plan. The MIFID will amend the Capital Adequacy Directive and completely replace the ISD, and must be implemented by E.U. member states no later than April 30, 2006. The purpose of the MIFID is to extend the scope of the ISD (and thus the European Passport) in terms of both financial services and instruments covered. The MIFID does not alter the premise underlying the existing ISD that the home country regulator shall be responsible for supervising the prudential aspects of a firm’s business, while the host country regulator shall be responsible for ensuring that the services provided by the branch comply with E.U.-wide standards for conduct of business.

(i.e., non-U.K.) regulator and the FSA that the branch's activities would be regulated, in the aggregate, consistent with the terms of the Rule 30.10 Order issued to each regulator, including a representation from each regulator that it would provide the Commission with the information regarding the branch's activities. In the circumstances where the home country regulator was not the recipient of a Rule 30.10 Order, the Commission confirmed relief after undertaking a review of the prudential requirements implemented by the home country regulator and upon receipt of the additional representations regarding the division of responsibilities for the supervision of the firm and information sharing.

III. Procedural Requirements

The Commission believes that the Act's customer protection mandate can be effectively maintained by authorizing NFA to confirm Rule 30.10 relief to an CBFB subject to combined regulation by authorities located in two different jurisdictions under certain, pre-defined circumstances. Specifically, the two regulators or SROs, in the aggregate, must regulate the CBFB consistent with the provisions of Appendix A as outlined in the Rule 30.10 Order issued to each regulator or SRO. Moreover, each regulator or SRO must be willing and able to share relevant information with each other and with the Commission. Accordingly, the Commission is authorizing NFA to confirm Rule 30.10 relief to any CBFB that solicits or accepts orders (and accepts money, securities or property to margin the trades that result or may result therefrom) from U.S. foreign futures and options customers and that is fully regulated, in the aggregate, by a host and home country regulator, each of which has received a Rule 30.10 Order from the Commission (hereafter, "modified relief"). For a CBFB to receive confirmation of modified relief, the CBFB: (1) Must apply for confirmation of relief in accordance with the provisions set forth in the host country regulator's or SRO's Rule 30.10 Order; (2) represent that it will comply with the relevant provisions of each Rule 30.10 Order; (3) and agree to provide to each regulator or SRO any information regarding transactions arising from such relief. In addition, each regulator or SRO must confirm that it will monitor the CBFB for compliance with the local laws, rules and regulations governing those aspects of the broker's business subject to regulation in its respective jurisdiction, and state that it will share information with the Commission in accordance

with the terms and conditions of the applicable Rule 30.10 Order.

The Commission also is authorizing NFA to confirm modified Rule 30.10 relief to a CBFB that is organized and operating pursuant to the European Passport (as described herein) from a branch location in a jurisdiction whose regulator or SRO has received Rule 30.10 relief, notwithstanding that the Commission has not issued a Rule 30.10 Order issued to the home country regulator. As set forth above, the Commission has determined that, in the aggregate, the regulatory program governing the cross-border activity of any firm operating pursuant to the European Passport from a branch located within a jurisdiction whose regulator or SRO has received Rule 30.10 relief provides a basis for permitting substituted compliance for purposes of exemptive relief pursuant to Rule 30.10. Therefore, the Commission believes that it is appropriate to no longer require a CBFB operating pursuant to the European Passport to petition the Commission for confirmation of relief when NFA already has been authorized to confirm other standardized requests for relief.

The CBFB seeking the alternative modified Rule 30.10 relief under this scenario must: (1) Apply for confirmation of relief in accordance with the provisions set forth in the host country regulator's or SRO's Rule 30.10 Order; (2) represent that it will be operating from a branch located in the host country pursuant to the European Passport, and will comply with the applicable provisions of the host country's Rule 30.10 Order and the applicable laws and regulations of its country of origin, as well as all current and future Directives and other legislation underlying the European Passport; and (3) agree to provide to the host and home country regulator or SRO any information regarding transactions made in accordance with such relief. In addition, both the host and home country regulator, respectively, must confirm that they will monitor the CBFB for compliance with the local laws, rules and regulations governing those aspects of the broker's business subject to regulation in its respective jurisdiction, and state that they will share information with the Commission, either in accordance with the terms and conditions of the applicable Rule 30.10 Order (host country regulator) or pursuant to a separate written undertaking (home country regulator). Prior to confirming modified Rule 30.10 relief under this alternative method, NFA shall consult with Commission staff to ensure that the information-

sharing arrangement between the Commission and the home country regulator is sufficient.

The Commission has determined, for the time being, to retain the authority to determine whether Rule 30.10 relief is appropriate in other circumstances, including those where a firm is organized in a country whose home country regulator is the recipient of a Rule 30.10 order and seeks to conduct brokerage activities pursuant to the European Passport through a branch from a location where the host country regulator is not the recipient of a Rule 30.10 order. NFA shall continue to forward to the appropriate Commission staff in accordance with existing procedures those applications not addressed in this or prior Orders granting NFA the authority to act on the Commission's behalf with respect to the confirmation of relief under Rule 30.10.

By prior orders, the Commission, in accordance with section 8a(10) of the Act, has authorized NFA to maintain various other Commission registration records and certified NFA as the official custodian of such records for this agency.²⁰ Consistent with those orders, the Commission has determined to authorize NFA to maintain and to serve as the official custodian of records for filings made pursuant to the relief set forth herein. This determination is based upon NFA's continued representations regarding the implementation of rules and procedures for maintaining and safeguarding all such records. In maintaining the Commission's records pursuant to this Order, NFA shall be subject to all other requirements and obligations imposed upon it by the Commission in existing and future orders or regulations. In this regard, NFA shall also implement such additional procedures (or modify existing procedures) as are necessary to ensure the security and integrity of the records in NFA's custody and acceptable to the Commission; to facilitate prompt access to those records by Commission and its staff, particularly as described in other Commission orders or rules; to facilitate disclosure of public or nonpublic information in those records when permitted by Commission orders or rules and to keep logs as required by the Commission concerning disclosure of nonpublic information; and otherwise to safeguard the confidentiality of the records.

²⁰ 49 FR 39593 (October 9, 1984); 50 FR 34885 (August 28, 1995); 51 FR 25929 (July 17, 1986); 54 FR 19594 (May 8, 1989); 54 41133 (October 5, 1989); 58 FR 19657 (April 15, 1993); 62 FR 47792 (September 11, 1997).

IV. Conclusion

The Commission has determined, in accordance with section 8a(10) of the Act, to authorize NFA to grant exemptive relief to any CBFB that solicits or accepts orders (and accepts money, securities or property to margin the trades that result or may result therefrom) from U.S. foreign futures and options customers and that: (1) Is fully regulated, in the aggregate, by a host and home country regulator, each of which has received a Rule 30.10 Order from the Commission; or (2) is organized in a home country and operating pursuant to the European Passport (as described herein) from a branch located in a host country where the regulator or SRO has received a Rule 30.10 Order, notwithstanding that the Commission has not issued a Rule 30.10 Order to the home country regulator. The Commission has determined further to authorize NFA to maintain records pertaining to the functions described in this Order and to serve as the official custodian of those Commission records. The Commission's authorization concerning records is subject to the terms and conditions set forth above.

The Commission notes that confirmation of rule 30.10 relief pursuant to this Order extends solely to conduct by the firm's branch in its capacity as a member or regulatee of the host country regulator from a location in the host country, subject to the Commission's Limited Marketing Orders.²¹ As such, the Rule 30.10 relief would not extend to conduct undertaken from any other office or affiliate of the firm involving U.S. customers under the Act, including any office or branch located within the home country.

NFA shall perform this function in accordance with the standards established by the Act and the regulations and Commission orders, including the procedural requirements set forth in Part III of this Order, issued thereunder and shall provide the Commission with such summaries and periodic reports as the Commission may determine are necessary for the effective oversight of this program.

²¹ In 1992, the Commission issued an order commonly referred to as the Limited Marketing Order. 57 FR 49644 (November 3, 1992). The Limited Marketing Order permits firms that have received confirmation of Rule 30.10 relief, without prior notice to the Commission, to engage in limited marketing conduct with respect to foreign futures or option contracts within the U.S. through their employees or other representatives, subject to the terms and conditions set forth therein. In 1994, the Commission expanded the category of persons to whom qualified firms may direct limited marketing conduct. 59 FR 42156 (August 17, 1994).

This determined is based upon the Congressional intent expressed in Section 8a(10) of the Act that the Commission have the authority to authorize NFA to perform any portion of the Commission's registration responsibilities under the Act for purposes of carrying out these responsibilities in the most efficient and cost-effective manner and upon NFA's representations concerning the standards and procedures to be followed and the reports to be generated in administering these functions. This Order does not, however, authorize NFA to render "no-action" positions, exemptions or interpretations with respect to applicable disclosure, reporting, recordkeeping and registration requirements. In addition, nothing in this Order shall affect the Commission's authority to review NFA's performance of the Commission functions listed above.

NFA is authorized to perform the functions specified herein until such time as the Commission orders otherwise. Nothing in this Order shall prevent the Commission from exercising the authority described herein. NFA may submit to the Commission for decision any specific matters that NFA has been authorized to perform, and Commission staff will be available to discuss with NFA staff issues relating to the implementation of this Order. Nothing in this Order affects the applicability of previous orders issued by the Commission under Part 30.

V. Cost-Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its action before issuing a new regulation under the Act. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the regulation outweigh the costs. Rather, Section 15(a) simply requires the Commission to "consider the costs benefits" of its action.

Section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: Protection of market participants and the public; efficiency, competitiveness, an financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule was necessary or appropriate to protect the public interest or to

effectuate any of the provisions or to accomplish any of the purposes of the Act. This Order is intended to create an expedited process to confirm exemptive relief to a class of qualified foreign brokers that would otherwise be required to seek relief through a more time-consuming procedure.

1. Protection of market participants and the public. The Order does not change the requirements to qualify for relief under Rule 30.10. Accordingly, the Order has not effect on the Commission's ability to protect market participants and the public.

2. Efficiency and competition. The Order should permit a firm engaged in cross-border activities to more quickly secure exemptive relief under Rule 30.10, and thus provides a benefit of greater efficiency.

3. Financial integrity of futures markets and price discovery. The Order does not have any effect, from the standpoint of imposing costs or creating benefits, on the financial integrity of futures markets and price discovery.

4. Sound risk management practices. The Order does not impact the risk management practices of the futures and options industry.

5. Other public interest considerations. The performance of the functions described herein by NFA will significantly reduce the amount of Commission and staff resources dedicated to the Part 30 program.

Upon consideration of these factors, the Commission has determined to issue this Order.

Issued in Washington, DC, on January 11, 2005, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 05-814 Filed 1-13-05; 8:45 am]

BILLING CODE 8351-01-M

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the Chief of Naval Operations (CNO) Executive Panel

AGENCY: Department of the Navy, DOD.

ACTION: Notice of Closed Meeting.

SUMMARY: The CNO Executive Panel is to report the findings and recommendations of the Special Access Program Processes Study Group to the Chief of Naval Operations. The meeting will consist of discussions of policy considerations on the Navy's Special Access Programs and how well they are integrated into the overall Navy, DOD, and allied requirements processes.