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DIVISION OF
TRADING & MARKETS

96-21

February 29, 1996

Anne S. Polaski
Assistant General Counsel
Chicago Board of Trade
141 W. Jackson Blvd.
Chicago, Illinois 60604-2994

Re: Request for Relief from Commission Rule 1.10(d)(4)

Dear Ms. Polaski:

This is in response to your letter dated January 30, 1996, as supplemented by telephone conversations with Division staff, in which you requested, on behalf of the Chicago Board of Trade (CBT) and its affected members, an exemption from certain requirements of Commission Rule 1.10(d)(4)[1/] concerning the attestation of financial reports. You also requested that CBT be exempted from any requirement to enforce the corresponding requirements of CBT Capital Rule 311. Commission Rule 1.10(d)(4) provides as follows:

> Attached to each Form 1-FR filed pursuant to this section must be an oath or affirmation that to the best knowledge and belief of the individual making such oath of affirmation the information contained in the Form 1-FR is true and correct. If the applicant or registrant is a sole proprietorship, then the oath or affirmation must be made by the proprietor; if a partnership, by a general partner; or if a corporation, by the chief executive officer or chief financial officer.[2/]

1/ 17 C.F.R. §1.10(d)(4) (1995).

2/ The Commission originally proposed to require both the chief executive officer and the chief financial officer of a corporation to sign the attestation on Form 1-FR. 41 Fed. Reg. 45706, 45711 (Oct. 15, 1976); 43 Fed. Reg. 15072, 15075, 15082 (April 10, 1978). The Securities and Exchange Commission has a similar rule for securities broker-dealers, although it provides that in the case of a corporation, reports must be signed by "the chief executive, or, in his absence, by the person authorized to act in his place." 17 C.F.R. §240.17a-5(b)(2) (1995).

You have requested that in those instances where a member futures commission merchant (FCM) of CBT is a partnership which has no general partner who is a natural person, the chief financial officer (or the individual who has these responsibilities) be permitted to meet the attestation requirements of Commission Rule 1.10(d)(4) and CBT Capital Rule 311. In your letter, you stated that CBT has several member FCMs which are partnerships whose only general partners are other partnerships, corporations or limited liability companies. You further stated that, "[i]n these instances, it would be possible to have a partner of the partnership which is the general partner or an officer of the corporate general partner sign the attestation," even if such persons are not directly responsible for the preparation of the financial statements.

The Commission's minimum financial and related reporting requirements for FCMs and introducing brokers, as well as corresponding rules of self-regulatory organizations, are major elements of the financial surveillance system in the futures industry. When a firm files a report of its financial condition, the report must be a representation of management's true belief as to the firm's financial condition. The signature on the attestation is an affirmation of this belief.

This does not mean, however, that the signatory on a Form 1-FR is directly responsible for the preparation of the financial statements. In a case where the Commission charged an FCM and its chief executive officer (CEO) with, among other things, filing false reports in violation of Section 6(c) of the Commodity Exchange Act (Act)[3/] and Commission Rule 1.10, the CEO was the signatory of the Forms 1-FR. The forms were prepared by the firm's comptroller. During the period when one of the firm's founders served as chief financial officer (CFO), the comptroller reported to the CFO and submitted the Forms 1-FR to the CFO who in turn forwarded them to the CEO to review and sign; after the co-founder/CFO left the firm, the comptroller submitted the forms directly to the CEO. The Commission noted that even though the CEO did not directly prepare the Forms 1-FR, he "was in a position to ensure that the forms were accurately prepared, and to require [the comptroller and the co-founder/CFO] to demonstrate

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3/ 7 U.S.C. §9 (1994). Prior to the Futures Trading Practices Act of 1992, this provision of the Act was denominated as Section 6(b).

the forms' accuracy, if necessary through supporting statistics or documents."[4/]

In a telephone conversation with Division staff, you indicated that CBT is the designated self-regulatory organization (DSRO) for 66 FCMs, eight of which are partnerships. However, you further indicated that only four of the eight partnerships would be seeking the relief referred to herein with respect to attestation of reports. In your letter, you referred to one such firm with a corporate general partner, another with only limited liability companies as general partners and a third firm whose general partner is itself a partnership where the individual authorized to sign on behalf of the general partner is located outside of the United States.

Although the Division believes that certain relief from the requirements of Rule 1.10(d)(4) may be appropriate in the case of partnerships with corporations or limited liability companies as general partners, we believe that where the general partner of an FCM organized as a partnership is itself a partnership, it is appropriate for an individual general partner of such upstream partnership to sign the attestation on Form 1-FR.

Based upon the foregoing, the Division will not recommend that the Commission take enforcement action under Rule 1.10(d)(4) against an FCM organized as a partnership that has only a corporation or a limited liability company as a general partner based solely upon such FCM's CFO (or the individual who has these responsibilities) signing the attestation on Form 1-FR. This position is subject to the condition that the FCM file with its DSRO and the Commission regional office where it submits its financial reports, and maintain as a record pursuant to Commission Rule 1.31,[5/] evidence that the CFO or individual with those responsibilities is authorized to sign on behalf of the FCM. Such filing must accompany or precede the first Form 1-FR signed by the CFO or individual with those responsibilities.[6/] In the case of an FCM with another partnership as its

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4/ In the Matter of First National Trading Corporation, et al., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,142 (July 20, 1994).

5/ 17 C.F.R. §1.31 (1995).

6/ If the signatory remains the same individual, the filing need not be repeated with subsequent financial reports. However, a new filing would be required with or prior to the submission of a Form 1-FR signed by a different individual.

general partner, the general partner of such other partnership must sign the attestation required by Rule 1.10(d)(4).

CBT, like each other self-regulatory organization, must have in effect and enforce rules approved by the Commission prescribing minimum financial and related reporting requirements for member FCMs.[7/] CBT Capital Rule 311 is one such rule. Based upon the foregoing, the Division will not recommend that the Commission take enforcement action under Commission Rule 1.52 against CBT based solely upon its enforcement of CBT Capital Rule 311 in a manner consistent with the discussion herein pertaining to the signing of the attestation on a Form 1-FR filed by an FCM organized as an partnership.

The positions taken herein apply to FCMs organized as partnerships solely in connection with the attestation requirements of Commission Rule 1.10(d)(4) and to CBT solely in connection with its enforcement of such a requirement pursuant to CBT Capital Rule 311, as required by Commission Rule 1.52. This letter does not excuse such FCMs or CBT from compliance with any other applicable requirements contained in the Act or in the Commission's rules promulgated thereunder. Further, the positions taken herein represent the views of this Division only and do not necessarily reflect the views of the Commission or any other office or division of the Commission. If you have any questions concerning this correspondence, please contact me, Deputy Director Paul H. Bjarnason, Jr. or Associate Chief Counsel Lawrence B. Patent.

Very truly yours,

Andrea M. Corcoran
Director

cc: Daniel A. Driscoll, National Futures Association
Henry J. Matecki, Chicago

7/ See Commission Rule 1.52, 17 C.F.R. §1.52 (1995).