



DIVISION OF
TRADING AND MARKETS

COMMODITY FUTURES TRADING COMMISSION
2033 K STREET, N.W., WASHINGTON, D.C. 20581

84-16

September 7, 1984

Re: Regulation as a commodity trading advisor or
a commodity pool operator.

Dear :

This is in response to your letter dated July 26, 1984, in which you requested on behalf of (the "Trust Company") our opinion that: (1) certain corporate employee benefit plan assets for which the Trust Company acts as a fiduciary would not be a "pool" within the meaning of Rule 4.10(d), 17 C.F.R. §4.10(d) (1983); and (2) that the Trust Company would not be either a commodity trading advisor ("CTA") or a commodity pool operator ("CPO") as those terms are defined in Section 2(a)(1)(A) of the Commodity Exchange Act (the "Act"), 17 U.S.C. §2 (1982).

From the representations made in your letter, we understand the facts to be as follows:

A. Trust Company

The Trust Company is a non-depository trust company organized under the banking laws of the State of As a trust company operating under the state banking laws, the Trust Company is subject to regulation and examination by the Supervisor of Banking of the State of Washington. . . .1/

B. Provision of Trust Services

The Trust Company offers comprehensive trust services to employee stock bonus, pension or profit-sharing plans which meet the requirements for

1/ In this connection, your letter represents that the requirements of the Administrative Code for a state chartered bank trust department are substantially the same as the requirements applicable to a national bank trust department subject to direct regulation by the Comptroller of the Currency.

qualification under Section 401 of the Internal Revenue Code (referred to hereafter as "Corporate Employee Benefit Plans").

The Trust Company, as a trustee or "investment manager", enters into written agreements ("Trust Agreements") establishing fiduciary relationships with respect to property then held and subsequently acquired by the Corporate Employee Benefit Plans. The Trust Agreements obligate the Trust Company to hold and manage the property for the benefit of the beneficiaries of the trust in accord with the provisions of the Trust Agreements and applicable laws, including ERISA.

At June 30, 1984, the Trust Company served as "trustee" or "investment manager" for approximately \$1.2 billion of assets held by Corporate Employee Benefit Plans sponsored by approximately 110 different corporations. Although the Trust Company is empowered to invest Corporate Employee Benefit Plan assets on a non-commingled basis and on occasion does so, most assets are invested in portfolio securities through collective trust funds maintained by the Trust Company. 2/

C. Collective Trust Funds

The Trust Agreements provide that each trust's assets may be commingled with assets of other trusts for which the Trust Company is a trustee or investment manager, and invested in one or more collective trust funds consisting exclusively of funds transferred to it by Corporate Employee Benefit Plans.

The Trust Company currently maintains eight collective trust funds for this purpose, each with different investment objectives and policies:

' , ' , ' , ' and
. . . .

2/ Your letter further explains that, in order for the collective trust funds to not be subject to Federal income tax, the Trust Company "must conduct and does conduct" its operations and the operations of its collective trust funds in conformity with the substantive provisions of 12 C.F.R. Part 9, "which Part constitutes the regulations adopted by the Comptroller of the Currency for application to trust departments of national banking associations."

The Trust Company is the sole trustee of each of the collective trust funds, and has final and complete authority to determine the specific securities purchased and sold by each collective trust fund. However, the Trust Company retains the services of a number of investment advisers to advise and to make recommendations. . . . [T]hese recommendations are reviewed and approved by officers of the Trust Company, which have final authority with respect to investments.

D. Use of Futures Contracts

The Trust Company, in its capacity as trustee or investment manager, intends to invest in financial instrument futures and stock index futures including options thereon (hereafter collectively referred to as "Futures") on behalf of both Corporate Employee Benefit Plans and the collective trust funds (hereafter collectively referred to as the "Trusts").

Futures investments in the Trusts shall not be for speculation and shall be limited to hedging transactions (i.e., "short hedge" and "long hedge" transactions) and are intended to reduce risks in the management of trust assets which arise from the potential change in the value of such assets.

In this regard, the Trust Company's Trusts will use Futures for each Trust solely for bona fide hedging purposes, as defined by Regulation §1.3(z)(1). . . . To insure that the Trust's use of Futures meets this definition, the Trust will enter into them for the purposes and with the hedging intent specified in Regulation §1.3(z)(1) and that a substantial majority -- approximately 75% of Futures purchases -- will be "completed."

In addition, the Trust Company (1) will not enter into Futures commitments which would require as deposits for initial margin or premiums for the Futures (and options thereon) more than 5% of the fair market value of a Trust's total assets (taken at market value at the time of entering into the Futures contract); (2) will not market to the public participation in the Trusts as or in a commodity pool or otherwise as or in a vehicle for trading in the commodities futures or commodity options markets; and (3) will disclose in writing to each prospective participant in the Trusts

the purpose of and the limitations on the scope of the Futures trading. 3/

Investments in Futures will be made upon the recommendation of the various investment advisers to the Trust Company. However, the Trust Company . . . will have final and complete authority to accept or reject the investment advisers' recommendations. . . .

I. Regulation as a CTA.

Section 2(a)(1)(A) of the Act defines the term "commodity trading advisor" to mean in relevant part:

[A]ny person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for futures delivery made or to be made on or subject to the rules of a contract market, any commodity option authorized under section 4c, or any leverage transaction authorized under section 19 or who, for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the foregoing; but such term does not include (i) any bank or trust company or any person acting as an employee thereof, . . . Provided, that the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession. . . .

Thus, the Act excludes from the CTA definition any bank or trust company, provided that the furnishing of services which would otherwise bring such an entity within the statutory definition is solely incidental to the conduct of its business. Commission staff previously has expressed the view that the words "solely incidental" must be interpreted "in the context of the business concerned and the factual situation in which the services are rendered." See CFTC Staff Interpretative Letter No. 76-1, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,907 (February 26, 1976). With respect to the instant situation, your letter represents that law provides that among the primary corporate powers of an entity engaged in a business such as the Trust Company is the power "to execute trusts of every description." 4/ Thus, your

3/ In a telephone conversation with Division staff held on August 6, 1984, you explain that these disclosures would be made to the fiduciary, co-trustee, or administrator of a Corporate Employee Benefit Plan -- i.e., the person who has the authority to appoint the Trust Company to serve as a fiduciary of the Plan.

4/ Your letter represents that this authority is provided in Rev. Code ch. 30.08, §150(11) (1974).

letter further represents that the Trust Company is authorized to act in the capacity of fiduciary as a regular part of its business and its services as a fiduciary are among the range of banking services it may lawfully offer.

Based upon our review of the representations made in your letter, it appears that the Trust Company, and its employees, would come within the statutory exclusion from the definition of the term "commodity trading advisor" contained in Section 2(a)(1)(A) of the Act. We note that this opinion is based upon, among other things, the fact that any commodity trading advice the Trust Company may furnish will be furnished solely incidental to the conduct of its business as a non-depository trust company and in its capacity as a fiduciary of the Trusts. 5/

II. Regulation as a CPO.

As you are aware, on February 2, 1984, the Commission issued proposed Rule 4.5, which would exempt certain otherwise regulated persons from registration as a CPO and from the provisions of Subpart B of Part 4 of the Commission's regulations. 6/ See 49 Fed. Reg. 4778 (February 8, 1984), 49 Fed. Reg. 6910-11 (February 24, 1984). Based upon our review of the representations made in your letter, it appears that the Trust Company would be eligible for this proposed exemption inasmuch as the Trust Company: (1) is among the persons covered by the proposal -- i.e., a trust company subject to State regulation; (2) will engage in commodity interest transactions as a fiduciary of the Trusts solely for bona fide hedging purposes; (3) will not deposit as initial margin or premiums for a Trust's commodity interest transactions more than 5% of such Trust's total assets; (4) will not, and has not, marketed any Trust as a commodity pool or otherwise as a vehicle for trading in the commodity interest markets; and (5) will disclose in writing to the prospective participants in the Trusts the purpose of and the limitations on the scope of such commodity interest trading.

Accordingly, this Division will not recommend that the Commission take any enforcement action against for failure to register as a CPO or to comply with the provisions of Subpart B of Part 4 of

5/ See Division Trading and Markets Staff Interpretative Letter No. 83-2 [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,788 (March 18, 1983).

We note that you have not requested, and therefore that by our letter we also are not providing or implying, an opinion that any of the investment advisers to the Trusts are not CTAs.

6/ Section 4m(1) of the Act, 7 U.S.C. §6m(1) (1982), requires each person who comes within the CPO definition to register as a CPO with the Commission. The provisions of Subpart B of Part 4 concern the operational, disclosure, reporting and recordkeeping requirements of registered CPOs. See 17 C.F.R. §§4.20-4.23 (1983), as amended by 48 Fed. Reg. 35248 (August 3, 1983).

the Commission's regulations. 7/ This position is, however, subject to the condition that the Trust Company will comply with Rule 4.5 as adopted by the Commission or with any other such rule that the Commission may adopt to exempt certain otherwise regulated persons from regulation as a CPO. 8/ Therefore, this position will cease upon the effective date of Rule 4.5 or of such other rule.

In this connection, we note that previously we have issued opinions to certain other persons that they would not be pools within the meaning and intent of Rule 4.10(d) based upon representations similar to those made by the Trust Company. 9/ However, in light of the Commission's recent proposal in this area, we believe that such a "no-action" position is the appropriate relief that should be afforded at this time. We further note that with respect to such persons and the filing of certain notices proposed in Rule 4.5, the Commission has stated:

[We do] not believe that it should be necessary for the recipients of such interpretative letters to, in effect, "re-submit" an application for exemption -- i.e., to file an initial notice of eligibility -- in the event the proposal is adopted. However, to insure that these persons (and entities) would be in compliance with the requirements of the proposed rule, the Commission intends to take the position that such persons must file supplemental notices in the event that any of the representations they previously had made to the Commission changed or that, to the extent that the proposal would require any additional

7/ Inasmuch as proposed Rule 4.5 would provide exemption for a trust company subject to regulation by any State, and any principal or employee thereof, and as you have requested, the position we are taking herein also would apply to any principal or employee of the Trust Company -- e.g., its officers.

8/ For example, the rule as adopted may or may not contain the same standards and indicia of bona fide hedging transactions and positions contained in the rule as proposed. Moreover, to the extent that the rule as adopted is less restrictive than the rule as proposed -- with respect to the standards and indicia of bona fide hedging transactions and positions or to any other aspect of the proposal -- the Trust Company would be able to trade commodity interests subject to such other restrictions provided, of course, that such trading is conducted in accordance with the rule as adopted.

9/ See _____, Comm. Fut. L. Rep. (CCH) ¶21,908 (available November 3, 1983); _____, Comm. Fut. L. Rep. (CCH) ¶21,906 (available October 21, 1983); _____, Comm. Fut. L. Rep. (CCH) ¶21,905 (available September 13, 1983). See also _____, Comm. Fut. L. Rep. (CCH) ¶21,910 (available November 21, 1983).

representations, they were not in compliance with them. This position would ensure equal treatment of all persons claiming exemption under the rule. 49 Fed. Reg. 4778 at 4782-83.

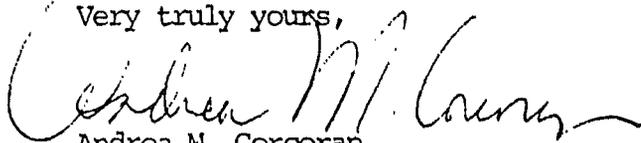
We believe, and intend to recommend, that the Commission should take this same position with respect to the Trust Company.

* * * * *

You should be aware that the positions we have taken in this letter do not excuse the Trust Company from compliance with any otherwise applicable requirements contained in the Act or in the Commission's regulations thereunder. For example, as a CPO it remains subject to the anti-fraud provisions of Section 40 of the Act, 7 U.S.C. §60 (1982), and as a "person" under the Act it remains subject to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations, 17 C.F.R. Parts 15, 18 and 19 (1983), as amended.

The positions we have taken herein are based upon the representations that have been made to us. Any different, changed or omitted facts or conditions might require us to reach different conclusions. In this connection, we request that you notify us immediately in the event the Trust Company's operations and activities change in any way from that as represented to us.

Very truly yours,



Andrea M. Corcoran
Director