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COMMENT

March 9, 2000

Ms. Jean A. Webb
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Proposed Amendment to Rule 4.5 for Church Plans

Dear Ms. Webb:

We wish to express our support and approval of the above referenced amendment. We have worked over many years representing a number of church pension funds. We agree that the amendment is important to avoid excessive Federal entanglement with religion and is consistent with the law's treatment of similarly situated types of plans (i.e., government plans). Furthermore, the amendment codifies what appears to be consistent treatment of individual plans which have requested guidance regarding this issue. In addition, we note that the rights of plan participants are fully protected by the exclusive benefits requirements imposed on church plans by the Internal Revenue Code to protect plan participants' interests.

Section 403(b) plans are required to hold assets for the exclusive benefit of plan participants and beneficiaries. Code Section 403(b)(9) was added to the Code under the Tax Equity and Fiscal Responsibility Act of 1982. This Code Section provides that with respect to "retirement income accounts" provided by churches, the account shall be treated as an annuity for the purposes of Code Section 403(b) and that "retirement income account" shall mean a defined

contribution program established or maintained by a church, to provide benefits under Section 403(b) for an employee or his beneficiaries.

The legislative history of the Tax Equity and Fiscal Responsibility Act of 1982, which added Code Section 403(b)(9) to the Code, specifies that "the conferences intend that the assets of a church plan may be commingled in a common fund with other amounts devoted exclusively to church purposes (for example, a fund maintained by a church benefit board) if that part of the fund which equitably belongs to the plan is separately accounted for and *cannot be used for or diverted to purposes other than for the exclusive benefit of employees and their beneficiaries.*" (Italics added.)

Code Section 401(a) church plans are subject to a similar requirement. The very first sentence of Code Section 401(a) requires that plan assets be held for the exclusive benefit of the employee or beneficiary. Code Section 401(a)(2) even more explicitly requires that it be "impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of [such] employees or their beneficiaries" Code Section 401(a) church plans are not exempt from this requirement.

Therefore, even without additional regulation, church plans are required by law to hold plan benefits for the exclusive benefit of the plan participants and their beneficiaries. Consequently, the proposed amendment will release church plans from regulation which was both potentially inappropriate with respect to Federal entanglement with religion and certainly unnecessary given the participant protection provided by other laws applicable to church plans.

Sincerely,

Bernard F. O'Hare

Bernard F. O'Hare

cc: Barbara S. Gold, Esq.