



COMMODITY FUTURES TRADING COMMISSION

2033 K STREET, N.W., WASHINGTON, D.C. 20581

(202) 254-8955

(202) 254-3534 FACSIMILE

91-5

DIVISION OF  
TRADING AND MARKETS

May 28, 1991

Re:

Dear :

This is in response to your letter dated November 7, 1990 to the Division of Trading and Markets (the "Division"), in which you requested on behalf of the Board of Trustees (the "Board") of the (the "Fund") relief from regulation as a commodity pool operator ("CPO").

Based upon your letter and subsequent telephone conversations with Division staff, we understand the facts to be as follows. The Fund is a multiemployer, welfare benefit plan administered by the Board which is comprised of officials of

and various local unions. The Fund provides health care and other benefits to employees on behalf of whom employers make contributions pursuant to collective bargaining agreements with the . The Board, on behalf of the Fund, desires to invest assets of the Fund in the trading of commodity interests solely for bona fide hedging purposes within the meaning and intent of Rule 1.3(z)(1).<sup>1/</sup> At no time will the Board enter into futures and options contracts for which the aggregate initial margin will exceed five percent (5%) of the fair market value of the Fund's assets, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into.

The Fund is a noncontributory plan. All contributions to the Fund are made by the employers whose employees receive benefits under the Fund. No payments into the Fund are solicited from or permitted by such employees. The Board has not offered nor does it propose to offer participation in the Fund to the public as or in a commodity pool or otherwise as or in a vehicle for trading in the commodity futures and commodity options markets.

---

<sup>1/</sup> Commission rules referred to herein are found at 17 C.F.R Ch. I (1990).

The Fund is not a pension plan, since its main purpose is not to provide pension-related benefits. Nonetheless, like a pension plan, the Fund is subject to Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 et seq (1988).

Specifically, ERISA requires, with respect to the Fund, preparation of a "summary plan description" which must be provided to employees receiving benefits under the Fund and filed with the Department of Labor. A separate "plan description" and "annual report," and information regarding changes in or modifications to the Fund, must also be filed with the Labor Department (a summary of the "annual report" is provided to employees). These reporting and disclosure requirements are subject to criminal enforcement penalties under the law. The fiduciaries of the Fund are likewise subject, in their capacities as fiduciaries, to the fiduciary responsibility provisions of ERISA, and are personally liable for any losses the Fund suffers as a result of breaching such responsibilities. In general, these are the same reporting and disclosure requirements applicable to pension plans under ERISA. <sup>2/</sup>

As you are aware, Rule 4.5(a) specifically excludes from the definition of a "pool" the following pension plans:

- (i) noncontributory plans covered under Title I of ERISA;
- (ii) contributory defined benefit plans covered under Title IV of ERISA, with certain limitations;
- (iii) governmental plans as defined in Section 3(32) of Title I of ERISA.

In addition, by Rules 4.5(a)(4) and 4.5(b)(4), the Commission has excluded from the definition of "commodity pool operator" set forth in Section 2(a)(1)(A) of the Commodity Exchange Act (the "Act"), 7 U.S.C. § 2(a)(1)(A) (1988), the trustee or named fiduciary of any pension plan subject to Title I of ERISA provided that such trustee or named fiduciary files a notice of eligibility with the Commission representing that it will conduct its trading in commodity interests in accordance with certain requirements

---

<sup>2/</sup> Labor Department regulations under ERISA Section 104 provide some variance in these requirements for certain welfare benefit plans. The variance in these requirements exists because the relevant information for pension plans and employee welfare benefit plans is different. However, the scope of reporting and disclosure requirements is comparable for employee welfare benefit plans and pension plans.

specified in Rule 4.5(c)(2). Because the Fund is not among the foregoing trading vehicles specified in Rule 4.5, the relief available under the rule is not available to the Board and the Fund.

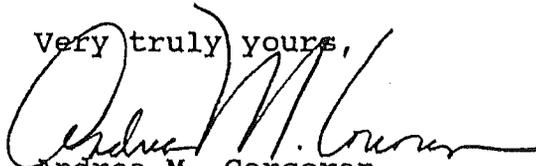
However, based upon your representations, the Division has determined that it will not recommend that the Commission take any enforcement action for failure to register as a CPO against the Board in connection with its operation of the Fund. This no-action position is based upon your representations that: (1) although the Fund is not a pension fund eligible for relief under Rule 4.5, it is similar to such funds in that it is subject to Title I of ERISA; (2) the Fund intends to trade commodity interests solely for bona fide hedging purposes; (3) the Fund is a noncontributory plan; (4) at no time will the Board enter into futures and options contracts for which the aggregate initial margin and premiums exceed five percent (5%) of the fair market value of the Fund's assets, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; and (5) the Board has not offered nor does it propose to offer participation in the Fund to the public as or in a commodity pool or otherwise as or in a vehicle for trading in the commodity futures and commodity options markets. This no-action position is conditioned upon the Fund's making the disclosure required by Rule 4.5(c)(2)(iv) in the annual report to be filed with the Department of Labor and the summary of annual report to be provided to employees. This disclosure should include representations numbered (2) and (4) above. This no-action position is also conditioned upon the Board's submitting to such special calls as the Commission may make to demonstrate that the Fund is operating according to the representations set forth in this paragraph.

We note that this letter does not excuse the Board from compliance with any otherwise applicable requirements contained in the Act or in the Commission's regulations thereunder. For example, it remains subject to the antifraud provisions of Section 40 of the Act, 7 U.S.C. § 60 (1988), and to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the regulations.

This letter is based upon the information that has been provided to us and is subject to the conditions stated above. Any different, changed or omitted facts or conditions might require us to reach a different conclusion. In this regard, we request that you notify us in the event that the Fund's operations, including membership composition and the source of capital contributions, change in any way from those as represented to us.

Finally, this position is that of the Division of Trading and Markets and does not necessarily represent the views of the Commission or any other office or division of the Commission.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Andrea M. Corcoran". The signature is written in dark ink and is positioned above the printed name and title.

Andrea M. Corcoran  
Director